



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

CASE NO: 22/18285

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

8 December 2023

EJ Francis

In the matter between:

PORTER, JAKOBUS ADRIAAN

First Applicant

VAN DYK, RICHARD WILHELM

Second Applicant

and

ESPORTIF INTERNATIONAL (SA) PTY LTD

Respondent

In re:

ESPORTIF INTERNATIONAL (SA) PTY LTD

Plaintiff

and

PORTER, JAKOBUS ADRIAAN

First Defendant

VAN DYK, RICHARD WILHELM

Second Defendant

JUDGMENT

FRANCIS J

1. The first and second applicants (the applicants) brought an application to set aside subpoenas *duces tecum* (subpoenas) issued by the respondent in an action where the respondent is the plaintiff and the respondents the defendants. The applicants further seek an order that depending on the outcome of the relief sought that the respondent refrain from issuing any further subpoenas encompassing the same or similar documents as the subpoenas forming the subject matter of this application; alternatively, that any party/person/entity to whom a subpoenas may be issued in the terms set out in the subpoenas forming the subject matter of this application.
2. The respondent had instituted an action against the applicants for a statement and debatement of account arising from employment agreements that had been concluded between the respondent and the applicants. The action is being defended by the applicants and pleadings have closed.
3. The respondent caused there to be served on various third parties, a range of subpoenas calling upon those parties to provide the respondent with documents in their possession, this relating *inter alia* to any payments made to either of the respondents as commissions by or on behalf of any professional rugby players. The subpoenas were issued on the following third parties:
 - 3.1 Subpoena served on/or directed to the Chief Executive Officer, Manager, or requisite authorised representative of In Touch Sports Management CC, alternatively In Touch Sports (Pty) Ltd, further alternatively, In Touch Sports Management (Pty) Ltd and dated 6 September 2022;

- 3.2 Subpoena served on James Andrew Stuart Adams, in his capacity as a Director of the entities mentioned in the above paragraph and dated 6 September 2022;
 - 3.3 Subpoena served on the Griquas Rugby Union;
 - 3.4 Subpoena served on Lions Rugby Union;
 - 3.5 Subpoena served on Sharks Rugby Union;
 - 3.6 Subpoena served on the Free State Cheetahs (Pty) Ltd alternatively the Free State Rugby Union, further alternatively the Free State Cheetahs Union; and
 - 3.7 Subpoena served on the South African Sevens Rugby Team under the South African Rugby Union.
4. The respondent opposed the application and has raised a point *in limine* that the applicants lack *locus standi* in this application since the subpoenas were not issued against the applicants and that the applicants do not represent those third parties against whom the subpoenas were issued.
 5. The applicants have raised a number grounds why the subpoenas should be set aside. They *inter alia* referred to an appeal that was pending before the Full Court and that the respondent is not entitled to the relief that it was seeking.
 6. The applicants explain in paragraphs 5 to 9 of their founding affidavit what the purpose of the application is. In paragraph 6 it is stated that the affidavit is deposed to in support of an application whereby the subpoenas as served on third parties ought to be set aside. They indicate why the subpoenas should be set aside.

7. In paragraph 10 to 12 they deal with the jurisdiction of this court to hear the matter. In paragraphs 13 to 35 they deal with the general background to Litigation: Employment Relationship.

8. The applicants in paragraphs 40 and 41 of the founding affidavit state that the plaintiff has without any basis proceeded to issue subpoenas against third parties when the documents reflect in the subpoenas manifest as the documents forming the subject matter of the statement and debatement and this the entitlement to such documents remain the subject of a dispute between the respondent and applicants. Given the period set out in the subpoenas i.e. 1 January 2016 to 31 August 2022, it is clear that the subpoenas are not aimed at procuring evidence in respect of the first or second applicants two years from date of the conclusion of an agreement with a player, being the date upon which the relevant agreement but now extends to 31 August 2022 and covers a period prior to the applicants' employment with the respondent. They state that subpoenas are a clear abuse of process. They are premature, arbitrary and contain inappropriate requests and are in the whole irrelevant to the issues to be determined in the main action and ought to be set aside.

9. The applicants deal further with the *locus standi* issue in their replying affidavit from paragraphs 9 to 12. They admit that they do not represent the third party recipients of the subpoenas or that they do not contend that agency. If regard is had to the relief sought in the action instituted against them, the court will note that the entitlement of the respondent to a statement and debatement is still subject to adjudication by the court. The right of the respondent to gain access to any of the documents in any of the relevant

subpoenas has not been established yet, and the respondent seeks delivery of documents in establishing the possible indebtedness of the applicants to the respondent under circumstances where a right to such statement and debatement has not yet been established. Where the respondent's right has not been established it is clear that the applicants' rights are adversely affected in respect of a trial during which the respondent's mere entitlement to the documents sought must be determined. The applicants therefore have *locus standi* in this application.

