

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: CC 26/2016
Date heard: 14 September 2016
Date delivered: 20 September 2016

In the matter between

CHRISTOPHOROS CONSTANTINOU PANAYIOTOU Applicant

And

THE STATE First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

THE MINISTER OF POLICE The Intervening Party

JUDGMENT

GOOSEN, J.

- [1] The applicant, who has been arraigned for trial on seven charges arising from the murder of his wife, seeks orders compelling the second respondent to disclose and to furnish copies of certain documents contained in the case docket. The first and second respondents oppose the relief sought. The central issue to be determined is whether, in the circumstances, the applicant has made out an appropriate case for the granting of what amounts to further “discovery” in the context of a pending criminal trial.

- [2] It is necessary to set out by way of background the circumstances in which the application was brought.
- [3] The applicant was indicted on seven counts, including conspiracy to commit murder, kidnapping, murder, robbery and possession of firearms and ammunition, before this court on 26 July 2016. Prior to this the applicant, along with a number of co-accused, made appearances in the magistrates' court before the matter was transferred to this court.
- [4] The procedure followed by the Director of Public Prosecutions in relation to matters enrolled upon the High Court trial roll, is to arrange for one or more appearances before this court as part of a procedure to facilitate the finalisation of all pre-trial procedures. Upon service of the indictment the prosecution makes available to the defence copies of the investigation docket, specifically such documents and statements and reports as are contained in the docket and upon which the prosecution is to be based.
- [5] The case is then set down for what is termed a pre-trial hearing at which a determination is made whether the matter is ready for trial and whether it may formally be allocated a trial date. This procedure is, particularly in matters such as the present where the duration of the trial is expected to be lengthy, directed to ensure that the matter may, as far as is reasonably possible, commence and then proceed to finality in a single allocated trial period. In accordance with this procedure the matter was enrolled for a pre-trial hearing on 25 August 2016.
- [6] Shortly before that hearing the applicant launched a substantive application for access to a broad range of documents in addition to those already furnished by

the prosecutor. The application was set down for hearing on the day of the pre-trial hearing. However, in the light of the substantive nature of the application and its status as civil proceedings, it was agreed that the application be heard on 14 September after opposing papers had been filed.

- [7] On 26 August 2016 the applicant filed a notice withdrawing the application and on the same day caused an application in identical terms to be issued. The only difference being that the Director of Public Prosecution was cited in the application as the second respondent. The respondents filed a notice of intention to oppose the application on 6 September 2016 and on the same date filed answering affidavits by the second respondent as well as a supporting affidavit by Swanepoel, the investigating officer in the criminal matter.
- [8] On 9 September 2016 a Notice of Amendment was filed by the applicant indicating the applicant's intention to delete paragraphs 2.1, 2.2, 3, 4 (a), 4 (b) (i), 4 (c) to (g), 5, 6 and 9 of the prayers set out in the notice of motion and further stating that the applicant will no longer seek such relief. I shall return to the content of the relief sought in these paragraphs hereunder. On the same day, 9 September 2016, the applicant filed its replying affidavit.
- [9] It should be mentioned here that on 8 September 2016 the first and second respondents filed a notice of irregular proceedings which related to the fact that the applicant had caused to be issued and served a number of subpoenas *duces tecum* on various members of the South African Police Service requiring them to attend the hearing on 14 September 2016 to give evidence and to produce certain documents specified in the respective subpoenas *duces tecum*.

- [10] Included in the case file are 14 subpoenas *duces tecum* issued by the registrar of this court and furnished to the sheriff of the court for service on 29 August 2016. The persons in respect of whom the subpoenas were issued include the 12 persons named in paragraph 3 of the notice of motion and, it appears, the relevant officials who are the commanding officers of the two police stations referred to in paragraph 2.1 of the notice of motion.
- [11] On 12 September 2016 the Minister of Police filed an application to intervene in the proceedings together with a notice of irregular proceedings setting out the basis of the objection to the subpoenas issued by the applicant. In the notice of motion seeking leave to intervene in the proceedings the Minister sought orders that the subpoenas referred to above be set aside as being an irregular step in the proceedings, alternatively that it be ordered that the members of the police services need not comply with the terms of the subpoenas until the underlying dispute between the parties has been resolved by order of this court. The applicant filed a notice to oppose the relief sought by the Minister on the basis that the subpoenas are not irregular and that they do not pre-empt any relief sought in the notice of motion issued by the applicant.
- [12] At the commencement of the hearing the Minister moved for an order granting leave to intervene. This was not opposed by the applicant. Accordingly the Minister was granted leave to intervene and is accordingly cited as such.
- [13] I shall deal with the issues raised in this matter under separate headings as accords with the manner in which the application was argued before me.

