IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 2023-607518

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

SIGNATURE **DATE:** 30 April 2024

In the matter between:

HARMONY GOLD MINING COMPANY LIMITED First Applicant

HARMONY MOAB KHOTSONG OPERATIONS (PTY) LTD Second Applicant

PETER CORNELIS ERNST BIERMAN Third Applicant

NEIL TERBLANCHE Fourth Applicant

ROLLET MASONKONA Fifth Applicant

and

CAPM TAU MINE (PTY) LTD First Respondent

HEAVEN SENT GOLD PROCESSING COMPANY (PTY) LTD Second Respondent

SCHALK BURGER N.O. Third Respondent

THE CLERK OF THE RANDBURG MAGISTRATE'S COURT Fourth Respondent

JAMES & WAGENER Fifth Respondent

JOHAN LABUSCHAGNE Sixth Respondent

RYNIER SHIELDS Seventh Respondent

JUDGMENT

PULLINGER AJ

INTRODUCTION

[1] The applicants apply for an order setting aside certain *subpoenas duces tecum* ("**the Subpoenas**") issued by the fourth respondent in the private arbitration proceedings before Adv Schalk Burger SC ("**the Arbitration**").

[2] The Arbitration concerns a dispute between the first and second respondents, arising from a purchase and sale agreement in of certain shares concluded in April 2022.

[3] The Subpoenas which are the subject of paragraph 1 of the applicants' notice of motion, call upon Messrs Bierman, Terblanche and Masonkona to deliver certain documents to the fourth respondent. Those documents are:

"1 The following documentation for the period from 1 February 2018 until 30 June 2022 in respect of the written service level agreement concluded between AngloGold Ashanti Limited ("**AngloGold**") and the Kopanang Gold Mining Company Proprietary Limited ("**Kopanang**"), in terms of which AngloGold agreed, inter alia, to accept and store tailings produced from the processing of ore from the Mine at the West Gold Plant at one of AngloGold's tailings storage facilities ("**the SLA**"):

1.1 The agreement concluded between Harmony and AngloGold in terms of which Harmony acquired the rights and obligations in and to the SLA;

1.2 All and any correspondence exchanged between Harmony and/or AngloGold and Kopanang, Heaven Sent Gold Processing Company (Pty) Ltd ("**Heaven Sent**") , CAPM Tau Mine (Pty) Ltd ("**CAPM Tau**"), CAPM African Precious Metals (Pty) Ltd ("**CAPM**"), Tau Lekoa Gold Mining Company (Pty) Ltd and/or any of the Village Main Reef companies, including but not limited to Village Main Ref Gold Investment 01 (Pty) Ltd, Village Main Reef (Pty) Ltd and Village Main Reef Empowerment Company (Pty) Ltd in regard to the tailings storage facilities as provided for in the SLA, including but not limited to any correspondence concerning whether the tailings facilities had become or would soon become unsuitable for or unavailable for use in respect of tailings from the gold ore processing facility operated by West Gold Plant Proprietary Limited;

1.3 All and any correspondence exchanged with experts appointed to inspect and investigate the tailings storage facilities as provided for in the SLA;

1.4 All expert reports prepared and provided to Harmony in respect of the tailings storage facilities as provided for in the SLA;

1.5 Notices calling for meetings, agenda's and minutes of meetings held between Harmony and/or AngloGold and Kopanang, Heaven Sent, CAPM Tau, CAPM, Tau Lekoa Gold Mining Company (Pty) Ltd and/or any of the Village Main Reef companies, including but not limited to Village Main Ref Gold Investment 01 (Pty) Ltd, Village Main Reef

(Pty) Ltd and Village Main Reef Empowerment Company (Pty) Ltd in regard to the tailings storage facilities as provided for in the SLA;

1.6 Any breach notices, cancellation notices, force majeure notices and the like issued by Harmony to Kopanang in terms of the SLA; and/or

1.7 Any and all documentation relevant to the SLA and exchanged between the parties to the SLA and any third parties in regard to the tailings storage facilities as provided for in the SLA."

