

SOUTH AFRICA / JUDGMENT

Tiger Brands Limited and Others v Pillay and Others (Famous Brands and Another Intervening) (2019/25309; 2018/12835; 2019/36431) [2020] ZAGPJHC 160 (23 June 2020)

[2020] ZAGPJHC 160

COURT

South Gauteng High Court, Johannesburg

BEFORE

C G Lamont

CASE / FILE NUMBER

2019/25309; 2018/12835; 2019/36431

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/25309

CASE NO: 2018/12835

CASE NO: 2019/36431

In the application between:

TIGER BRANDS LIMITED First Applicant

ENTERPRISE FOODS (PTY) LTD Second Applicant

TIGER CONSUMER BRANDS (PTY) LTD Third Applicant

And

JEZAMAY PILLAY First Respondent

ASPIRATA AUDITING TESTING AND

CERTIFICATION (PTY) LTD Second Respondent

DIONNE RAUS Third Respondent

DELTAMUNE (PTY) LTD Fourth Respondent

FAMOUS BRANDS LIMITED 1st Intervening Party

MONTLHA WELHEMINA NGOBENI & 13 OTHERS 2nd Intervening Party

J U D G M E N T

LAMONT, J:

- [1] During, the period January 2017 to May 2018 the country experienced an unprecedented listeriosis outbreak. The outbreak was investigated and documented by the National Institute for Communicable Diseases (“NICD”) a division of the National Health Laboratory Services (“NHLS”). The NICD over an extensive period of time delivered reports reflecting the investigations it had undertaken and its opinions based on the investigations. In compiling those reports, the NICD appears to have had unlimited access to all available sources and laboratories. The NICD engaged the services of the Applicant Association for Food Science and Technology and made use of the expertise and assistance of the SAAFOST members’ in its investigation. Various personnel were required to produce support documents and take other steps to assist in the investigation to enable it to be as wide-ranging as possible.
- [2] Over the period, the NICD obtained access to a multitude of facts upon which it founded its opinion that the strain responsible for the outbreak was L.Monocytogenes ST6. The NICD determined that the ready-to-eat meat products manufactured at the Polokwane factory were the source of the outbreak. Tiger (which is how the defendants will be referred to) closed the Polokwane factory and recalled the ready-to-eat processed meat products. At or about that date approximately 1000 listeriosis cases had been reported to NICD. Tiger confirmed that independent laboratory test results reflected the presence of the ST6 strain of L.Mono in samples of ready-to-eat meat products manufactured at the Polokwane factory. The listeriosis outbreak ceased during September 2018.
- [3] Four classes of persons became infected with L.Mono during the outbreak. Those classes sought and were granted leave to institute a class action against Tiger. While the classes are different as to the identity of the people who formed them, they are identical as to the requirement that the harm was suffered in consequence of the person contracting an infection of Listeria Monocytogenes, by ingesting contaminated food products originating from or having passed through the Enterprise meat processing facility at Polokwane over the period 23 October 2016 to 3 September 2018.
- [4] The order granting leave directed that the action be conducted in two stages: –
1. In the first stage, the classes were to seek declaratory relief in respect of the respondents’ liability to the classes on the basis that members of the classes who did not wish to be bound by the outcome of the first stage might opt out of the class action by delivering notice doing so.

