

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2023-006221

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[Redacted signature]

SIGNATURE

DATE: 21 July 202

In the matter between:

JEROME MAROUN CLAASSEN

First Applicant

KOBILAN PILLAY

Second applicant

LEWIS BLANKFIELD

Third Applicant

GITA DHIRAJLAL BLANKFIELD

Fourth Applicant

And

MAUREEN ORA FRAME

Respondent

In re:

MAUREEN ORA FRAME

Plaintiff

And

MELVYN FRAME

Defendant

JUDGMENT

Noko J

Introduction

[1] The applicants instituted the proceedings against the Ms Maureen Ora Frame (“*respondent*”) for an order setting aside a subpoena issued against the applicants to hand over to the Registrar of Court certain documents related to the assets of the Mr Melvyn Frame, the defendant in the pending divorce proceeding. The first applicant was acting in his personal capacity and also his capacity as the attorney acting on behalf of the other applicants. The other applicants have subsequently complied with the subpoena and are not participating in the proceedings and reference to the applicant in this *lis* shall mean the first applicant.

[2] The applicant is representing Mr Frame in the divorce action whereas Mrs Frame is represented by her current attorneys of record. Mr and Mrs would be referred to as the defendant and plaintiff respectively.

Background

[3] The plaintiff and defendant were married out of community of property subject to the accrual system, which marriage still subsists. The plaintiff has instituted divorce proceedings against the defendant, which proceedings are still pending, and have now reached *litis contestatio*. The plaintiff has sued out a *subpoena duces tecum* on 21 November 2023 for documents which are in the applicant’s possession to be handed over to the Registrar of the High Court.

[4] The applicant penned a letter to the respondent’s attorneys on 5 October 2023, conveying that issuing of the subpoena was irregular, but would, in any event, discover the documents required and requested a period of 30 days to provide the said documents. The respondent’s attorneys replied on 9 October 2023 and stated that the subpoena was properly

issued and refused to grant the requested extension to comply. The applicant thereafter launched these proceedings to set aside the said subpoena.

Parties' submissions and legal analysis.

[5] The applicant has alluded to several grounds upon which he contends that the subpoena is susceptible to be set aside, first, non-compliance with Rule 38 of the Uniform Rule of Court which according to the applicant requires that the subpoena must be issued against the witness who will be called to testify. The applicant referred in this regard to the constitutional court judgment in *PFE*¹ where it was held that the person so subpoenaed should at least be a witness or a prospective witness. In view of the fact that the defendant has not relayed the intention to call the applicant as the witness, the argument continued, then the subpoena was not issued properly and stands to be set aside.

[6] I noted that the provisions of rule 38 was promulgated to give effect to the provisions of section 35 of the Superior Court Act² which provides that

“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 protection of any document or thing in the manner provided for in the rules of that court”. (underlining added).

[7] *Ex facie* this provision, it appears that a party may invoke the provisions of the section for the purpose of securing a document to court and not necessarily that the person in possession of the said documents is required to attend court. The contention that the applicant must first be called as a witness is therefore unsustainable. In any event, having regard to the nature of the documents required and the applicant's activities as outlined in the General Power of Attorney, the applicant would be the relevant person to speak to the said documents and is a prospective witness.

¹ *PFE International and Others v Industrial Development of South Africa Ltd* 2023 (1) SA 1 (CC). See paras 14 and 18 of the Applicant's Heads of Argument at CL 011-4.

² 10 of 2013.

[8] The counsel for the applicant further referred to the constitutional court in *PFE*, where the court held that:

“The-Constitutional Court in-the PFE Judgment, with reference the *Trust Sentrum (Kaapstad) (Edms) Bpk and Another v Zevenberg and Another* 1989 (1) SA 145 (C) matter held that "It is difficult to imagine how a party that is still to have access to a document can positively tell that a document would definitely be tendered as evidence at the trial. It seems to me that access must precede the formulation of an opinion regarding whether a particular document would have any evidential value at trial. Limiting the scope of the rule to documents that are to be tendered as evidence and persons who are going to testify results in an absurdity".³

[9] The applicant's second ground is that documents listed under para 1 - 10 are irrelevant, and to this end, a declarator should be issued confirming that the said documents are irrelevant. The applicant referred to *Helen Suzman Foundation*⁴ where it was held that In addition, that there is a higher threshold with regard to the subpoena as envisaged in section 36(5) of the Act, read with Rule 38, that it should be absolutely necessary with a measure of certainty that the required documents are relevant to the underlying action. It was also held in *Deltamune*⁵ that production of documents in terms of Rule 35 (3) should be those which may be relevant, whereas in terms of section 36(5) has a higher threshold as it relates to the documents which would be relevant at trial.

[10] The plaintiff contends correctly that the documents listed are linked to the assets of the defendant and would be relevant for the determination of what has accrued to the defendant for the purposes of accrual.