[4] The Subpoenas which are the subject of paragraph 2 of the applicants' notice of motion call upon Messrs Labuschagne and Shields to deliver the following documents to the fourth respondent:

"1. The following documentation for the period from 1 February 2018 until 30 June 2022 in respect of the tailing storage facilities of Harmony Gold Mining Company Limited & Harmony Moab Khotsong Operations Proprietary Limited ("**Harmony**"), including and not limited to, West Complex - Compartment 2, West - Compartment 4 and West Extension tailings storage facility ("**tailing facilities**"). These tailings storage facilities are governed by the written service level agreement concluded between AngloGold Ashanti Limited ("**AngloGold**") and the Kopanang Gold Mining Company Proprietary Limited ("**Kopanang**"), in terms of which AngloGold agreed, inter alia, to accept and store tailings produced from the processing of ore from the Mine at the West Gold Plant at one of AngloGold's tailings storage facilities ("**the SLA**"). The rights and obligations in and to the SLA were acquired by Harmony:

1.1 All and any correspondence exchanged between Harmony, AngloGold, Kopanang, Heaven Sent Gold Processing Company (Pty) Ltd ("**Heaven Sent**"), CAPM Tau Mine (Pty) Ltd ("**CAPM Tau**"), CAPM African Precious Metals (Pty) Ltd ("**CAPM**"), Tau Lekoa Mining Company (Pty) Ltd ("**Tau Lekoa**"), and/or any of the Village Main Reef companies, including but not limited to Village Main Ref Gold Investment 01 (Pty) Ltd, Village Main Reef (Pty) Ltd and Village Main Reef Empowerment Company (Pty) Ltd in regard to the tailings facilities, including but not limited to any correspondence concerning whether the tailings facilities had become or would soon become

unsuitable for or unavailable for use in respect of tailings from the gold ore processing facility operated by West Gold Plant Proprietary Limited;

1.2 All reports prepared and provided to Harmony and/or AngloGold in respect of the tailings facilities;

1.3 Notices calling for meetings, agenda's, notes, recordings and/or minutes of meetings held between Jones and Wagener, CAPM, CAPM Tau, Harmony, Heaven Sent, Tau Lekoa, and/or any of the Village Main Reef companies, including but not limited to Village Main Ref Gold Investment 01 (Pty) Ltd, Village Main Reef (Pty) Ltd and Village Main Reef Empowerment Company (Pty) Ltd in regard to the tailings facilities;

1.4 Notices calling for meetings, agenda's, notes, recordings and/or minutes of internal meetings of AngloGold, Harmony and/or Kopanang;

1.5 Any and all documentation exchanged between Jones and Wagener, Harmony, AngloGold, Kopanang, Heaven Sent, CAPM Tau, CAPM, Tau Lekoa and/or any of the Village Main Reef companies, including but not limited to Village Main Reef Gold Investment 01 (Pty) Ltd, Village Main Reef (Pty) Ltd and Village Main Reef Empowerment Company (Pty) Ltd and any third parties in regard to the tailings storage facilities as provided for in the SLA; and

1.6 Any and all communications exchanged between the directors, shareholders or employees of Kopanang, Heaven Sent, CAPM Tau, CAPM, Tau Lekoa, and/or any of the Village Main Reef companies, including but not limited to Village Main Ref Gold Investment 01 (Pty) Ltd, Village Main Reef (Pty) Ltd and Village Main Reef Empowerment Company (Pty) Ltd, AngloGold and Harmony in regard to the tailings storage facilities as provided for in the SLA."

[5] It is the applicants' case that the Subpoenas fall to be set aside on six grounds, being a lack of relevance to any issue in the arbitration proceedings, the documents being remote or far removed from the dispute between the

parties in the Arbitration, the documents to the extent that the first respondent is entitled to them, can be obtained in terms of the relevant discovery processes in the arbitration proceedings, that the requests are too broad and wide, constitute an abuse of process and the Subpoenas being unnecessary.

[6] Whilst six separate grounds are identified there is substantial overlap.

[7] The applicants rely on section 173 of the Constitution read with section 36(5) of the Superior Courts Act, 2013 for the relief claimed. There is no dispute about the Court's power to set aside the subpoenas in appropriate circumstances.

[8] At the outset, a brief analysis of the pleadings in the Arbitration are necessary.

THE PLEADINGS

[9] The first respondent, as claimant in the Arbitration, seeks an award for specific performance from the second respondent (as respondent in the arbitration) under the purchase and sale agreement to which I referred above.

[10] In terms of the purchase and sale agreement, the first respondent sold the Share Equity (as defined) to the second respondent for a purchase price of R130,000,000.00.