The access application

- [14] As I have already indicated the ambit of the access application became more and more attenuated as it progressed. At the commencement of the hearing, the applicant sought only disclosure of (a) the so-called B and C sections of the case docket; (b) the cellphone billing information or records of cell phone number, 0834919039, being the cellphone of the witness Ndedwa; (c) the affidavit of Theresa Botha; and (d) the affidavit of Rhynhardt Swanepoel.
- [15] During the course of argument applicant's counsel, Mr Hattingh, abandoned the order sought in respect of the cellphone billing information in respect of the witness Ndedwa. The reason for doing so appeared to be the unanswerable basis of the second respondent's opposition to the order. In the supporting affidavit deposed to by Swanepoel it was stated that the cell phone number belonging to Ndedwa was not used during the relevant period and that the investigation established that no telephonic contact was made between that number and any of the telephone numbers of the 'role players'. Accordingly the billing information was not obtained by the investigation team. The prosecution was therefore not in possession of the requested documents. In argument, Mr Stander pointed out that the only means by which the information could be obtained from the relevant service provider was by way of issuing a subpoena in terms of s 205 of the Criminal Procedure Act. In the light of the information at the disposal of the investigators, it was not possible to meet the requirements of s 205 in relation to these records. It was pointed out in the affidavit of Swanepoel that, with reference to the cell phone records of those persons whom the state alleged played a role in the commission of the offences, it was possible to

establish that the witness Ndedwa's telephone number 0834919039 was not used to make contact with any of the relevant persons.

[16] In regard to the affidavits of Botha and Swanepoel the applicant persisted with seeking an order compelling production, whilst apparently accepting that the prosecution is not yet in possession of the two affidavits. Mr Stander indicated that the prosecution would be in possession of both of the statements by 23 September and further undertook to immediately make them available to the defence.

[17] With this in mind the central issue raised in respect of the access application was therefore the applicant's right of access to the B and C sections of the case docket. Mr Stander's opposition to making these portions of the docket available to the applicant was founded upon the assertion that the applicant had not set out with any particularity in his papers why the said documents would be required, nor established that the documents contained in the investigation docket in the two sections concerned bear any relevance to the matters to be addressed at trial. It was also argued that the applicant's reliance upon the provisions of the relevant Standing Orders which deal with docket management and the contents of the various portions of a police investigation docket serve merely as guidelines as to what the portions should contain and in any event did not support the applicant's assertion that these documents would be necessary. Mr Stander further submitted that the allegations pertaining to the assertion of the applicant's right to a fair trial and the applicant's assertion of the relevance of the documents are, at best, generally asserted in the applicant's founding papers and that upon close analysis no basis is established upon which it could be found

that the requested documents are reasonably required for the purpose of ensuring that the applicant has a fair trial.

[18] In countering these arguments Mr Hattingh argued that it is not necessary for the applicant to establish that the documents he seeks will indeed be relevant and therefore potentially admissible at the trial. All that the applicant needs to establish in asserting the right to a fair trial is that there are documents in the possession of the respondents which would bear upon the subject matter of the charges and the police investigation conducted against the applicant and which are not subject to any accepted ground of justification for nondisclosure that the prosecution might assert. In those circumstances the legal principles applicable to disclosure of documents establish a balance in favour of an accused person and, accordingly, in favour of disclosure irrespective of the considerations of relevance at the stage of pre-trial disclosure of information.

[19] In *Shabalala and others v Attorney General, Transvaal and another*¹ the Constitutional Court was called upon to consider an accused's right of access to the contents of the police docket prior to trial in the context of an assertion of a right to a fair trial. The court held that the assertion of a blanket docket privilege² was unreasonable and unjustifiable in an open and democratic society. The court declared that ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.³ The court further declared that ordinarily the right to a

¹ 1995 (2) SACR 761 (CC)

² *R v Steyn* 1954 (1) SA 324 (A)

³ *Shabalala* at par 72, A3

fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses), and such of the contents of the police docket as is relevant in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial.⁴

[20] A police docket normally consists of three sections: section A, which contains the statements of witnesses, expert reports and documentary evidence; section B which contains internal reports and memoranda and section C, which contains the investigation diary⁵.