2. If any class was not successful in the first stage of the class action, then all members of the unsuccessful class who did not opt out in accordance with the procedure would be bound by the judgment given at the conclusion of the first stage.
3. If any class was successful in the first stage, then the class action in respect of all such successful clauses would proceed to the second stage.
- [5] Pursuant to the court order, the class action members (hereafter referred to as “the claimants”) instituted action against Tiger. The claimants (fourteen of them) set out what the nature of the bacteria was and then repeated in detail a wide-ranging set of facts and opinions including the reports of NICD and various press releases of various bodies, including the Minister of Health. The claimants, in the particulars of claim, relied on causes of action based on the Consumer Protection Act Number 68 of 2008 which imposes strict liability on Tiger; a delictual liability based on Tiger producing ready-to-eat processed meat products that it knew or reasonably should have known were susceptible to contamination by L.Mono. Finally, the claimants sought constitutional exemplary punitive damages.
- [6] The claimants set out in the particulars of claim that approximately one thousand and sixty eight people were diagnosed with Listeria; two hundred and eighteen people died; four hundred and forty three neonates contracted listeriosis; ninety-three of them died; sixty-eight children between the age of one month and fourteen years contracted listeriosis and none of them died; a large number of women miscarried or gave birth to stillborn babies; and a number of the neonates who survived were permanently disabled and disfigured. The outbreak affected a wide-ranging number of people in a horrific way. The persons responsible face the likelihood of having to pay extensive compensation to them. The trial is likely to be long and complex as it will deal with wide-ranging sets of facts and opinions covering a period of several months.
- [7] It is apparent from the particulars of claim that the claimants have not limited themselves to making allegations as the Rules require but have incorporated wide-ranging sets of facts and opinions in the particulars by referring to them in detail. For example, the claimants’ state at paragraph 47 that the factual averments made in the NICD reports cited should be read as averments that are expressly pleaded by the plaintiffs. The claimants do not limit themselves to making legal allegations but incorporate a significant amount of factual evidence and opinion. This results in a long convoluted document filled with factual evidence.
- [8] It is apparent from the sets of facts which have been pleaded that the claimants proposed relying upon evidence obtained by inter alia NICD from a large number of different sources within the industry as well as opinions obtained from different persons within the industry both in the formulation of its claim and in the evidence which it will lead in due course at the trial.
- [9] There is no clarity in the particulars as to whether the opinions are based only upon the facts, which appear in the particulars of claim and the reports referred to, or whether there are other facts upon which the experts relied in formulating their opinions. It would seem

that NICD and the sets of persons, including experts, who had access to the entirety of the facts available to the industry considered the facts, decided which facts were relevant, and applied their skill and expertise to those facts to formulate opinions which are expressed in the particulars of claim. The particulars of claim do not allege that all the facts discoverable have been pleaded. Hence there can be facts in existence, which were omitted because the person sifting through the facts possibly did not discover them, considered them irrelevant, untrue or for some unknown reason chose not to rely on them.

[10] In order, to determine the accuracy of the facts and opinions, it is necessary to identify all the facts, ascertain which are true, then identify those which are relevant, to enable an opinion to be formed, and those which are not. A similar process will be undertaken when consideration is given to whether an opinion is rational. It seems reasonable to expect that as the entire industry was the subject of the investigation, the ambit of facts include all those facts which existed throughout the industry. There is evidence before me which expresses the opinion that all the documents sought by Tiger are relevant to establish what the facts were; which facts are correct, and which facts are relevant to form an opinion. The opinion that all the documents are required may, in due course, be found to be mistaken once all the facts are known. At present, it cannot with precision be determined to what extent the documents are required. It will only be possible to establish what the extent of the enquiry should have been course once the documents have been considered. On the face of it, the evidence sought is germane to establish facts, to found an opinion; to controvert the rationality of the opinion expressed in the particulars of claim; and to cross examine witnesses and so on. From a factual point of view, the documents are relevant.

[11] The question is whether the documents are legally relevant. This question is answered by considering the issues raised in the

pleadings. In the particulars of claim, the claimants allege that, based on the set of facts, the opinion of the experts is that the L.Mono outbreak emanated at the Polokwane factory, that the claimants became infected with L.Mono and that Tiger caused the harm suffered. Because all the factual issues are raised in the pleadings, the facts become legally relevant. Even if the pleadings are treated as dealing only with allegations the factual issues become relevant as they underpin the allegations. This is presumably why the pleader was not concerned to plead only allegations but pleaded the wealth of facts. The claimants will be required to establish the facts and opinions upon which they rely, and which have been pleaded in the particulars of claim. This will involve evidence of the matters considered supra which, put crisply, concern whether or not the facts are all the facts, what the facts are, whether they are true or not and which facts should be relied upon to found the opinion sought to be advanced. It is clear from the issues in the pleadings that the documents sought are relevant.

[12] In the plea, Tiger denies that the outbreak emanated from the Polokwane factory and admits only that L.Mono ST6 was present at the factory. Mono ST6 is a particular strain of L.Mono.

