



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG**

Case No: 12119/2021

In the matter between:

**AUDITOR-GENERAL OF SOUTH AFRICA
NONKUTHALO PHEPHU**

**FIRST APPLICANT
SECOND APPLICANT**

and

**SOLBETH SECURITY PROTECTION
SERVICES CC**

RESPONDENT

ORDER

The following order is made:

1. The subpoena is set aside and cancelled.
 2. The respondent is ordered to pay the costs of the applicants on scale C.
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JUDGMENT

Siwendu J:

Introduction

[1] This application concerns the setting aside of a subpoena *duces tecum* (subpoena) issued by the Registrar of this Court on 14 February 2025 at the instance of the respondent, Solbeth Security Protection Services CC (‘Solbeth’).

[2] The subpoena is directed at the Auditor-General of South Africa (‘AGSA’) and the second applicant, Ms Nokuthula Phephu (‘Ms Phephu’), an authorised auditor in the employ of AGSA. It calls for the production of documents pertaining to an alleged contractual relationship between Solbeth and the eThekweni Municipality (‘the Municipality’).

[3] AGSA is a Chapter 9 institution established in terms of ss 181 and 188 of the Constitution of the Republic of South Africa, 1996, read with s 3 of the Public Audit Act 25 of 2004 (‘Public Audit Act’). As the external auditor of the public sector, AGSA is mandated to audit and report on the accounts, financial statements, and financial management of all national and provincial state departments and public entities, as well as municipalities governed by the Public Finance Management Act 1 of 1999 and the Local Government: Municipal Finance Management Act 56 of 2003 (‘MFMA’).¹

[4] The applicants seek an order setting aside the subpoena on three principal grounds. First, they contend that AGSA cannot lawfully be compelled to disclose information obtained in the course of an audit conducted in terms of the Public Audit Act 25 of 2004 (‘the Public Audit Act’). Second, it is submitted that the subpoena constitutes an abuse of this court’s process. Third, the

¹ Section 188(4) of the Constitution read with the Public Audit Act 25 of 2004.

applicants aver that the documents sought in the subpoena do not exist and, in any event, are not in their possession or under their control.

Background

[5] The background to the dispute lies in action proceedings instituted by Solbeth against the municipality in December 2021 for payment of approximately R41 678 970.67 allegedly due for security services rendered between October 2019 and September 2020.

[6] Solbeth alleged that it rendered the services pursuant to a partly oral and partly written agreement concluded between its Chief Executive Officer, Mr Xulu, and the municipality's Municipal Manager, Mr Nzuza.

[7] On 30 January 2025 a council meeting of the municipality was convened to address audit findings of the AGSA for the financial period ending 30 June 2024.

[8] During the council meeting, Ms Phephu, who attended in her capacity as a senior manager employed at AGSA, responded to questions relating to a CCTV services contract allegedly concluded between Solbeth and the municipality.

[9] In response to questions posed at the meeting, Ms Phephu verbally confirmed the existence of such a contract between Solbeth and the municipality.

[10] It subsequently emerged that this response was incorrect. AGSA later clarified that the statement had not been based on any audit finding or review of contractual documentation, but rather on a general understanding of cybersecurity and ICT risk management.

[11] AGSA subsequently withdrew the statement and issued a written apology to both the Speaker of the municipality and Solbeth.

The PAIA request and subpoena

[12] Following the council meeting, Solbeth's attorneys addressed a request to AGSA on 13 February 2025 purporting to seek information in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA').

[13] The request sought the following documents:

'A copy of all reports, investigations and findings confirming that Solbeth protection Services CC currently is providing cyber (CCTV) services to eThekwin Municipality and the period of such services from 1 January 2019 to 1 January 2025.

All documents showing any irregularities reported by the eThekwin Municipality accounting officer with regard to Solbeth Protection services cc from 1 January 2019 to 1 January 2025.

A copy of all documents which you have in order for you to have drawn the conclusion to Council that Solbeth has a contract with the eThekwin Municipality currently and is providing CCTV surveillance.'