[21] An accused person's ordinary entitlement to access to documents in the docket is not restricted to statements of witnesses or experts (i.e. those contained in the A section of the docket) but extends to all documents that might be important for the accused to properly adduce and challenge evidence.⁶

[22] In the *King* matter the court was required to consider whether an accused is entitled as of right to a full description of each of the documents to which he was denied access (i.e. the B and C sections of the docket), together with a detailed statement setting out the basis upon which access was denied.

[23] The court noted that an accused person does not enjoy a blanket right to all information in the hands of the prosecution,

Litigation privilege does still exist, also in criminal cases, albeit in an attenuated form as a result of these limitations. Litigation privilege is in essence concerned with what is sometimes called work product and consists of documents that are by their very

⁴ *Shabalala* at par 72, A4

⁵ *Shabalala* at par 10; *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) at par 1

⁶ *Shabalala* at par 57; *King* at par 1

nature, irrelevant because they do not comprise evidence or information relevant to the prosecution or defence.⁷

[24] “Discovery in criminal cases”, the court noted, “must always be a compromise.”⁸

Although the *King* matter was not concerned with the assertion of a right of access to the documents contained in the B and C sections of the docket (as opposed to a claim for access to a ‘motivated index’ of the sections) the court’s treatment of the assertion of the right to a fair trial as founding the right to the index is instructive. The court noted that King’s case was built on the general submission that one can assume that all withheld documents are in some way relevant to the prosecution. He accordingly asserted an entitlement to be informed of the reason for nondisclosure on that basis. The court however, in dealing with the relevance of non-disclosed documents, noted that ordinarily documents tendered by the prosecution which are relevant to the accused’s case, or which are likely to comprise the case against the accused are those contained in section A of the docket and are disclosed on the basis of the rule in *Shabalala*.⁹

[25] A document, however,

“... may be relevant to the prosecution, without being relevant to the accused’s guilt or defence. For instance, King seeks a motivated list of opinions by prosecutors, notes on legal research, and copies of judgments (reported and unreported). These documents are clearly relevant to the prosecution, but they are not relevant “for the purpose of making full answer and defence”. In other words, as mentioned at the outset of this judgment, most of the material covered by litigation privilege in criminal cases would in any event not be discoverable because the material is not germane to the conduct of the trial, i.e. is not relevant in the sense discussed.”¹⁰

⁷ *King* at par 2

⁸ *King* at par 5

⁹ *King* at par 29 - 30

¹⁰ *King* at par 30

- [26] The court accepted that the mere assertion of a right of access to “relevant” documents without any *prima facie* facts to establish relevance is insufficient.¹¹
- [27] The applicant seeks access to all of the documents contained in the B and C sections of the case docket. Reliance is placed on the Police Standing Orders 321 and 323 relating to case docket management to assert his entitlement to the documents. Standing Order 321 describes the divisions in a docket as “clip” A, B and C. It provides that the Clip B of the docket should include correspondence in connection with the case, reports such as negative fingerprint reports, reports from Prison Boards etc., replies from other police stations and newspaper clippings of any value, as well as all documents not falling under A or C.
- [28] The supporting affidavit of attorney Griebenouw does not deal with the basis upon which the documents included in the B section are sought by the applicant. His affidavit, however, refers to correspondence in which the B section was requested. A reading of the relevant correspondence, however, reveals only the request for access to the B section of the case docket without any indication of the relevance of that class of documents to the applicant’s right to adduce and challenge evidence. The correspondence deals at length with specific requests for documents or information not contained in the B section of the docket as well as the applicant’s motivation for seeking disclosure of the C section. There is however no treatment of the basis upon which the B section is required.
- [29] In the opposing affidavit filed by the Deputy Director of Public Prosecutions the following is stated in relation to the contents of the docket and the basis for opposition to disclosure of the B and C sections:

¹¹ *King* at par 32

8. The “B” section of the case docket contains
 - 8.1 internal police status reports;
 - 8.2 internal police memorandums;
 - 8.3 correspondence with various stakeholders, including applications in terms of Section 205 of Act 51 of 1977;
9. The balance of the documents in the “B” section are covering sheets and police nodal point records which, like the investigation diary, are neither exculpatory nor inculpatory, nor do they *prima facie* favour the Applicant. Access thereto is not justified for the purpose of enabling the applicant properly to prepare his defence. These documents are, in any event, also not relevant to the Applicant’s guilt or defence.
10. Correspondence with evidential value that might or will be used in court, must be filed in the “A” section of the docket as set out in the Standing Order.... This has been done and that correspondence has been made available to the Applicant.
11. The “C” section of the docket is a record of events with reference to documents filed in the case docket. The Applicant is in possession of all the documents in the A section and the description has been provided *infra* of those in the B section of *this* case docket. The Police Standing Orders categorically state that it should not be necessary for a prosecutor to refer to the B and C sections of the case docket at all.

[30] In reply Griebenouw refers to the statement that the B section contains the s 205 applications and suggests that these may disclose information relative to the service providers and cell phone holders in respect of the cell phone records already in the applicant’s possession and that this underlines the relevance of the documents contained in the B section of the case docket. He goes on to state that the other documents in the B section may therefore also be relevant to the applicant’s case.

[31] This latter statement reflects the speculative basis of the assertion of relevance in relation to the B section of the case docket. It is striking that the applicant did not seek, in the light of the contents of the affidavit of the Deputy Director of Public Prosecutions, to amend the relief sought in the notice of motion to specifically require disclosure of the s 205 applications for the reasons advanced but persisted with the general assertion of relevance and the need for disclosure of the entire contents of the B section.

[32] When I consider all of the allegations advanced by the applicant, both in the affidavits filed and the annexed correspondence, it is my view that the applicant has not established *prima facie* facts which point to the contents of the B section of the case docket as being relevant in the sense required in the *King* matter. The assertion by the second respondent that the B section does not contain any material which is exculpatory or which *prima facie* favours the applicant or is relevant to the applicant's guilt or innocence must, in the absence of the allegation of facts to the contrary, be accepted. In the circumstances the B section is not discoverable and the applicant is not entitled to the order he seeks.

[33] Different considerations, however, apply to the C section. These may be dealt with briefly. The C section contains the investigation diary which, according to the Police Standing Order 323, *inter-alia* contains a chronological record of work done on the case; serves as an index to all statements and documents contained in the case docket and serves as a reference in court should any aspect of an investigation process be brought into question.

[34] I have already referred to the correspondence addressed to the second respondent in which the applicant sought disclosure of the C section of the case docket. As indicated the reasons for seeking access are set out in some detail. The correspondence pertinently refers to the fact that the applicant intends to challenge the conduct of the investigation from its outset, in order to establish that evidence allegedly implicating him is, by reason of the manner in which it was obtained to be excluded at trial. In setting this out in the correspondence the applicant has, in my view, signaled an intention to bring into question aspects of the police investigation. The merits of the challenge is of course a matter for the

trial court. In the context of a request for access to the C section of the docket however, it must be accepted that the applicant has set out, at least *prima facie*, an entitlement to such access on the basis that it is required in order for him to be able to adduce and challenge evidence to be presented at trial. In the absence of a justified ground for non-disclosure raised by the second respondent, the principle in *Shabalala* must apply and, accordingly, in my view, access to the C section of the investigation docket ought to be granted.

[35] In regard to the applicant's access to the affidavits of Botha and Swanepoel, the second respondent has undertaken to furnish copies of both affidavits when they are available by no later than 23 September. That aspect of the relief can accordingly be granted in accordance with the undertaking given by the second respondent.

[36] I turn now to deal with the second aspect of the present application, namely the subpoenas issued by the applicant.

The subpoenas *duces tecum*

[37] As already indicated subpoenas were issued in respect of all of the persons named in paragraph 3 of the notice of motion for the documents referred to in that paragraph and in paragraph 4 the notice of motion. In each instance the person summonsed to appear was required to appear.

“ in person before the Registrar of this Court....on WEDNESDAY the 14th day of September 2016 at 09H00, and thereafter to remain in attendance until excused by the Court, in the above-mentioned matter, to give evidence and/or to produce the following documents, on request of the Applicant in this matter...”