[11] The purchase price was to be paid in two tranches, the first payment of R50,000,000.00 to be paid within five days from signature date and the balance of the purchase price (duly adjusted in terms of clause 20.2 of the agreement) was payable on or before 31 July 2022.

[12] Although the first respondent made payment of the first tranche, it is alleged to have failed or refused to make payment of the second tranche, duly adjusted, and deliver certain documents to the Department of Mineral Resources and Energy.

[13] The first respondent pleads:

> "22. The Respondent breached the Agreement in that to date, it has failed, neglected and/or refused to:
>
> 22.1 make payment of the remaining Purchase Price to the Claimant;
>
> 22.2 deliver to the Claimant the original financial provision guarantee that it plans to submit to the DMRE; and
>
> 22.3 attend at the offices of the DMRE with the Claimant's representatives for purposes of uplifting the Seller Financial Provision and replacing it with the Purchaser Financial Provision.
>
> 23.1 As a result of the Respondent's breach of the Agreement, the Claimant has suffered damages in that:
>
> 23.1.1 the remaining Purchase Price has not been paid to the Respondent and is due and payable to it."
>
> 23.1.2 it was required to maintain the Seller Financial Provision from 31 July 2022 to date. As at 20 February 2023, the cost of maintenance thereof is ZAR 938,502.00. The Claimant stands to suffer further

damages until finalisation of these arbitration proceedings, and it accordingly reserves the right to adjust the quantum of the damages suffered accordingly."

[14] The second respondent delivered a statement of defence and counter-claim.

[15] The second respondent contends for a fraudulent non-disclosure on the part of the first respondent which entitles it to rescind the purchase and sale agreement. It pleads:

"13. As between the claimant and the respondent, the subject-matter of the Agreement was the acquisition by the respondent of the claimant's shareholding in and claims against West Gold Plant (Proprietary) Limited ("**WGP**"), which company was in the business of operating and maintaining a gold ore processing facility ("**the Plant**") within the municipal district of Moqhaka, North-West Province, South Africa.

14. At all material times during the negotiation and up to the execution of the Agreement on 28 April 2022, the following facts were known to the claimant:

14.1 In order to operate its business at all, it was essential to WGP that it be able to deposit and store the tailings produced from the processing of ore at the Plant at a suitable tailings storage facility or tailings dam.

14.2 It was fundamentally important to the envisaged operation of the Plant after the Agreement that the Plant be able to use the tailings storage facilities referred to in paragraph 7.4 above ("**the Tailings Storage Facilities**").

14.3 The Tailings Storage Facilities were in such a condition that they were not capable of use for the deposit and storage of tailings from the Plant at all, alternatively lawfully, effectively rendering it impossible for the Tailings Storage Facilities to be used for the deposit and storage of tailings from the Plant ("**the Defect**").

14.4 The respondent was unaware of the Defect.

14.5 Had the respondent been aware of the Defect, it would not have concluded the Agreement.

15. The claimant failed to disclose the Defect to the respondent with the intention of deceiving the respondent in relation to the presence of the Defect. This non-disclosure included a positive representation made orally during the negotiation of the Agreement by Mr Xining Xin, on behalf of the claimant, to the respondent's representatives, that, once certain relatively minor repair maintenance work had been completed on the Plant, the Plant would be capable of being fully operated, such oral representation having been made in the context of a report, dated 6 April 2022, presented to the respondent by the claimant, relating to the repair and maintenance work required to render the Plant operational, and a PowerPoint presentation by the claimant to the respondent dated 14 April 2022 …

16. The non-disclosure induced the respondent into concluding the Agreement.

17. Accordingly, the respondent was entitled to resile from the Agreement."

[16] In terms of the second respondent's counter-claim it seeks restitution of any performance rendered by it under the Agreement.

[17] The counter - claim is predicated upon the claimant's alleged failure to disclose the defect (defined in paragraph 14.3 of its statement of defence) which, so it is asserted, amounts to a fraudulent misrepresentation as the non-existence of the defect and which induced the second respondent to conclude the agreement.

[18] It claims, further, payment of the reasonably incurred expenses it incurred in maintaining the underlying assets of the agreement, being the plant, in an amount of R40,472,621.31. The second respondent asserts that these costs

where reasonably foreseeable by the claimant at the time it breached its obligation in respect of its alleged duty in respect of the disclosure of the defect.