[14] The PAIA request was not pursued. In any event, it would not have passed muster, as it was defective and not made in the manner prescribed by PAIA. Moreover, Solbeth was aware that AGSA was not a party to the litigation with the Municipality. Had the request been directed to the Municipality, Solbeth would have appreciated that PAIA may not be employed as a mechanism to 'fish' for evidence outside the structured discovery regime, nor to bypass or undermine that process. Where a request is substantially aimed at obtaining documents for use in pending litigation, a court may, on that basis, refuse access.²

² *Unitas Hospital v Van Wyk and Another* [2006] ZASCA 34; 2006 (4) SA 436 (SCA); *Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225 (SCA).

[15] On 14 February 2025, and notwithstanding the prior PAIA request, Solbeth's attorneys procured the issue of a subpoena by the Registrar of the Pietermaritzburg High Court. The subpoena required AGSA to produce the documents identified in the PAIA request to 'the Registrar of this Court by 21 February 2025'. It bears noting that the action proceedings to which the subpoena relates are pending before the Durban High Court.

[16] On 17 February 2025 the subpoena was forwarded to AGSA by email with a demand that the documents be delivered by 21 February 2025.

Subsequent engagement between the parties

[17] Following the service of the subpoena, AGSA communicated with Solbeth's attorneys and reiterated that the statement made at the council meeting was incorrect and had been withdrawn.

[18] To resolve the matter amicably, the legal general counsel at AGSA convened a meeting with Solbeth's attorneys on 7 March 2025.

[19] During that meeting Solbeth's attorneys requested additional information, including copies of certain municipal audit reports and a confirmation that the erroneous statement had been formally withdrawn.

[20] AGSA obliged and provided the requested audit reports and written confirmation comprising:

- (a) The municipality's audit reports from 2019/2020 to 2024/2025.
- (b) AGSA's letter to council dated 27 February 2025, retracting the erroneous answer given at the Council meeting; and
- (c) A confirmation that the municipality's audit report of 2019/2020 did not make mention of Solbeth.

[21] In addition, AGSA confirmed that:

- (a) it was not in possession of any reports confirming the existence of a contract between Solbeth and the municipality; and
- (b) it had no documents reflecting irregularities reported by the municipality concerning Solbeth.

[22] Despite the above clarification, Solbeth refused to withdraw the subpoena, leading to AGSA instructing its attorneys to bring this application. Solbeth opposed the application, in a brief the answering affidavit deposed to by its attorneys, on the grounds that:

- (a) AGSA undertook to provide the information requested in the subpoena.
- (b) The information was subsequently provided.
- (c) Accordingly, the matter is moot.
- (d) It has not pursued the subpoena, as it has elected not to enforce it.
- (e) The application for cancelation of the subpoena was brought as a stratagem to incur unnecessary costs payable by the taxpayer and constitutes an abuse of the court's process.

[23] Solbeth delivered its answering affidavit out of time and similarly filed its heads of argument late. Although it sought condonation in respect of both failures, counsel for AGSA submitted that these delays reflected a lax approach to the litigation and were indicative of the poor merits of Solbeth's opposition. Notwithstanding this, counsel correctly accepted that the matter is of sufficient importance. It ought not to be resolved solely based on an inadequate explanation for the delay. The validity of the subpoena is at stake. Condonation was granted. It is in the interests of justice that the matter be determined on its merits to determine the fate of the subpoena.

[24] The principal contention by AGSA is that neither it nor the authorised auditors in its employ may be compelled, by way of a subpoena to disclose information obtained in the course of an audit conducted under the Public Audit Act. In this regard, AGSA contended further that in terms of s 18(3) of the Public Audit Act,³ it is a competent but may not be compelled to disclose information obtained in the course of official auditing duties in any proceedings in which the AGSA is not a party before a court in a civil matter.

Issues for determination

[25] The primary issue is whether the applicants are entitled to an order for the cancellation of the subpoena in terms of s 36(5) of the Superior Courts Act 10 of 2013 ('Superior Courts Act'), and whether there is merit to Solbeth's contention that the court should refuse relief, because its order will have no legal effect as the matter has become moot, and on the basis that it has elected not to enforce it.