[38] What follows this is a description of the particular documents sought from the person concerned. The witness is then admonished that, in terms of Rule 38 (1) (b) he is required to hand over the specified documents, “to the Registrar as soon as possible”.

[39] The subpoenas were all issued on 29 August 2016 at a stage when the applicant was seeking orders to compel the respondents to produce the specified documents in this application. It is this fact that prompted the second respondent to file a notice of irregular proceedings and prompted the Minister to intervene in the proceedings. It is common cause that the applicant only “abandoned” the relief sought in relation to these documents on 9 September when he filed both a replying affidavit and a Notice of Intention to amend the notice of motion.

[40] During argument before me Mr Hattingh stated that the subpoenas had been issued in relation to the criminal trial and not for purposes of the hearing of the application which served before court on 14 September 2016. The witnesses had been subpoenaed to produce the documents on this date because the applicant was entitled to obtain the documents prior to the trial. The only procedure available to the applicant was that provided for by Rule 38 of the Rules of Court.

[41] Section 179 (1) of the Criminal Procedure Act provides that:

(a) The prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of the court the process of court for that purpose.

[42] The section, which is consonant with the constitutional rights conferred by section 35 of the Constitution conferring upon an accused person the right to “adduce and challenge evidence”, entitles an accused person to compel the

attendance of a witness or the production of a document in criminal proceedings pending against such accused person.

[43] This right, also finds expression in section 35 of the Superior Courts Act, Act 10 of 2013, which provides that:

(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.

[44] The relevant rules regulating criminal proceedings in the High Court and the issuing of subpoenas are Rules 54 and 55.

[45] Rule 54 (5) provides:

The subpoena or process for procuring the attendance of any person before a superior court (other than a Circuit Court) to give evidence in any criminal case, or to produce any books, documents or things, shall be sued out of the office of the registrar of that court, by the chief clerk to the Attorney-General (or where the prosecution is at the instance of a private party, by himself or his attorney); and the same shall be delivered to the sheriff, at his office, for service thereof, together with so many copies of the subpoena or process as the persons to be served. In the case of the Witwatersrand Local Division, the process may also be served out by the Deputy Attorney General, Johannesburg, and delivered to the sheriff concerned.

[46] It was suggested in argument that Rule 54 (and for that matter Rule 55 which deals with the process issued in relation to Circuit Courts) makes no reference to an accused person and, accordingly, that the process envisaged by Rule 54 is not one available to an accused person. An accused person is, therefore, so the argument went, required to utilise Rule 38 of the rules.

[47] I need not decide the issue since it is common cause that the applicant utilised the procedure provided for by Rule 38. It may be mentioned that Rule 54 and

Rule 55 serve to prescribe the office out of which the process of court for securing the attendance of the witness in criminal trials is to be issued, as is specifically envisaged by section 179 of the Criminal Procedure Act. The Rules provide for different offices to issue the relevant process by virtue of the different administrative arrangements that apply in relation to permanent as opposed to Circuit Courts.

[48] Rule 38 generally regulates the procedure for procuring evidence for trial. The relevant portion of the Rule provides as follows:

- (1) (a) Any party, desiring the attendance of any person to give evidence at trial, may as of right, without any prior proceeding whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the sheriff in the manner prescribed by rule 4, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 16 in the First Schedule.

If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoenas shall specify such document or thing and require him to produce it to the court at the trial.

- (b) Any witness who has been required to produce any deed, document, writing or tape-recording at the trial shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape-recording is privileged. Thereafter the parties may inspect such deed, document, writing or tape-recording and make copies or transcriptions thereof, after which the witness is entitled to its return.

(Emphasis added)

[49] I accept that the applicant, as an accused person in pending criminal proceedings, is entitled to utilise the machinery provided by s 179 (1) of the Criminal Procedure Act as read with the rules of court, including Rule 54 and Rule 38, to sue out of the office of the registrar one or more subpoenas requiring the attendance of witnesses and or the production of documents at the trial of the

pending criminal proceedings. For this purpose Rule 38 must be applied *mutatis mutandis* to the circumstances of a criminal trial.

