NOC (PVT) LTD
and
MD
versus
EW (PVT) LTD
and
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE, 3 and 19 November 2015

Application for setting aside a subpoena *Duces Tecum*

T Mpofu, for the applicants
T Nyambirai, for 1st respondent
ABC Chinake, for 2nd respondent

KUDYA J: This is an application by a witness for the setting aside of a subpoena *duces tecum* compelling him to testify and produce bills of entry, packing lists, invoices and proof of payment of duty on base stations imported by his employer during the period 1998 to June 2013 on the ground that it was both invasive and incompetent in its scope and reach.

A subpoena *duces tecum* was defined in reference to a taxpayer in *Fisher* v *United States* (1976) 425 US 391; 48 Led 2d 39 and approved by Dumbutshena CJ in *Poli* v *Minister of Finance* 1987 (2) ZLR 302 (SC) at 315D as "a subpoena that demands the production of documents and does not compel oral testimony nor would it ordinarily compel the taxpayer to restate, repeat or affirm the truth of the contents of the documents sought."

In Case Number FA 01/14, the main proceedings, the first respondent appealed against the decision of the second respondent imposing duty retrospectively in the sum of US$15 884 943.46 and a 300% penalty in the sum of US$47 654 830.38 arising from the importation of base station components in the period between 2009 and June 2013. The first respondent intended to call a former clearing agent who cleared base station components on behalf of the first applicant which were purportedly classified under the same duty free tariff regime as the ones imported by the first respondent to show that it was being discriminated

against in violation of the constitution and the law. The first applicant objected to the production of its base station components importation documents by this witness. The second respondent claimed client taxpayer privilege in terms of s 34A of the Revenue Act [*Chapter 23:11*] which privilege can in terms of s 34 (2) be curtailed by an order of a competent court. Mr *Chinake* who appeared for the Commissioner further contended that the second respondent was not the custodian of the base station components import documents of the first applicant. It appeared to be material to appellant's case who seemed to have no other means of assembling this information and the court was duty bound to grant the relief for justice to be properly served in the absence of any cogent reason to withhold the requested help.

In the result, the first respondent applied in terms of s 6 (1) and (2) of the Fiscal Appeal Court Act [*Chapter 23:05*] as read with s 62 (2) of the Constitution of Zimbabwe for a subpoena *duces tecum* against the second applicant, the managing director of the first applicant which I granted on 9 February 2015 compelling him to appear in court on the following day to testify and assemble the requested documents. The subpoena was duly issued by the registrar pursuant to my order. The second applicant appeared in court and applied for a postponement of three weeks to enable him to seek legal opinion on the propriety of the order and to properly prepare the requested documents. He expressed his discomfiture in testifying for and producing the first applicant's documents to a competitor. He was warned to attend Court at the next hearing date.

The applicants do not impeach the validity of the order of Court from which the subpoena was issued. They aver that the contents of the subpoena emanated from the first respondent and not from the Court. They seek the setting aside of the subpoena on three basic grounds. In its opposing papers and written heads, the first respondent took the point that the Court became *functus officio* once the Court order was issued. In his oral submissions Mr *Nyambirai*, for the first respondent, abandoned the point and contended that as it was an interlocutory order, the Court had inherent power to regulate its own procedure for the purpose of promoting a fair and satisfactory trial, which the litigants were obliged to follow[1]. The power is wide enough to encompass directions concerning the search for and collection

[1] *Seetal v Pravitha & Anor NO* 1983 (3) SA 827at 831H.

of evidence required in litigation.[2] The power of the Court to regulate its own procedure is derived from s 4(1) and (4) of the Fiscal Court Act which provides that:

> "(1) The president of the Court shall make rules for regulating the procedure of the Court, which shall be as simple and informal as reasonably possible.
> (4) In any case not provided for in the rules the Court shall act in such manner and on such principles as it considers best fitted to do substantial justice."

The nature and scope of the rules are set out in subs (2). The rules only take effect after approval and gazetting in the Government Gazette by the Minister of Finance. The operations of the Fiscal Appeal Court are presently governed by the Fiscal Appeal Court Rules 2002, Statutory Instrument 41 of 2002. In addition s 6 empowers the Court to summons witnesses, to call for the production of and grant inspection of books and documents and to examine witnesses on oath. This is exercised through a subpoena issued by the registrar of the Court. Any subpoenaed witness possesses the same privileges and immunities of a witness called to attend and testify at a trial in the High Court. A witness who defies the subpoena suffers the drastic consequences listed in s 7 of the Act.