³ Though the above quote relates to the relevance by parity of reasoning it should apply to the point raised by the applicant. As such the documents delivered will provide a guide as to which witness would be required to testify on which documents. See para 34 heads at 022-21.

⁴ *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 768 (CC) (24 April 2018) at para 22 and 26.

⁵ *Deltamune (Pty) Ltd v Tiger Brands Limited* [2022] (3) SA 339 (SCA).

[11] As it is stated in the quote from *PFE* in the paragraph above it would only be after the documents have been made available that determination of relevance would be embarked upon. It follows therefore that the ground raised by the applicant is bound to fail.

[12] The third ground raised was that the plaintiff prematurely caused the subpoena to be issued, as there was no trial date issued. In retort, counsel for the plaintiff contended, correctly, that the rule does not make a provision that a trial date should have first been obtained before a subpoena is issued. In any event, the applicant has noted that the pleadings have reached *litis contestatio* and as such the next step is to secure the date for trial. Noting further as set out above, a determination for relevancy and identification of the correct witness to call would readily be determined after the documents have been availed.

[13] A further ground advanced by the applicant is that the defendant is abusing the court processes, and on that basis, the subpoena should be set aside. This contention is predicated on the contention that the plaintiff had an option to request the documents in terms of Rule 35(1) and not Rule 38(1)(a)(iii). The applicant further submitted that the High Court held in *Scott v Scott* 2006 JDR 0605 (C) at p29 that where a party had an option to proceed in terms of Rule 35 but proceeds in terms of Rule 38, such a conduct would be considered as abuse of the court process.

[14] In addition, the applicant contended further, that the court is invited to assess whether the subpoena was issued for a legitimate purpose. The applicant contends that the subpoena in this instance was issued to embarrass the applicant and to undermine the relationship between the applicant as an attorney and the defendant, being his client. Further that there is also a possibility that the applicant would be in conflict with his client, being the defendant having to consult and advise the defendant on how to react to the subpoena whilst he is under a threat of arrest for non-compliance.

[15] In retort, the plaintiff contends that the documents requested are for a legitimate purpose and they relate to assets which must be considered to determine the question of

accrual. Further that Rule 35 is intended to cater for instances between the parties, and in this instance, the documents required were not in the defendant's possession.

[16] The plaintiff's counsel further submitted that the applicant has not raised any of the valid defences, which may include the defence that the information/documents requested is confidential and or privileged.

[17] I had regard to the arguments advanced by the applicant and agree that one should ordinarily be slow to place an attorney in an invidious position of having to act as both an attorney and at the same time as a party now having to react to a subpoena which relates to the assets of his client. This case may be construed as presenting an exception as the applicant stated that his mandate was broadened since his client was diagnosed with dementia since 2021. In addition, the general power of attorney is so expansive and give the attorney powers beyond what would be standard provision of legal service. The attorney has not claimed privilege over the documents requested or that he has instructions from the defendant not to make such documents available. Instead, he has requested as an option to be given sufficient time to provide the required documents.

[18] The bases upon which the applicant seeks to challenge the validity of the subpoena are unsustainable. The documents required are indeed relevant to the determination of the accrual as it was argued by the plaintiff's counsel that since the antenuptial contract did not disclose assets as at the time of marriage, the law assumes that all assets were acquired after the marriage.

[19] The applicant has further failed to substantiate the argument regarding the abuse of the court process. He failed to indicate the basis of conflict of interest through proffering evidence that his client is objecting to the production of documents in his possession on the basis of privilege and or confidentiality. Further grounds advanced are predicated on the misunderstanding of the provisions of section 35 of the Superior Practice Act, more particularly that the request for documents is inextricably intertwined with the calling of a witness. This can be gleaned from *PFE* by parity of reasoning that a proper and final determination of which evidence is relevant and which witness to call, would be made only

after the documents have been made available. To this end, I find that the application is unsustainable and bound to be dismissed.

[20] With regard to the issue of costs I am not persuaded to unsettle the principle that costs should follow the results. The second to fourth applicants have offered to furnish the registrar with documents in their possession on or before 4 February 2024 and have also tendered to pay the wasted costs to date of filing of the heads.

[21] In the circumstances I make the following order:

1. *The application is dismissed with costs on scale B including the costs for counsel where so employed.*
2. *The second to the fourth respondents are jointly and severally with the first applicant liable for costs from the beginning of the suit until the date of filing of the heads of argument.*



M V Noko
Judge of the High Court.

This judgment is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 21 July 2025.

Dates:

Hearing: 3 February 2025.

Judgment: 21 July 2025.

Appearances:

For the Applicants: T Halgryn, instructed by EFG Inc, JHB.

For the Respondent: M Smit, instructed by JM Claasen Attorneys.