[50] I accept also that the applicant as a party to proceedings, in this case proceedings which are civil in nature, is entitled to utilise the machinery provided by section 35 of the Superior Courts Act as read with rule 38 to secure the attendance of witnesses and /or the production of documents at trial proceedings to which the applicant is a party.

[51] The question that arises is whether the issue of the subpoenas in the particular circumstances, i.e. in the exercise of the right of an accused person to secure the attendance of witnesses at the pending criminal trial entitled the applicant sue out subpoenas and cause the attendance of witnesses and or the production of documents at the hearing of application proceedings to which the applicant is a party.

[52] Before dealing with this aspect it is necessary to deal briefly with the circumstances in which the subpoenas were issued.

[53] On 29 August 2016, on the same day that the re-issued application was served upon the second respondent, the applicant's attorney caused subpoenas to be issued in respect of the production of documents which formed the subject matter of the application. In the replying affidavit attorney Griebenouw explains the process as follows:

5. As background to what follows *infra*, the following:

5.1 This application was initially set down for hearing on 25 August 2016 and the papers were timeously served on the Deputy Director of Public Prosecutions.

5.2. Mr Stander representing the State however, when appearing on the 25th of August 2016, which was also the date of the pre-trial hearing, indicated that his office did not

hand him the papers, but that he intends to oppose the application on the following basis:

5.2.1 that he does not intend to supply the B- and C Section of the docket;

5.2.2 that he will oppose the application inter-alia, in respect of all documents which are not in his possession;

5.2.3 that he may take an *in limine* point on the basis that the State should not have been indicated as Respondent, i.e. that the wrong party was brought before court.

6. To avoid possible delays with an *in limine* point being taken, I withdrew the original application against the State and simultaneously filed a fresh application with the same contents, but with the State as First Respondent and the Director of Public Prosecutions as Second Respondent. It is not clear in respect of which Respondent the opposite posing papers were filed.

7. I also commenced with the issuing of subpoenas *duces tecum* to address the approach by Mr Stander with regard to documents which are not in his possession. The subpoenas were issued with regard to prayers 2.1, 2.2, 3, 4 (a), 4 (c) to (g) and the orders sought in this regard are not proceeded with in this application.

8. As far as prayers 4 (a), 4 (c) to (g) are concerned, subpoenas *duces tecum* were issued to the police officials to provide a cell phone accounts for the relevant periods to enable me to identify the names of the service providers, which will in turn have to be subpoenaed to present the cell data required for us to prepare for the trial itself.

[54] It is clear from this that at the stage that the application was re-issued applicant's attorney was aware that the second respondent would resist the relief sought in relation to certain documents on the basis that they were not in his possession. Applicant's attorney was also aware that the applicant was vested with an alternative remedy by which to obtain documents in the possession of third parties, and immediately proceeded to utilise that mechanism. What is not explained is why it was necessary to issue an application against the second respondent requiring production of documents which were not in the second respondent's position when the applicant knew that it had available to it a procedure for obtaining such evidence at trial. What is also not explained is why, having launched the application against the second respondent, it was then decided to issue subpoenas *duces tecum*, notwithstanding the existence of a dispute in relation to the production of those documents between the parties to

the application. It is also not explained why and for what purpose the subpoenas were issued in relation to the hearing of the application on 14 September 2016.

[55] The argument, as I understood it, was that se 35 of the Superior Courts Court entitles a party to proceedings before the High Court to issue a subpoena to secure the attendance of a witness or the production of document and that the Rules entitle the applicant to seek access to the document prior to trial, so as to enable it to prepare.

[56] A subpoena “is a court order, commanding the presence of a witness under a penalty of fine for failure”¹². Its primary purpose is to secure the attendance of a witness or the production of documentary evidentiary material at court proceedings in order to facilitate the presentation of the evidence in such proceedings. A subpoena accordingly serves to facilitate the administration of justice between parties by making available a mechanism to compel the production of evidence. The Acts – in the form of both the Criminal Procedure Act and the Superior Courts Act – provide for the issue of subpoenas in relation to pending proceedings. It is a necessary condition for the issue of a subpoena that court proceedings involving the presentation and admission of evidence in a trial process must be pending between the parties or that the person issuing the subpoena is an accused in criminal proceedings.