Applicable principles

[26] A subpoena is a mechanism to procure evidence in pending proceedings as provided in s 35(1) of the Superior Courts Act.⁴ As submitted on behalf of AGSA, on the strength of the Constitutional Court decision in *Minister of Police v*

³ The relevant parts of s 18 of the Public Audit Act read:

'(3) The Auditor-General, an authorised auditor or an assistant or other person referred to in section 17, is competent but may not be compelled to disclose information obtained in the course of official duties in any proceedings in which the Auditor-General is not a party, before-

(a) a court in a civil matter; or

(b) any other body or institution established in terms of legislation.

(4) Subsection (3) does not apply in any proceedings before-

(a) a legislature or an internal committee of a legislature; or

(b) a court in a criminal matter.'

⁴ Section 35(1) of the Superior Courts Act reads as follows:

'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.'

Premier of the Western Cape,⁵ a subpoena is a court order ‘commanding the presence of a witness under penalty of fine for failure.’

[27] Section 35(4) of the Superior Courts Act creates a criminal offence for failure to obey a subpoena without reasonable excuse.⁶ This is evident from the present subpoena, which informs the applicants to ‘on no account neglect to comply’ with it as they may be ‘liable to a fine of R1000, or to imprisonment for three months’.

[28] Section 36(5) of the Superior Courts Act which sets out the circumstances under which a subpoena can be set aside states that:

‘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-

- (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.’

[29] As held in *Beinash v Wixley*,⁷

‘a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of the truth, unless the disclosure of the document is protected by law. The process of a subpoena is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded. For this reason the Court must be cautious in exercising

⁵ *Minister of Police and Others v Premier of the Western Cape and Others* [2013] ZACC 33; 2014 (1) SA 1 (CC) para 1, fn 1.

⁶ Section 35(4) of the Superior Courts Act specifically states that:

‘Any person subpoenaed to attend any proceedings as a witness or to produce any document or thing who fails without reasonable excuse to obey such subpoena, is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months.’

⁷ *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734-735.

its power to set aside a subpoena on the grounds that it constitutes an abuse of process. It is a power which will be exercised in rare cases, but once it is clear that the subpoena in issue in any particular matter constitutes an abuse of the process’.

[30] The decision in *Beinash v Wixley* was subsequently referred to, with approval, by the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency and Others*.⁸ In that matter, the court endorsed the principle that an abuse of process occurs where procedures permitted by the rules of court, intended to facilitate the pursuit of truth, are used for a purpose extraneous to that objective. Whether such an abuse has occurred must ultimately be determined with reference to the circumstances of the particular case.

[31] Nonetheless in *Universal City Studios Inc v Network Video (Pty) Ltd*,⁹ Corbett JA held that ‘there is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice.’

[32] Lastly, the rule that courts avoid deciding moot issues primarily applies to appellate courts, particularly in light of s 16(2)(a)(i) of the Superior Courts Act.¹⁰ A court of first instance is ordinarily required to decide the issues before it, because it is seized with a live dispute on the pleadings. However, as articulated in *Tilsa Projects (Pty) Ltd v Department of Public Works and Infrastructure and Others*¹¹, a decision of this Division, “mootness” with reference to a court of first instance is whether the subject matter of litigation has ceased to exist before

⁸ *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45; 2017 (1) SA 645 (CC) paras 20-21.

⁹ *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 at 754G-H.

¹⁰ See *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5 where the doctrine of mootness is discussed and the circumstances under which a court on appeal may exercise its discretion to determine the merits of a case on appeal.

¹¹ [2025] ZAKZPHC 85 para 21 onwards

judgment. If it has ceased, the court has no jurisdiction to entertain the merits of the matter.

Analysis

[33] After the subpoena was issued, the AGSA confirmed that the factual premise underlying its issue does not exist. The letter dated 26 March 2025 by AGSA to Solbeth’s attorneys, sent after the meeting, made it plain that Solbeth was not provided with any information *in terms of the subpoena*.

[34] The relevant part of the letter states that:

‘8. In respect of the first request, contained in paragraph 2.1 above and in paragraph (i) of the Subpoena, we respond as follows: *The AGSA is not in possession of, nor is it aware of, any “reports investigations and findings confirming that Solbeth Protection Services CC currently is providing cyber (CCTV) services to the eThekweni Municipality and the period of such services from 1 January 2019 to 1 January 2025”.*

9. Regarding your second inquiry detailed in paragraph 2.2 above and also in paragraph (ii) of your Subpoena, we respond as follows: *The AGSA is not in possession, and is not aware, of any “documents showing any irregularities reported by eThekweni municipality accounting officer with regard to Solbeth Protection CC from 1 January 2019 to 1 January 2025”.*

10. On the last enquiry at paragraph 2.3 above which also appears at paragraph (iii) of your Subpoena, we respond as follows: *As stated in paragraph 5 of our 16 February 2025 letter to you, “the answer provided at Council meeting was incorrect. The AGSA does not have a report confirming the existence of the contract between Solbeth Protection Services.”* (Own emphasis.)

