

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WILCHEME & NOT ADDITIONAL

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

DATE: 13/05/2011
In the matter between:  SIGNATURE

13/05/2011
CASE NO: 50122/2008

NEVILLE PARSONS
MARTIN GOUWS

1st Plaintiff
2nd Plaintiff

And

DEON VILJOEN

Defendant

JUDGMENT

MATOJANE J

[1] The respondent caused a subpoena (the "impugned subpoena") to be issued in the main proceedings requiring the applicant ("David Chiat") to produce certain documents which were said to be relevant in the said proceedings (the "main proceedings") then pending between the respondent as defendant and certain other parties, as plaintiffs. The plaintiff withdrew the action on the morning of the trial and each party agreed to pay its own costs.

[2] Chait was not personally cited as a defendant in the main proceedings, he is a stranger to the main proceedings. He, as applicant in the present proceedings seeks an order setting aside the impugned subpoena with costs.

[3] It was contended on behalf of Chait that the subpoena issued against him should be set aside on the ground that it does not comply with the rules of court in that firstly, it does not state what volume of documents is required and secondly there is no tender for costs for the preparation, production, copying and compilation of the documents subpoenaed *duces tecum*. It was argued that as the subpoena required Chait to bring to court documents not properly defined, he was well within his rights to object to the subpoena as being vague and too wide.

[4] It is necessary to set out briefly the history which led to the present proceedings. The subpoena was properly served on Chait on 5 April 2011 informing him that the matter was on the roll on 15 April 2011. A sum of R700 was paid to him as witness fees. Annexure A to the subpoena requires Chait to bring:

"Alle korrespondensie, aansoeke of dokumentasie wat betrekking het op sodanige korrespondensie of aansoeke vir die agentskap ("franchise") en

of handelaarskap ("dealership") wat betrekking het op die perseel wat bekend staan as Zenex Olivedale".

[5] No affidavits to set aside the impugned subpoena were filed, it being agreed by the parties that the application is based on the contents of the subpoena itself.

[6] Rule 38(1) of the Uniform Rules expressly requires that a subpoena *duces tecum* "specify" the document or thing which the witness concerned is required to produce. Rule 38(1)(b) provides that any witness who has been required to produce a document at the trial shall hand it over to the registrar as soon as possible. It is clear that the primary objective of rule 38 is to secure the production of documents from persons who are not necessarily parties in the main proceedings. The respondent was accordingly acting within his rights to issue and serve the impugned subpoena. In the absence of the evidence by the applicant of the volume of the documents covered by the subpoena, I disagree with applicant's contention that the impugned subpoena should be set aside on the basis that there is no tender for costs for the preparation, production and copying of the documents subpoenaed. The Rule requires the documents to be handed over to the registrar and it is for the person who requires the documents to make copies not the applicant.

[7] The subpoena was served on the applicant 10 days before the date of the hearing. It is clear from the annexure to the subpoena that the documents he was required to produce were not sufficiently described. In my view, in the absence of an explanation by applicant why he decided to launch these proceedings, lack of specificity in this case is not a valid ground for setting aside the impugned subpoena. The appellant had sufficient opportunity to enquire from the respondent what documents he was required to bring to court. Appellant was a material witness and was paid R700.00 in advance to come to court, he could not be found to be in contempt for not bringing to court a document which is not specified, if that document is called for. In my view, it cannot be said that the subpoena constituted a form of harassment or that it was oppressive. Save for not knowing what documents to bring to court he did not suffer any material prejudice.

[8] The question which arises is whether the issue and service of the impugned subpoena constituted a *mala fide* exercise by the respondent of its rights in terms of rule 38(1). See *Beinash v Wixley* 1997 (3) SA 721 at 736H/I-I/J & 737E-E/F. In my view, there is no suggestion that the respondent abused the process of court in seeking to secure the production of documentary evidence it thought relevant to its case in the possession and control of Chait.

[9] I am therefore of the view that Chait was not entitled, in the circumstances of the present case, to ask the court to set aside the impugned subpoena on the ground that the documents he was required to bring were not sufficiently described.

[10] In my view, there is no justification for a cost order as the respondent did not incur any costs in opposing the application as the matter was set down for hearing on that day.

In the result the following order is made:

1. The application is dismissed.
2. Each party to pay its own costs.



MATOJANE, J