[57] Rule 38 makes this clear in its terms where it refers to ‘a party desiring the attendance of a person to give evidence at trial, and where it provides that a subpoena may ‘require a witness to produce [a specified] document at the trial’.

¹² *Minister of Police v Premier of the Western Cape and others* 2014 (1) SA 1(CC) at par 1 (fn 1)

[58] The requirement that a witness present him/herself or specified documents ‘at the trial’ serves both procedural and substantive purposes. Substantive issues relating to the reception of the evidence by the trial court, namely issues relating to the compellability and competence of the witness as well as the relevance of the evidence, and consequently its admissibility at the trial are matters to be determined by the trial court in accordance with the law of evidence. In like manner disputes relating to the production of documents under compulsion of a subpoena are matters to be dealt with by the court which is to receive the evidence or evidentiary material procured by way of the subpoenas. It is for this reason that Rule 38 (1) (a) and (b) specifically require that the subpoena must require the attendance or production of documents ‘at the trial’.

[59] In argument before me it was conceded that the subpoenas were issued in relation to the pending criminal trial proceedings. Their purpose was to secure evidentiary material for the applicant to utilise at the trial of the criminal proceedings. The subpoenas were issued under case number CC26/2016, the criminal case number assigned to the pending criminal trial. Although this application was also, in my view incorrectly issued under the same case number, it was accepted that these proceedings were civil proceedings and not the pending criminal proceedings. It was accepted that no evidence other than that produced by way of the affidavits filed in the matter would be heard. It was also accepted that the documents sought to be produced by way of the subpoenas had no bearing upon the decision to be made in this application. The only reason advanced for issuing the subpoenas for 14 September 2016 was to secure access to the documents so as to enable the applicant to prepare for the forthcoming trial scheduled for 11 October 2016.

- [60] Counsel for the Minister, Mr Wolmarans, argued that the subpoenas were irregularly issued by reason of the fact that the underlying dispute was still alive and on the basis that the subpoenas were issued for 14 September 2016. The applicant argued that he is entitled to issue the subpoenas for 14 September 2016 in the light of rule 38(1) (b) which entitles a party to require the handing over of the required documents “as soon as possible”. On this basis it was argued that the applicant was entitled to nominate 14 September as the date for production of the documents.
- [61] In advancing the argument on this issue reference was made to *Trust Sentrum (Kaaptstad) Edms Bpk v Zevenberg*¹³ where the court noted that sub-rule (1) (b) was introduced as an amendment to the Rule in order to obviate the delays caused by the practice of only producing documents under subpoena at the trial, or when the witness was called to testify. This practice, it was noted, inevitably resulted in trial matters (particularly civil trials) being delayed as a result.
- [62] The purpose of sub-rule (1) (b) is undoubtedly to place the person subpoenaed under an obligation to produce the documents and hand them over to the Registrar as soon as possible prior to the trial date. However, the language of the sub-rule makes it clear that the compulsion to produce is ‘to the court at the trial’, i.e. on the scheduled date of the trial. Section 35 and 36 of the Superior Courts Act provides for the manner in which a court, before whom a witness is summoned by subpoena, must deal with non-compliance. Those powers of the court are subject to ‘reasonable excuse’ (s 35(2)) or ‘just excuse for such refusal or failure’ (s36 (1) (c)) to comply. In similar vein s 187 of the Criminal Procedure Act requires a person subpoenaed to attend criminal proceedings to remain in

¹³ 1989 (1) SA 145 (C) at 148C-J

attendance ‘unless...excused by the court’. In terms of s 189 the court may in a summary manner enquire into a refusal or failure to comply and may, ‘unless the person so refusing has a just excuse’ impose a punishment upon such person. Such ‘just excuse’ is not confined to lawful excuses arising from the rules of privilege, compellability of witnesses or the admissibility of evidence but will depend upon the circumstances of the case.¹⁴

[63] What this points to is that it is the trial court which is to consider the witnesses’ compliance with the terms of a subpoena and to act in accordance with the compulsion imposed upon such witness by the subpoena ‘to appear at the trial’.

[64] Rule 38(1) (b) does not, therefore, permit a party seeking to compel the production of documents at trial to nominate a date for appearance of the subpoenaed witness other than the date of trial. The *Trust Sentrum* matter is not authority for that proposition and the applicant’s argument therefore, that he was entitled to issue the subpoenas for 14 September, cannot be upheld.