- [13] It was submitted during argument that the particulars of claim limited the issue to be determined to L.Mono ST6 and not to L.Mono including all its strains. The parties to the action all agreed that the issue to be determined concerns L.Mono including all its strains. On a proper reading of the particulars of claim, the claim is not limited to the ST6 strain. The allegations are that the Listeriosis outbreak was caused by L.Mono; leave was given for the class action to be brought in respect of L.Mono - not only the ST6 strain - the plaintiff intends to rely on infection caused by cross-contamination which involves factual questions of when, where and how the product ingested became infected with L.Mono. The order made sanctioning the class action, limited the issue to be determined in the first phase of the action (which is the phase with which we are concerned). The question of whether or not the harm was caused by ingesting contaminated food products which had originated or which had passed through the Polokwane factory did not limit the issue to the ST6 strain only. Although there is a reference in the particulars of claim to the ST6 strain, there are equally references to L.Mono, which would include all strains.
- [14] The submission that what had originated and or passed through the Polokwane factory was only the L.Mono ST6 strain. Hence, the question of whether or not Tiger was the sole source or cause of the outbreak was limited to that strain only. The submission made is dependent upon an assumption of the accuracy and completeness of facts alleged. Those facts are of course not established to be complete or accurate.
- [15] The cross-contamination issue concerns the ingestion of product which contained L.Mono ST6 from a source other than Tiger. The question immediately arises whether the other manufacturer's product was, in fact, infected by a Tiger product or whether it became infected in some other way.
- [16] The order made when leave was given, sanctioning the class action, to be interpreted in accordance with the usual principles applicable to court orders[1]. In my view, on an interpretation of the order, when the court decided the question of quantum was to be separated from the issue of liability, it intended for all the class issues concerning liability to be decided. The question of liability cannot be determined completely if only part of it is determined, namely the part relating to the ST6 strain as opposed to the whole part, namely the part concerning L.Mono including all its strains. In my view, it is inconceivable that liability itself was intended to be dealt with piecemeal. The authorities are well known. See for example *Denel (Edms) Bpk v Voster* 2004 (4) SA 481 (SCA) at 4841-485B. This finding fortifies my view that the separation concerns all strains of L.Mono and not only ST6
- [17] Tiger issued subpoenas to obtain evidence from witnesses-persons who are not parties. The persons whose opinions have been expressed, and who hold the relevant factual information are not parties to the action. The only mechanism, by which the evidence required for the matter can be obtained, is through the process of a subpoena. Discovery Rules are inapplicable to persons who are not parties to the litigation.

[18] Tiger recognized this and issued a number of subpoenas requiring a number of non-participants to produce wide-ranging sets of documentation. Tiger accepted that it had sought more than it was entitled to obtain and reduced the ambit of documents during the hearing. At my request, the annexures to the subpoenas were re-drafted to reflect the current state of Tiger's demands.

Tiger submitted that it was proper to reduce the ambit of the sets of documents to be produced as the principle of severability applies. That is so, but there is an impact on the costs.

[19] The rights of a litigant to issue a subpoena to obtain documentary evidence are dealt with in the Superior Courts Act number 10 of 2013 ("the Act") and the Rules. Section 35(1) of the Act provides:

"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."

[20] The section deals with the right to obtain production of the document as opposed to the right to view the contents of the document. The section establishes a mechanism whereby documents can be obtained for production in court. The right to see the contents will be determined once the documents have been produced.

[21] Rule 38 of the High Court rules regulates the procedure for the procurement of evidence by subpoena. Rule 38 provides:

"(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) The process for subpoenaing a witness referred to in subparagraph (i) shall be by means of a subpoena in a form substantially similar to Form 16 in the First Schedule.

(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.

(b)(i) The process for requiring the production of a document referred to in sub rule (1)(a)(iii) shall be by means of a subpoena in a form substantially similar to Form 16A in the First Schedule.

(ii) Within 10 days of receipt of a subpoena requiring the production of any document, any person who has been required to produce a document at the trial shall lodge it with the registrar, unless such a person claims privilege.

(iii) The registrar shall set the conditions upon which the said document may be inspected and copied so as to ensure its protection.

(iv) Within five days of lodgement with the registrar, the party causing the subpoena to be issued for the production of the document shall inform all other parties that the said document is available for inspection and copying and of any conditions set by the registrar for inspection and copying.

(v) After inspection and copying, the person who produced the document is entitled to its return.”