[19] The first respondent delivered a replication in which it pleads:

"1. **Ad paragraphs 2.1, 5, 9, 11, 14, 15, 17, 18 and 19**

1.1 The claimant specifically denies that the respondent was entitled to or did validly rescind the Agreement either as alleged or at all.

1.2 Without derogating from the generality of the aforegoing denial, the claimant specifically:

1.2.1 denies the alleged defects;

1.2.2 denies that the claimant had knowledge at any relevant time of such alleged defects (which are denied);

1.2.3 avers that prior to the respondent entering into the second addendum on 15 June 2022, the respondent had acquired knowledge of what is contended to have been defects, more particularly in that on or about 30/31 May 2022 respondent had received and become aware presentation by Jones & Wagener (engineering and environmental consultants) identifying what are now alleged to have been defects relied upon by the respondent;

1.2.4 avers further that with full knowledge of such presentation and information the respondent elected to enter into the second addendum and not to resile from the Agreement;

1.2.5 avers further that the respondent is accordingly precluded from terminating the Agreement, having so elected to not resile from the Agreement, but rather to enter into the second addendum on 15 June 2022.

1.3 Save as aforesaid the claimant joins issue with and denies the further allegations in the respondent's statement of defence, save to the extent that the respondent admits allegations in the claimant's statement of claim."

[20] The case pleaded by the first respondent, is that

[20.1] it acquired, *inter alia*, the shareholding in West Gold Plant (Proprietary) Limited ("**West Gold**") on the basis of there being tailings storage facilities that West Gold would be able to use (and were capable of being used), for the deposit and storage of tailings; and

[20.2] to the knowledge of the second respondent, the tailings facilities were not in such condition that they could be used for the purpose contemplated;

[20.3] this rendered the first respondent unable to operate West Gold's plant.

[21] The retort is somewhat confusing in that it denies the fact of a defect (as defined) but asserts, that the first respondent bore knowledge of these facts concerning the tailings facilities at the time of the conclusion of the purchase and sale agreement.

[22] Arbitration concerns, therefore, the nature of the "defect" and the respective parties knowledge thereof and the timing of the second respondent's knowledge thereof.

DISCUSSION

Legal framework

[23] This is not an application to review the decision of Adv Burger SC and/or the fourth respondent to issue the subpoenas. Rather, the applicants invoke this Court's inherent jurisdiction and the provisions of the Superior Courts Act, 2013 to found its relief.

[24] Section 36(5) of the Superior Courts Act provides:

> "When a subpoena is issued to procure the attendance of any person as a witness or to produce any book, paper or document in any proceedings, and it appears that-
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> *(a)* he or she is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in such proceedings; or
>
> *(b)* such book, paper or document could properly be produced by some other person; or
>
> *(c)* to compel him or her to attend would be an abuse of the process of the court,
>
> any judge of the court concerned may, notwithstanding anything contained in this section, after reasonable notice by the Registrar to the party who sued out the subpoena

> and after hearing that party in chambers if he or she appears, make an order cancelling such subpoena."

[25] Accordingly, a court is empowered to cancel a subpoena where any evidence or document is irrelevant to the proceedings concerned, the evidence or document may be obtained from some other person or his/ her attendance at the hearing would be an abuse of process.

[26] It appears to me that the Superior Courts Act has codified the common law grounds upon which a subpoena may be set aside and granted the court a statutory power to prevent abuses.[1]

[27] The first relevant ground upon which a court may exercise its power is an absence of relevance.

[28] Relevance is determined with reference to the pleadings. In the context of Uniform Rule 35, this court has said:

> "Rule 35(1) and (2) require a party to any action who has been requested thereto, to make discovery of all documents and tape recordings 'relating to any matter in question in such action'. The discovery is done on affidavit
>
> 'as near as may be in accordance with Form 11 of the First Schedule specifying separately –

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[1] Consider: **Beinash and Another v Ernst & Young and Others** 1999 (2) SA 116 (CC) at [17] in the context of a vexatious litigant. As appears from the High Court's judgment, reported *sub nom* **Ernst & Young and Others v Beinash and Others** 1999 (1) SA 1114 (W), Beinash had caused three consecutive subpoenas *duces tecum* to be served on Wixley requiring him to deliver a host of documents to the Registrar. Each of these subpoenas were set aside on grounds of abuse of process and vexatiousness (at 1130 F *et seq*); **Bernstein and Another v Bester and Others NNO** 1996 (2) SA 751 (CC) at 783 D; **Price Waterhouse Coopers Inc v National Potato Cooperative Ltd** 2004 (6) SA 66 (SCA) at [50]

(a) such documents and tape recordings in his possession or that of his agent other than documents and tape recordings mentioned in para *(b)*;

(c) such documents and tape recordings in respect of which he has a valid objection to produce;

(d) such documents and tape recordings which he or his agent had but no longer has in his possession at the date of the affidavit.'