[65] The procedure adopted by the applicant, in causing subpoenas to be issued compelling the attendance of witnesses at the application hearing of 14 September 2016 was not authorised by the Rules and was accordingly irregular. The question that arises is whether, as was urged upon me by counsel for the Minister, to set aside the subpoenas.

[66] Section 36 (5) of the Superior Courts Act provides for the setting aside of a subpoena by a judge (i.e. a judge sitting in chambers) if it appears that (a) the

¹⁴ See *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A)

person concerned is unable to give any evidence or to produce any book which would be relevant to any issue in the proceedings; (b) such book, paper or document could properly be produced by some other person, and (c) to compel the person concerned to attend would be an abuse of the process of court.

[67] This court however, has inherent jurisdiction to set aside a subpoena if it is satisfied that it is unsustainable¹⁵ or if it constitutes an abuse of the process of court.¹⁶ An abuse of process occurs where the procedures permitted by the Rules to facilitate the pursuit of truth are used for a purpose extraneous to that purpose.¹⁷

[68] A court will not lightly come to the conclusion that the issue of process constitutes an abuse of the process and will not readily set aside a subpoena. I have already pointed to the circumstances in which the subpoenas came to be issued in this matter. The conduct of the applicant's attorney in so issuing the subpoenas whilst knowing that the issue as to the production of the documents remained in dispute between the parties, is clearly unacceptable and is to be deprecated. It suggests a disregard for the process of this court and reflects poorly upon the manner in which this matter was conducted. Having said that, I do not consider that the applicant sought, by the issue of the subpoenas to achieve a purpose extraneous to the object served by the issue of such subpoenas. That the procedure followed was irregular is plain. One would have expected an attorney of the experience of the applicant's attorney to have known better and, to have been able to consult the rules of court to know what procedure is permitted. It is for this reason that the conduct is to be deprecated. I should mention that no party sought any cost

¹⁵ *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D)

¹⁶ *Beinash v Wixley* 1997 (3) SA 721 (SCA)

¹⁷ *Beinash v Wixley* at 734F-G

order in the matter. Had it been necessary to consider an appropriate cost order I would have given very serious consideration to registering this court's dissatisfaction with the conduct of the applicant and/or the applicant's attorney in the form of a punitive cost order.

[69] Setting aside the subpoenas and effectively requiring that they be re-issued for the trial date would, in my view, serve little purpose other than to mark this court's disapproval of the conduct. It would not serve the interests of justice in my view. When asked, during argument, as to how this court might treat the subpoenas, it was suggested by counsel for the Minister that in the absence of an order setting them aside it would be appropriate to defer the obligation to comply to the date of the trial. Such an order could be carried into effect by reason of the Minister's intervention in the proceedings on behalf of the subpoenaed members of the Police Service. That suggestion, it seems to me to be an eminently reasonable one. It has the additional benefit of ensuring that any disputes in relation to the production of the documents sought to be obtained by way of the subpoenas will fall to be determined by the appropriate forum, namely the trial court. The deferred compliance does not however exempt the persons so subpoenaed from complying with the obligations set out in Rule 38(1) (b).

[70] In the result I make the following order:

1. The Second Respondent is ordered to provide the Applicant with a copy of the C Section (Investigation Diary) of the investigation docket Kabega Park CAS 229/04/2015 within 10 days of the date of this Order;

2. The Second Respondent is directed, in accordance with the undertaking furnished, to provide the Applicant with a copy of the statement of Theresa May Botha as well as any accompanying documents and digital presentations and a copy of the statement of Lt. Rynhardt Swanepoel on or before 23 September 2016;
3. In respect of each of the subpoenas *duces tecum* issued by the Applicant under case number CC26/2016 requiring the attendance of witnesses on 14 September 2016, the date for such attendance and production of the specified documents is deferred to the date of trial being 11 October 2016, subject to the provisions of Rule 38(1) (b) of the Rules of Court.
4. There is no order as to costs.

G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances: For the Applicant
 Adv. A Hattingh
 Instructed by Griebenouw Attorneys

 For the First and Second Respondents
 Adv. M Stander
 Office of the Director of Public Prosecutions

For the Intervening Party
Adv. G Wolmarans
Instructed by the State Attorney