[22] Production to the registrar does not mean production to the public in general but, unless privilege is claimed, to a person (the registrar) who is to hold the documents pending rulings to be made in respect thereof by both himself and the court. The Rule contemplates that if privilege is claimed the document need not be produced. The word privilege must, in my view, be read to include any reason the witness has to protect the contents from disclosure. I need not deal with the issue of whether the document must be produced even if the witness claims a right of non-disclosure of its contents. In the present matter the witnesses are content to produce subject to a regime protecting all or some of the contents from disclosure.

[23] The witness is ultimately required to appear at the hearing itself with the documents. By no later than that time, the court can deal with the rights of access to the contents of the documents including any claims of privilege, privacy and the terms of disclosure.

[24] The Rules, which are procedural in nature, do not change the substantive law concerning access to the contents of the documents or the rights of control of them[2]. The fact that the document is produced does not entitle anyone to access to its contents.

[25] If the parties and witness consent to their production, production can take place in advance of the court hearing. The rights of parties to prevent disclosure of the contents of documents which have been produced are safeguarded as the registrar is to maintain control over the documents as the court can rule in due course on the issue. The necessity of early production and the ability to inspect the documents long prior to the trial has been recognized; as this is the only way in which (assuming their production is non-contentious), there can be proper preparation in advance of the hearing. There is no reason in the general course why a court cannot consider the issue prior to the trial, if necessary, to rule on the rights to disclosure. The Rules are intended to facilitate early production, which will aid the identification and settlement of the factual issues to enable the trial to run smoothly on the true factual issues without interruption[3].

[26] The right to obtain evidence by way of subpoena is a component of the right to a fair hearing as contemplated by section 34 of the Constitution. The Constitutional Court recognized that:-

“Section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret the legislation and Rules of Court where it is reasonably possible to do so, in a way that would render the proceedings fair”[4]

- [27] It is recognized that in order to give effect to the right to a fair hearing an interested party must be placed in a position to present evidence and controvert evidence in a meaningful way. See *Gavic v Status Determination Offices and Other* 2019 (1) SA 21 (CC) where the Constitutional Court held:

“[79] It is nevertheless necessary to state that a person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests. This is in accordance with the maxim audi alteram partem (hear the other side), which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in s 33 of the Constitution.

- [80] In order to give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert evidence in a meaningful way. In *Foulds, Streicher J* held that a decision maker was under an obligation to disclose adverse information and adverse policy considerations, and give an affected person an opportunity to respond thereto.”

See also *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) paragraph at paragraph 25, which provides:-

“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.”

- [28] It is apparent that the mere fact that the documents, which are the subject of the subpoena, are voluminous is not the issue. A subpoena, which requires production of voluminous documents will be proper, provided the documents are relevant and adequately specified to enable the witness to identify them.
- [29] The contention of the persons who were subpoenaed is that they should not be obliged to produce documents and that the subpoenas should be set aside.
- [30] A subpoena will not readily be set aside. See *Beinash v Wixley*

[1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734H-735A:

“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))”

- [31] An unsustainable subpoena must be obviously unsustainable, and this unsustainability must appear as a matter of certainty not merely as a probability.[5]
- [32] It must be established accordingly that, as a matter of certainty, the person which issued the subpoena is not entitled to production of the documents. When the court considers the issue, it will do so in the knowledge that the party before it is still to have access to the documents and so will have difficulty to positively state that the documents are definitely to be tendered in evidence at the trial. It will be only after access has been gained to the document, that the person who sought them will be able to determine their value and hence whether or not they, in fact, will have an evidential value at the trial. For this reason, the consideration of the validity of the subpoena will be generous regarding relevance and the consideration of whether or not documents will in fact be tendered and witnesses in fact testify.[6]
- [33] What in fact is relevant, can be decided by one of several (similar) tests including: whether or not the documents contain information which may directly or indirectly enable a party who seeks them to advance his case or damage the opponents case;[7] whether there is reason to believe that the documents requested will throw light on the issues[8] and whether it is reasonable to suppose that the documents sought contain information which may directly or indirectly enable the party to advance his own case or to damage the case of the adversary including, that it is a document which may fairly lead to a chain of inquiry which may have either of those two consequences.[9]
- [34] In the present matter, the pleadings contain wide-ranging sets of facts and allegations, which I considered supra. It seems clear that the trial will traverse those matters and that the documents contained in the lists of documents are germane to Tiger’s preparation for the trial and the evidence which will be led at it. All of those who received subpoenas are involved in the industry and are persons who could and who probably did furnish information, opinion and factual data to the NICD. The nature and extent of the information furnished, the nature and extent of information not furnished and the accuracy of the information are relevant to test whether or not the allegations made by the claimants are sustainable and necessary to run the trial. Hence, the wide-ranging set of information

sought in the subpoenas is relevant to the action.