In terms of Rule 35(3), if a party believes that there are other documents or tape recordings which may be relevant to any matter in question in the possession of any party,

'the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state under oath within ten days that such documents are not in his possession. . .'.

The requirement of relevance, embodied in both Rule 35(1) and 35(3), has been considered by the Courts on various occasions. The test for relevance, as laid down by Brett LJ in Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, has often been accepted and applied. See, for example, the Full Bench judgment in Rellams (Pty) Ltd v James Brown & Hamer Ltd 1983 (1) SA 556 (N) at 564A, where it was held that:

'After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", Brett LJ stated the principle as follows:

"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences." '

> See also *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 596H and *Carpede v Choene NO and Another* 1986 (3) SA 445 (O) at 452C--J.
>
> Counsel for the plaintiffs laid special emphasis on the indirect relevance a document may have, that is a document which may fairly lead him to a chain of enquiry which may advance the plaintiffs' case or damage the case of the first defendant. Reference was made hereto as 'indirect relevance' or 'secondary relevance'.
>
> The broad meaning ascribed to relevance is circumscribed by the requirement in both subrules (1) and (3) of Rule 35 that the document or tape recording relates to (35(1)) or may be relevant to (35(3)) 'any matter in question'. The 'matter in question' is determined from the pleadings. See in this regard SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd 1968 (3) SA 381 (W) at 385A--C; Schlesinger v Donaldson and Another 1929 WLD 54 at 57, where Greenberg J held
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> > 'In order to decide the question of relevancy, the issues raised by the pleadings must be considered . . .',
>
> and *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 753D--G."[2]

[29] The approach of the court in **Swissborough** in relation to "relevance" for purposes of discovery in High Court proceedings applies with equal effect to subpoenas *duces tecum*.[3]

[30] The second relevant ground upon which a court may exercise its power to cancel a subpoena is that the document/s may be obtained from some other person, presumably, a person that would be subject to the ordinary rules of disclosure or discovery.

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[2] **Swissborough Diamond Mines (Pty) ltd and Others v Government of the Republic of South Africa and Others** 1999 (2) SA 279 (T) at 316 A to 317 B

[3] **Helen Suzman Foundation v Judicial Service Commission** 2018 (4) SA 1 (CC) at [26] read with **Deltamune (Pty) Ltd and Others v Tiger Brands Ltd and Others** 2022 (3) SA 339 (SCA) at [21] with the caveat that a "d*ifferent threshold may apply*".

[31] The court's power in terms of section 36(5)(b) of the Superior Courts Act was considered in **Mvelaphanda**.[4]

[32] In **Mvelaphanda**, the applicant sought to have subpoenas set aside on grounds that:

> "[13] … (a) the documents sought in the subpoena are irrelevant to the issues in the divorce action; (b) the subpoena is unjustifiably wide and vague; (c) the subpoena unduly infringes the rights to privacy and the proprietary interests of the company and its shareholders; (d) the subpoena has been issued for an ulterior motive, to put pressure on the trustees to accede to Mrs S's financial demands; and (e) the production of the documents will be inconvenient, time-consuming and costly. In an all-encompassing submission, Mr Malindi argues that the subpoena constitutes an abuse of process."

[33] The issue of relevance having been conceded between the parties, the learned acting judge interrogated whether the subpoenas were unjustifiably wide and vague and, relevant for purposes of this discussion, the application and interpretation of section 36(5) of the Superior Courts Act, 2013. It held:

> "[49] It is not for the applicants to instruct Mrs S how she should go about gathering evidence for trial. It is not an answer to say that she should have sought other (relevant) documents first. If the documents sought in the subpoena are relevant to the issues in the trial, they must be produced, unless they are privileged from disclosure or the subpoena constitutes an abuse of process.
>
> [50] I return to the question whether Mr Steenkamp is a 'proper' person to have been subpoenaed. The issue raised by s 36(5)(b) of the Superior Courts Act is whether the documents could 'properly be produced by some other person'. In my view s 36(5)(b) envisages a situation where the person who has been subpoenaed is not one who 'properly' could produce the documents. In such a case a court would be empowered to cancel the subpoena. However, where

[4] **Mvelaphanda Holdings (Pty) Ltd and Another v JS and Others** 2016 (2) SA 266 (GJ)

> there are two or more people who could 'properly' have been subpoenaed, no basis would exist for a court to prefer the person, or persons, not subpoenaed."