10. The applicants in their replying affidavit stated that they have the right to bring the application because their rights have been adversely affected in respect of the trial and the documents are irrelevant and inappropriate.
11. The applicants state that the mere entitlement, viz nature of the plaintiff's entitlement to a statement and debatement, is the subject of an appeal before the Full Court and the judgment of the appeal shall affect the appropriateness of the relief sought.
12. Judgment was however granted by the Full Court that had dismissed the respondent's appeal after it had found *inter alia* that for the respondent to successfully establish a term at odds with the express term relied on, it would have to set out the circumstances relied on for that construction. To that extent the tacit term that had been raised may have involved proving that the express terms were not at odds with the proposed tacit term. That was all academic however in that the tacit term was not pleaded. The court found that the respondent had not made out not a case for either the original relief or the

alternative relief and that the proposed amendment could not rescue the application.

13. I deem it appropriate to refer to the decision of *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others* 2007 (6) SA 628 (D):

“[11] In the law reports most of the cases in which applications have been brought to set aside subpoenas have been brought by the witnesses upon whom the relevant subpoenas have been served. The only South African case to which I was referred to in which the applicant was not the witness is the unreported judgment of Mahomed AJ in this Division in Govender v Govender (case No 8298/97). In that case the applicant sought to set aside two subpoenas duces tecum issued at the instance of the respondent calling upon two bank managers to produce various documents in relation to matrimonial acting pending between the applicant and the respondent. The question of the applicant’s locus standi was not canvassed in the judgment but, in setting aside the subpoenas the learned judge in fact held that their issue had been an abuse of the process of the Court.

[19] An abuse of the process of the court occurs when ‘an attempt [is] made to use for ulterior purposes machinery designed for the better administration of justice’.....It can be said in general terms ... that an abuse of process takes place where the procedures permitted by the Rules of court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.’

[20] But a Court should not lightly exercise its power to set aside a subpoena ‘The Court must be satisfied, before setting aside a proceeding [i.e. subpoena], that is obviously unsustainable, and this must appear as a matter of certainty and not merely a preponderance of probability.’... It is a power

that will be issued in rare occasion in rare cases, but once it is clear that the subpoena in issue is any particular matter constitutes an abuse of process, the Court will not hesitate to say so and to protect both the Court and the parties affected thereby from such an abuse”.

14. The first issue that arises in this application is whether the applicants have *locus standi* to bring the application to set aside the subpoenas. Should I find that the applicants do not have the necessary *locus standi* the next question is whether the issuing of the subpoenas was an abuse of court. If it is found that it is an abuse of the court process the application should be granted.
15. It is clear from paragraph 7 of the founding affidavit that the relief that the applicant seek is to have the subpoenas which the respondent has caused to be issued in the prosecution of its claim against the applicants set aside. The applicants do not represent the third party recipients of the subpoenas nor do they contend for that agency. They therefore do not have any *locus standi* to enforce the rights on behalf of the third parties.
16. The only basis in which they can bring the application is if they were to show that the issuing of the subpoenas is an abuse of the court process.
17. I have considered the applicants’ submission that the issuing of the subpoenas against third parties is an abuse of the court process. I simply do not understand why if the application is not granted that it would prejudice the applicants since all the defences that the applicants want to raise will still have to be determined at the appropriate hearing. The respondent will have to

prove its claims against the applicants and this issue will be ventilated fully. They will have to deal with the Full Court judgment during their trial and how this prejudices the applicants is simply beyond me. At the end of the day the matter that will have to be dealt with in the action proceedings is a simple issue and how the documents provided in terms of the subpoenas is prejudicial is unfounded.

18. I am not persuaded that the applicants have proved that the issuing of the subpoenas is an abuse of the court process.
19. The application stands to be dismissed with costs on a party and party scale.
20. In the circumstances the following order is made:
 - 20.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARANCES

FOR APPLICANTS : M VAN DER WESTHUIZEN INSTRUCTED
GILDENHUYS MALATJI INCORPORATED

FOR RESPONDENT : ARG MUNDELL SC INSTRUCTED BY
ELLIS COLL ATTORNEYS

DATE OF HEARING : 17 JULY 2023

DATE OF JUDGMENT : 8 DECEMBER 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 8 December 2023.