- [35] Tiger has produced a set of expert opinions, which are to the effect that the documents are needed. There is no reason in advance of seeing the documents to hold that the facts on which they rely are incorrect. There is further no reason in advance of seeing the documents to find that the opinions and their reasoning are flawed. Rationality can be determined once the facts are obtained. For present purposes, I must accept the need for the documents and the rationality of the opinions expressed.
- [36] It was submitted that the periods in respect of which documents were sought was extremely wide and unjustified. Tiger has limited the extent of the periods in the latest documents it has provided as annexures to the subpoenas. There is in my view no reason why the period should be limited to the period which was identified by the persons (probably NICD) who participated in the drawing of the reports forming the basis of the particulars of claim. It is simply not apparent without proper investigation what an appropriate period is. The L.Mono outbreak may have started much earlier but not have been noticed and may have continued later unnoticed (although that is unlikely). As the persons who were involved in the drawing of the reports used in the particulars of claim were focused on the ST6 strain, there may have been other strains over different periods, which caused harm. These facts are simply unknown, and it is unjustified in my view to limit the period without knowledge of facts as this may result in irrationality. It is far more appropriate for proper investigations to take place over a longer period, which will give assistance and insight as to what an appropriate period is. Until the documents are seen, no prediction of what they contain can be made. It would be unfair to Tiger to force it to get the documents piecemeal as and when the disclosed documents reveal the need for further documents to be produced.
- [37] It was submitted that a wide-ranging and improperly identified series of documents was sought. The fact that the documents are voluminous and wide-ranging is of itself irrelevant to their production if the documents are relevant to the action. The documents need to be identified sufficiently and accurately to enable the recipient of the subpoena to identify them. All the subpoenas require particular documents, which are sought with reference to the generic type of document for a date. The fact that a period is identified, does not change the character of the request to relate to each day within the period. The fact that numerous documents are sought does not change the character of the request. It remains a request for each document of a particular type. The documents are readily identifiable, as are the dates when the documents came into existence. One of the letters (annexure N) furnished shows this quite clearly.
- [38] It is argued that confidentiality per se is not a ground for objecting to the disclosure of documents in our law. In this regard,

I was referred to *Rutland v Engelbrecht* 1956

(2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967

- (2) SA 239 (A) at 260; *S v Naicker and Another* 1965
- (2) SA 919 (N); *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980
- (3) SA 1093 (W) at 1099; and *De Ville Judicial Review of Administrative Action in South Africa* (2005) revised first ed at 310.
- [39] The fact that documents contain information of a confidential nature does not prevent disclosure. See *Comair Ltd v Minister for Public Enterprises and Others* 2014
- (5) SA 608 (GP) 619 per Jordaan J

“The fact that documents contain information of a confidential nature 'does not per se in our law confer on them any privilege against

disclosure' (see *Unilever plc v Polagric (Pty) Ltd* 2001

- (2) SA 329 (C) at 340A).”

[40] In respect of confidential commercial information Colman J held as follows in *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968

- (3) SA 381 (W) at 385A – B:

'It was pointed out, on behalf of the respondent, that the applicant is its trade competitor, and that disclosure of what is relevant to the action may also involve disclosure of confidential information which the respondent does not want its competitor to see. The respondent would, I was told, rather abandon part of its claim than make such information available to the applicant. I have some sympathy for the respondent in that regard, but I am unable to assist it. It need disclose nothing that is not material; but what is material, in the wide sense that that word bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be. . . .”

[41] Confidential commercial information is discoverable. The issue might concern the content of the document, which might require the need for special orders to be made to reduce the ambit of persons entitled to view the information or application of other terms controlling access to the documents, but the principle remains clear, persons who possess discoverable documents can be compelled to produce them. The rights of privacy can be respected by appropriate orders.