I presume that the challenge to the contents of the subpoena is based on s 4 (4) of the Fiscal Appeal Court Act. Mr *Mpofu*, for the applicants impugned the subpoena on three main grounds. The first ground was that the requested information was irrelevant to the determination of the real issues in the main proceedings between the first respondent as the appellant and the second respondent as the respondent. It does not appear to me that the applicants are aware of the sub issues feeding into the main issues. One of the factual sub issues the first respondent seeks to establish by reference to the importation of first applicant relates to the identification of the components the Commissioner regarded as constituting a base station. The first respondent has averred what the position was, which averment was disputed by the Commissioner. The documents sought by the first respondent contain this information. These documents will assist the Court unravel the truth and determine whether or not the appellant was correctly classified in tandem with her peers and whether it is liable to pay duty and suffer penalties. Reference to the request for particulars articulated in *Trinity Engineering (Pvt) Ltd* v *Commercial Bank of Zimbabwe Ltd* 2000 (2) ZLR 385 (H) at 389F is not apposite. In that case Trinity Engineering sought particulars of claim from its opponent, CBZ, on matters the onus of which lay upon it. It was held that particulars to which a litigant is entitled were those in respect of which the onus was on the opponent and which formed

[2] *Seetal's* case, *supra*, at 832D

part of the opposing case. In the present matter, the first respondent did not seek any further particulars from its opponent, the second respondent; rather it seeks certain listed documents from a third party, the first applicant. This is because it bears the onus to show on a balance of probabilities that it is not entitled to pay duty on the base station components for which duty was levied and penalties imposed. It believes that it will be able to discharge this onus from the information embedded in the documents sought through the subpoena *duces tecum*. These documents will show whether the second respondent levied duty on similar base station components that were imported by the first applicant. It is really a factual issue and not an issue of law that requires to be established by the documents sought.

It seems to me that the requested documents are relevant to the determination of the real issues between the first and second respondents. In any event it is presumptuous of the applicants to counsel the first respondent on how to prosecute its appeal. The applicant is simply not empowered to determine the relevance of the documents. This finding accords with the sentiments of Ramsbottom J in *Cave* v *Johannes NO and Others* 1949 (1) SA 72 (T) where a witness objected to the production of certain documents on the basis that the subpoena *duces tecum* was too wide and vague and that the documents were not exclusively his. At p 85 the learned judge remarked that:

> "In the present proceedings, the applicant does not deny that he is in possession of the documents. He can produce them and, in my opinion, he should do so. What use is to be made of the documents afterwards is a matter for the magistrate when the time comes when the documents are to be used."

In similar vein was Dumbutshena CJ in *Poli* v *Minister of Finance* 1987 (2) ZLR 302 (SC) at 316 F where he stated:

> "In any event the production and admissibility of these documents, were they to be obtained, would be matters for the decision of the trial court."

The duty of the witness is to produce the requested documents, answer questions pertaining to those documents and leave it to the Court to determine whether or not they are relevant. Again, resistance to the production of the documents on the ground that the main issue will be resolved solely on a point of law is incorrect. It must always be borne in mind that appeals to this Court are re-hearings that permit adduction of evidence on all or any one of the issues agreed at a pre-trial hearing. The first ground taken by the applicants is not well founded.

The second ground relates to the right to privacy. The first applicant is averse to the disclosure of its tax structure and trade secrets over a period of 15 years to a competitor and the general public. It sought shelter under the guarantees in s 57 of the Constitution and the common law[3] that protect the right of privacy to every person. Section 57 provides that:

"57 Right to privacy

Every person has the right to privacy, which includes the right not to have"—

The first respondent counterpoised with s 62(2) and (4) of the Constitution which grants every person the right of access to any information held by any person for the enjoyment, enforcement or protection of any right. Section 62(2) of the Constitution provides that:

"(2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.

(4) Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."

In my view, the right to privacy is countervailed by other rights such as the right to access of information for the protection of a right and the right to a fair hearing in s 69 (2). Section 69 (2) provides that:

"69 Right to a fair hearing

(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law."