[34] The aforegoing dictum is apposite in the instant case. The principle which emerges is that it is not a valid objection to the issue of a *subpoena duces tecum* if there are in existence other documents that ought first to be obtained and, where there are two or more people who could be subpoenaed, there would be no basis for the Court to exercise its statutory power to cancel the subpoena.[5]

[35] The decision in **Mvelaphanda** was cited with approval in **Antonsson**[6] where the approach adopted by the court in respect to relevance accords with that in **Swissborough**.

[36] The applicant relies on the Supreme Court of Appeal's judgment in **Deltamune**.[7] In particular, it relies on the dictum in paragraphs [22] and [23] thereof as support for the proposition that "*… if the party issuing the subpoena(s) can prove its case without such documents, it cannot be said that the document sought under the subpoenas are absolutely necessary. The corollary then, is that the party issuing the subpoena(s) must demonstrate to the Court that they cannot prove their case without such documents.*"

[37] The proposition advanced by on behalf of the applicant intertwines two distinct concepts being relevance and the duty to make out a case. Relevance, as

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5 Compare: **Beinash v Wixley** 1997 (3) SA 721 (SCA) at 736 B - C
6 **Antonsson and Others v. Jackson and Others** 2020 (3) SA 113 (WCC)
7 *Supra*

set out above, relates to the pleaded issues. It may be wider or narrower depending upon the formulation of the issues.[8] The duty to make out a case is different. The party resisting compliance with the subpoena *duces tecum* must make out a case for setting aside the impugned subpoena.[9]

[38] The first respondent contends that the starting point is the decision in **Sher**[10] where Corbett J, as he then was, considered an application to have subpoenas set aside in the context of matrimonial proceedings.

[39] The principle in **Sher** is "*[t]he Court must be satisfied, before setting aside a proceeding, that it is obviously unsustainable, and this must appear as a matter certainty and not merely on a ponderance of probability.*"[11] Accordingly, the learned judge held that the court "*… in the exercise of [its] general [inherent] power [a court may] set aside a subpoena where it is satisfied as a matter certainty that the witness who has been subpoenaed will be totally unable to be of any assistance to the Court in the determination of the issues raised at the trial …*"[12] These principles are approved in **Deltamune**.[13]

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8 Consider: **Deltamune** at [34] to [42] and [61]

9 **Quartermark Investments (Pty) Ltd v Mkhwanazi and Another** 2014 (3) SA 96 (SCA) at [13] and the authorities therein cited. This appears consonant with the approach taken in **Antonsson** (*supra*) at [51] and **South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others** 2007 (6) SA 628 (D & CLD) at [20] to [22]

10 **Sher and Others v Sadowitz** 1970 (1) SA 193 (C)

11 At 195D

12 At 195D - E

13 At [62]

[40] The first respondent, further, cited **Antonsson**[14] as authority for the proposition that a generous approach is taken toward establishing relevance. This proposition appears to be well supported.[15]

[41] **Deltamune** holds that the documents sought *via* a subpoena *duces tecum* must pertain to the pleaded issues and that those documents must be "absolutely necessary" in the sense that they cannot be obtained in the ordinary discovery process. It is then that a subpoena *duces tecum* is necessary and appropriate.

[42] The applicants must, consequently, satisfy the court that, as a matter of certainly, the documents which the first respondent has sought in the Subpoenas are irrelevant to the issues pleaded in the Arbitration.

[43] Accordingly, I am in disagreement with the proposition advanced by Advocate South SC who appeared for the applicants, that the first respondent is obliged to demonstrate that the documents sought in the subpoenas are "absolutely necessary". This is not consonant with the established principles.