[42] A number of persons who had done testing for others and some of those who had submitted samples for testing submitted that the results should not be made available as there might be an impact on their business if results were disclosed. The very reason testing is done is to control quality and if necessary, to disclose results to persons dealing with those issues. The focus on publication of matters concerning the public, particularly where their health is concerned, is on transparency. If anything, the courts, in my view, would lean to production rather than concealment of such records. In any event, the need for a fair trial dictates the

need for production. It does not lie in the mouth of a witness to seek to dictate to a party how it should run its litigation.[10]

[43] NICD submitted that there was another way the documents could be obtained, namely by Tiger using the Promotion of Access to

information Act 2 of 2000. (hereafter PAIA). This course was, in my view, unavailable to Tiger.[11]

[44] It was submitted that the rules dealing with discovery provided an option to obtain access to documents. The problem with this is that the persons subpoenaed are not parties. The further problem is that the claimants may not have all the relevant documentation. The extent to which the claimants have documents will only become evident after the documents have been inspected. At present, there is no evidence that all the documents are available from the claimants.

[45] The statutes to which I was referred as containing limitations on the rights to documents and the rights of inspection of their contents, all contemplate the right of courts to make such orders as may be appropriate allowing production and access - for example, section 14 of the National Health Act and PAIA which does not deal with rights being exercised in litigation.

[46] It is my view that Tiger is entitled to obtain production of the documents by way of the subpoenas. It follows that the applications

for quashing of the subpoenas and to prevent production must fail. There must be controls placed on the right of inspection of the contents of documents to the extent that the possessors of the documents and owners of that information object to such access. The registrar, in my view, must be directed to place restrictions on access to the contents of the documents to the extent of the

objections. The Rules do not expressly provide for a hearing prior to the trial to deal with that issue but I see no reason why in the present matter there should not be an advance hearing if it is necessary.

[47] I see no reason why the documents should not be produced in electronic form. They should be much more manageable in that form and the cost of production will be greatly reduced. I propose to allow the production in electronic form. If there is any difficulty this order can be reconsidered on notice by way of written submission. I did not raise the issue during the hearing and the parties may have submissions they wish to make.

[48] Each party including the intervening parties should pay their own costs. The annexures to the subpoenas were admittedly too wide. In addition, the procedure of when and how to deal with production of documents and access to their contents concerned the witnesses. The witnesses, although the argument was in the context of specificity and privilege, sought to raise questions concerning access to content on the basis it impacts on the obligation to produce to the registrar. I do not think that issue falls to be dealt with until after production

but it was not unreasonable to raise the concerns.

[49] For the sake, of convenience the orders have been reproduced in each individual application. The judgment concerns all issues and matters concerning the subpoenas.

[50] Orders and annexures “A” in each individual case are annexed hereto.

C G LAMONT

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING: 13, 14 and 15 May 2020

DATE OF JUDGMENT: 23 June 2020

[1] See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306D.

[2] See: *King v Margau* 1949 (1) SA 661 (W) and *Picked Properties (Pty) Ltd v Northcliff Township (Pty) Ltd* 1972 (3) SA 770 (W)

[3] See: *Trust Sentrum (Kapaastad) (Edms) Bpk and Another v Zevenberg and Another* 1989 (1) SA 145 (C).

[4] See: *De Beer NO v North-Central Local Council and South-Central Local Council*

[2001] ZACC 9; 2002 (1) SA 429 (CC) paragraph 11.

[5] See: *Sher and Others v Sadowitz* 1970 (1) SA 193 (C) at 195D. See also *Davis v Additional Magistrate, Johannesburg and Others* 1989 (4) SA 299 (W) at 306A

[6] See: *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (C) at paragraph 29

[7] *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (T) G.

[8] *Gumede v Subel NO and Others* 2006 (3) SA 498 (SCA) at paragraph 19.

[9] *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano*

(1882) 11 QBD 55.

[10] See: *Mvelaphanda Holdings (Pty) Ltd and Another v JS and Others* 2016 (2) 266 GJ para49.

[11] See: *PFE International and others v Industrial Development Corporation of SA Ltd* 2013(1) SA 1 CC.

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