Section 86 (2) provides a checklist against which the abridgement of fundamental rights and freedoms is permitted by a law of general application but subs (3) specifically excludes the limitation or violation by any person of the right, amongst others, to a fair trial. It reads:

"86 Limitation of rights and freedoms

(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms

[3] Zimunya v Zimbabwe Newspapers 1994 (1) ZLR 35 (H) at 43B-44A and the cases cited thereon

of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all, relevant factors, including—

(*a*) the nature of the right or freedom concerned;
(*b*) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
(*c*) the nature and extent of the limitation;
(*d*) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
(*f*) whether there are any less restrictive means of achieving the purpose of the limitation.
(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
(*e*) the right to a fair trial;"

The rule of law and the right to a fair hearing require that evidence which establishes the truth be laid before the Court. Section 6 and 7 of the Fiscal Appeals Court Act as read with r 9 of Fiscal Appeal Court Rules are laws of general application, which compel a competent witness to testify and assist the court unravel the truth. The applicants are competent and compellable witnesses. They have information which guarantees a fair trial to the first respondent, the appellant, in the main proceedings. Mr *Nyambirai* relied on the summation of an attack of the *Whitehall* v *Whitehall* 1958 SC 252 in the (1961*) Modern Law Review 3*13 for the proposition that a court may override the right of privacy in search for the truth. Didcott J summarised the repost at p 836G-837A, which he approved at 860F thus:

> "The *Whitehall* decision was attacked in (1961) *Modern Law Review* 313. The article made the following points. A call for the discovery of documents could not successfully be resisted on the grounds that their contents might harm the case of the litigant possessing them or help his opponent, on the grounds that he could not be expected to supply evidence which might therefore tell against him. The objection was no stronger when a blood test was demanded. To uphold it would be tantamount to excluding evidence because of its relevance, a novel criterion. Nor did it matter that the child was not a party to the proceedings. A stranger to any litigation could be compelled by a subpoena *duces tecum* to produce documents that were required there, although their disclosure might be detrimental to his own interests. The same went, or should go, for a sample of his blood."

The death knell to the right of privacy was nailed to the mast of the pursuit of truth at 861C-E of the same judgment in these words:

> "Yet a blood test on somebody without his consent is unquestionably an invasion of his privacy. And the invasion is no less such because on just about every occasion the test is otherwise innocuous. This strikes me as the only objection to compulsory tests which has substance. It is, I feel, a very real one. It must be admitted, on the other hand, that the privacy of the individual is not in law absolutely inviolable. Were subpoenas *duces tecum* and the

> discovery of documents innovations instead of practices to which we have grown accustomed, many lawyers would surely balk at the threat to privacy inherent in requisitions of personal correspondence and the like. Nor, to take another example, has the law ever protected the privacy of the confessional, of the psychiatrist's couch, of the physician's consulting room, against the disclosure in litigation of secrets told there. In all these instances the truth is pursued ruthlessly."

The fact that in classification cases any interested importer, intended importer, manufacturer and intended manufacture can intervene in classification proceedings in which it has a real interest undermine the privacy argument. In any event in terms of r 19 (3) of the Fiscal Court Appeal Rules this Court has the power to exclude such information from the public domain.

The third ground was that the subpoena was unduly oppressive to both applicants. The first applicant would lose the valuable services of its chief executive officer during his time at Court while second would suffer the inconvenience of adding value to a competitor at the expense of his own employer. It was common cause that the production of documents covering a period of 15 years would be burdensome to the applicants. However, the present subpoena *duces tecum* is in a class of its own. The duty and penalties imposed amount to a large sum of money which has far reaching consequences to the survival of the first respondent. It must be afforded every lawful opportunity to present and argue its case to the best of its ability. The oral testimony and the production of documents from a competent and compellable witness cannot be gainsaid. As was recognised in *In re Maville Hose Ltd* [1939] 1 Ch 32 , a company such as the first applicant has no body and so can only act through its directors, secretary and other officers. The second applicant falls into this class of persons who can legitimately act for the first applicant. In *R* v *Jele* 1960 (3) SA 172 (SR) a medical orderly who had examined and treated a victim of a knife attack was under administrative instructions not to testify in court on the nature of the injuries sustained. At p 173B Young J stated that:

> "With certain exceptions (as to which see Halsbury *Laws of England*, vol 15 p 752 3rd ed), all competent witnesses are compellable and all compellable witnesses can be ordered to attend court by subpoena."