[35] The letter makes it clear that the information does not exist. Notwithstanding what contemporaneous correspondence reveals, Solbeth utilising the existence of the subpoena, persisted in seeking information beyond that specified in the subpoena, asserting an entitlement thereto and demanding that AGSA account for what it characterised as delayed disclosure by way of an affidavit. In response to AGSA’s attorneys’ letter dated 31 March 2025, Solbeth,

again, rejected the request for the withdrawal of the subpoena. The relevant part of the letter dated 1 April 2025, states that:

“Your client has taken nearly two months to provide documentation to us and once we have the opportunity to peruse the documents in detail and at length, we will indicate what is missing if anything. At this stage, however, your client has failed to provide an Affidavit as it undertook to do and is required to explain why it delayed in providing the documents for over a week with the excuse that the Auditor General needed to sign the letter in Pretoria.

As indicated to you today telephonically, there is no need to withdraw the subpoena and all our client’s rights are reserved.”

[36] Solbeth’s stance is also evident from its opposing affidavit wherein it is stated that AGSA:

‘.... undertook and agreed to provide the documents and information requested in terms of the Subpoena and did so. Therefore after it consented to provide the information and after providing the information in terms of its consent and undertaking, it now cannot backtrack’.

[37] Solbeth did not dispute the applicants’ contention that the information sought does not exist. Notwithstanding this, it sought to contend that AGSA had furnished it with information pursuant to the subpoena, a proposition not borne out by the facts. Moreover, Solbeth purported to rely on the subpoena to demand disclosure directly to itself, rather than to the Registrar, and of information extending beyond that specified in the subpoena.

[38] Solbeth’s defence of mootness would mean the subpoena has no practical effect or result between the parties. That is erroneous. Solbeth’s assertion that it does not seek to enforce the subpoena is no answer to the relief sought by the applicants. Accordingly, a live dispute exists as the subpoena is valid until cancelled and set aside or withdrawn. The submission that the applicants complied with the subpoena and or abandoned their right to seek a cancellation of the subpoena is misleading and is not borne out by the facts.

[39] In this regard, the subpoena serves no legitimate purpose but operates as an instrument to compel the applicants in circumstances where the reason for its issue does not exist. The subpoena was not issued for a bona fide or lawful purpose. Instead, it was employed as a mechanism to compel AGSA to disclose information protected under s 18(3) of the Public Audit Act, despite Solbeth having been expressly informed that such information was not in AGSA's possession.

[40] Where the court procedures are invoked for impermissible purposes, this court is not only empowered, but obliged, to exercise its inherent jurisdiction to prevent an abuse of its process and the proper administration of justice.¹²

Conclusion

[41] I conclude that the subpoena ought to be cancelled and set aside. As to costs, there is no reason to depart from the general principle that costs follow the result. Solbeth refused to withdraw the subpoena and instead relied on its continued existence as leverage to press AGSA for further information. While the issue could have been resolved by consent in chambers, the opposition resulted in an unnecessary hearing. Contrary to its assertion, Solbeth put the AGSA to unnecessary legal costs involving an opposed application.

[42] In the result, the following order is made:

1. The subpoena is set aside and cancelled.
2. The respondent is ordered to pay the costs of the applicants on scale C.

¹² *TM v LM* [2016] ZAKZPHC 59 paras 16-17.

NTY SIWENDU J

Heard on: 20 January 2026

Delivered on: 1 April 2026

Appearances

For the applicant: L Kutumela

Instructed by: Fairbriges Wertheim Becker

Locally represented by: Snyman Leaker Williams

For the respondent: T Chetty

Instructed by: Theyagaraj Chetty Attorneys

Locally represented by: Cajee, Sethubi, Chetty Inc.