Relevance

[44] The applicants' case on relevance is that it is neither a party to the Arbitration nor the purchase and sale agreement. Similarly, it contends that none of the

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[14] **Antonsson and Others v Jackson and Others** 2020 (3) SA 113 (WCC)

[15] **Compagnie Financiére du Pacifique v Peruvian Guano Co** (1882) 11 QBD 55 (CA); **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others** 1999 (2) SA 272 (T) at 316G

first respondent, second respondent or West Gold are parties to the service level agreement between the first applicant and Kopanang ("**the SLA**"). It contends, that there are no rights or obligations accruing under the SLA to the first and second respondents, that the purchase and sale agreement requires a cession of rights and that such cession has neither been pleaded nor taken place.

[45] It contends, thus, that the first applicant is a party remote from or far removed from the dispute in the Arbitration.

[46] The first respondent disputes these allegations and, with reference to the terms of the SLA, states that:

> "28. In light of the terms of the SLA, the tailings storage facilities ("**TSF**") would be made available to Kopanang for the storage of tailings produced through the plant. Accordingly, the TSF's required by WGP in order for it to operate its Plant were provided through the terms of the SLA, making this agreement and the performance in its terms are fundamental importance for the business of WGP and for this reason it was described as one of the Material Contracts in the Share Purchase Agreement.
>
> 29. At the time of the conclusion of the SLA, the Plant was owned by Kopanang and was not a separate corporate entity but was an asset of Kopanang. It was only after the conclusion of the SLA that the Plant was housed in its own company (WGP) with its own registration number and was no longer an asset with Kopanang. …

30. The rights and obligations in and to the SLA were acquired by Harmony from AngloGold, which is admitted by Harmony in its founding affidavit …"

[47] The first respondent points out, further, that Kopanang is a party to the SLA and a subsidiary of the second respondent - a party to the Arbitration and the purchase and sale agreement at issue in the Arbitration.

[48] It concludes, in the circumstances, that correspondence exchanged between Harmony and/or AngloGold and Kopanang concerning the SLA and relating to the tailings storage facility, is relevant to the issues in the Arbitration because "*… it will indicate the state of those facilities, and what each party to the correspondence was aware of and/or communicating regarding the state of those facilities. These are central issues in the arbitration.*"

[49] The applicants, in reply, contend that the first respondent has deliberately mischaracterised its failure or refusal to abide the agreement. It contends that this mischaracterisation is a stratagem by the first respondent to obtain private documents belonging to Harmony, service providers and customers.

[50] The applicants rely on the first respondent's reference to a *force majeure* notice delivered by second applicant to Kopanang (a subsidiary of the second respondent) dated 14 June 2022. The letter records:

"2. In terms of (i) the Service Level Agreement concluded between AngloGold Ashanti Limited (hereinafter referred to as "**AngloGold**") and Kopanang Gold Mining Company (Pty) Limited formerly K2017449111 (South Africa) (Pty)

Limited, (hereinafter referred to as "**Kopanang**"), and (ii) the Transitional Services Agreement concluded between our client, AngloGold and Kopanang; all rights and obligations of AngloGold in terms of the service level agreement were ceded to our client.

3. We have been instructed by our client to provide Kopanang - as we hereby do - with notice in terms of clause 20 of the service level agreement that it is directly prevented from performing its obligations because of ground instability in and around the Tailings Storage Facilities.

4. In the circumstances, and despite West Gold Plant being under care and maintenance since January 2022, our client is (i) relived from its obligations in terms of the service level agreement until such time as the ground surrounding the facilities has become more stable to enable our client to continue performing its obligations and (ii) not liable for, *inter alia*, any delay or failure to perform in terms of the service level agreement."

[51] Thus, the applicants contend that notwithstanding the state of the tailings storage facilities, the first respondent would not be entitled to store its tailings at the first applicant's tailings storage facilities for want of any obligation on the first applicant to accept these tailings. It concludes:

"The state of Harmony's tailings storage facilities is thus immaterial to [the first respondent] storing its tailings there."

[52] On this basis that the applicants persist in their contention that the first respondent is not entitled to any reports, correspondence, minutes of

meetings or other documents requested in the subpoenas relating to the first applicant's tailings storage facilities.

[53] I do not agree with the applicants' conclusion. The state of the tailings storage facility is a central issue in the Arbitration. The second respondent has not pleaded any of the above issues upon which the applicants seek to have the Subpoenas set aside.

[54] I find, therefore, that as a general proposition, the documents sought in the Subpoenas are relevant to the issues pleaded in the Arbitration.

The terms of the Subpoenas

[55] The applicants complain that the use of the words "*any and all*" in relation to the exchanges between Harmony and Kopanang and the inclusion of further third parties expand the scope of the documents beyond limitation. In this regard, the applicants' rely on the judgment of Mohammed CJ, in the Supreme Court of Appeal's decision in **Beinash**.[16]

[56] The use of the words "*any and all*", without more, would usually support an argument that a *subpoena duces tecum* is an abuse of process with the concomitant result that the impugned subpoena set aside.

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[16] *Supra* at *fn 5*

[57] The point made by Mr Snyckers, who appears with Mr Wild on behalf of the first respondent, with reference to the Supreme Court of Appeal's decision in **Beinash** is that the documents sought in the impugned subpoenas do not relate directly or indirectly to a large category of open ended matters. He referred, further, to **Moodley**[17] in support of a proposition that the use of the word "all" is not objectionable where there is a clear defining criteria.

[58] In the instant case, there is a built-in limitation both to the nature of the documents required and the period in which they were exchanged or created.

[59] Accordingly, the documents requested are not open-ended. Nor are they subject to the exercise of any discretion on the part of the party receiving the *subpoena duces tecum* to determine whether or not they may (or may not) fall within the parameters of the subpoena.

[60] I cannot find, in the circumstances that the Subpoenas are too widely couched.

Illegitimate purpose

[61] The applicants contend that the first respondent is using the Subpoenas for an illegitimate purpose, in that, they are being sought for an purpose extraneous to the Arbitration.

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[17] **Moodley N.O. and Others v Public Investment Corporation SOC Limited and Others** [2023] ZAWCHC 49 at [11]

[62] The documents falling within this category are those described as "private and confidential reports" by the first applicant James & Wagener and/or the first applicant's agents.

[63] It is further contended that these documents are not “absolutely necessary” because the first respondent already has in its possession a report from a firm of engineers that "undoubtedly" sheds light on the condition of the first applicant's tailings storage facility at the time the purchase and sale agreement was concluded.

[64] The mere assertion of confidentiality does not fall within the parameters of section 36(5) of the Superior Courts Act as a ground upon which the court may set aside or cancel a subpoena. Nor is it, under the rules pertaining to discovery, a ground for refusing discovery.[18] To the extent that the common law rules concerning abuse of process provides an additional remedy to an applicant, in position of the applicants herein, it must be made a proper case. This, it has not done. The applicants' focus is on relevance.

[65] I have already discussed the concept of "relevance" for purposes of subpoena *duces tecum* and any issue of confidentiality is easily and pragmatically resolved through the imposition of an appropriate confidentiality regime. There is ample precedent for such a regime in our law.[19] The applicants do not propose or tender the documents subject to an appropriate redaction or the imposition of a confidentiality regime.

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[18] **SA Neon Advertising (Pty) Ltd v Claude Neon Sign (SA) Ltd** 1968 (3) SA 381 (W) at 385 A - C

[19] **Crown Cork and Seal Co Inc and Another v Rheen South Africa (Pty) Ltd and Others** 1980 (3) SA 1093 (W) at 1097 C *et seq*

[66] The relevance of these documents is manifest from the first respondent's statement of defence and pertain to a period during which the SLA was in operation.

[67] It is pertinent that this ground of objection appears to lack in a logical foundation. The mere fact that the first respondent has an experts report from which it was able to establish the defect in the tailings storage facilities does not establish the time at which the second respondent obtained knowledge thereof or, indeed, the ambit of the knowledge it had at the relevant time.

[68] There is no merit in this complaint.

Further and better discovery from the second respondent

[69] The applicants' complaint that the documents requested by the first respondent may be obtained through the ordinary discovery or further and better discovery procedures does not find traction on the strength of the principle in **Mvelaphanda.**[20]

CONCLUSION

[20] *Supra* at [49]

[70] On a conspectus of the applicants' case, I am unable to find that it has made out a case for the relief it seeks. They were required to overcome a high threshold in demonstrating an absence of relevance with regard to the pleaded issues in the Arbitration. It was also required to adduce facts that would lead to a conclusion of an abuse of process. The applicants have not passed the threshold.

ORDER

[71] In the result, I make the following order:

The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

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A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

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 10h00 on 2 May 2024.

DATE OF HEARING: **7 SEPTEMBER 2023**

DATE OF JUDGMENT: **30 MAY 2024**

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