The second applicant in the present case is a competent and compellable witness. That he is a managing director is beside the point. He has the authority and ability to testify on the pertinent issues found in the subpoenaed documents. He indicated his ability to assemble the requested documents within a period of three weeks from 10 February 2015,

when he attended Court in obedience to the subpoena. The scope and reach of the documents is unavoidable given the nature of a base station. It appears that the nature of base stations require importation in the form of unassembled complete knocked down CKD components. The components are numerous and result in the production of as many documents in the form of packing lists and bills of entry. Collating these documents is an arduous but not impossible task. It is hard work and to that extent burdensome but not in a futile or pejorative sense. It is a burden that must be carried to establish whether the respondent in the main proceedings is treating appellant in a discriminatory way contrary to the law.

At 173C Young J further stated that:

> "If a subpoena is, in the circumstances, oppressive, it can be set aside on application to the Court, but subject to that, it must be obeyed".

Mr *Mpofu* relied on this quotation and submitted that in the circumstances of this case, the subpoena in its present format was oppressive. He contended that the subpoena was oppressive in that it constituted an abuse of process to the extent that the first respondent brandished it as a weapon against the applicants for denying the former agent permission to testify on its behalf in the main trial. The second circumstance was that it was generalised and speculative being in nature a trawling exercise in search of unknown evidence. In *Beinash* v *Wixley* [1997] 2 All SA 241 (A) at 251e-j Mohamed CJ stated that:

> "What constitutes an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process. It can be said in general terms, however, that an abuse 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. (*Standard Credit Corporation Ltd* v *Bester and Others* 1987 (1) SA 812 (W) at 820A-B; Taitz, *The inherent jurisdiction of the Supreme Court* (1985) at 16.) A subpoena *duces tecum* must have a legitimate purpose. Ordinarily, 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 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, the court will not hesitate to say so and to protect both the court and the parties affected thereby from such abuse. (*Sher and Others* v *Sadowitz* 1970 (1) SA 193 (C), *S* v *Matisonn* 1981 (3) SA 302 (A).)

The subpoena in that case was the third one that had been issued by Beinash in substantially the same terms as the other two that he had purportedly withdrawn against Wixley, who was not a party in the main trial where Beinash was suing three defendants for defamation. He subpoenaed a vast array of documents in respect of a complex liquidation

handled by one of the defendants inclusive of every conceivable document "and / or" "any letter, memorandum, report, facsimile, note, aide-memoire made/received personally or officially, directly or indirectly refers to any one or all of these matters" and "any document on any complaint made to an accounting body, to the registrar of financial services, to a commission of enquiry, to the Master of the Supreme Court or the police in the preceding 3 years" against any of the defendants. There was no indication that these documents were in existence and were relevant to the main proceedings. The use of "and/or" "directly and indirectly" detracted from the specificity required by r 38 (1) of the Uniform Rules of Court. The subpoenaed witness was left in the invidious position of choosing which of the unspecified documents to produce and ran the risk of suffering imprisonment for failing to produce any of these documents. His cooperative overtures were spurned. Beinash declined to stay the subpoena pending discovery by the defendants. The court held that his inflexible approach was deliberately designed to harass the witness and not to search for the truth. The subpoena was set aside on the basis that it was not only oppressive but was also an abuse of process.

In the *In re Maville Hose Ltd* case [4], Simonds J in the special circumstances and at that stage of the proceedings of that case discharged part of the subpoena issued by the registrar calling on a director of a company in liquidation to be examined and produce "all other books, papers, deeds, writings and other documents in his custody or power in any wise relating to that company" but upheld the other portion requiring the production of a large number of dated debentures and guarantees listed in a schedule. He held that the discharged portion was oppressive to the witness in seeking from him the production of unspecified documents, failing which he risked committal to prison.

In comparison, the subpoena in the present matter calls upon the second applicant:

> "to attend the Fiscal Appeal Court at 10am on 10 February 2015 and from day to day until the above cause is tried to give evidence for the appellant and also to bring with you and produce at the time and place all the import documents, namely bills of entry, packing lists, invoices and proof of payment of any duty relating to the importation of base stations and base station components by first applicant duly stamped by the Zimbabwe Revenue Authority at the ports of entry where these base stations or base stations parts or components entered into the country for the whole period commencing October 1998 and ending 30 November 2013".

[4] *supra*

The impugned subpoena lists the required documents by name. These are bills of entry, packing lists, invoices and proof of payment of any duty for base stations and base station components stamped by the second respondent at points of entry from October 1998 to 30 November 2013. It seems to me that the applicants possess or have possessed these documents. They know the number of base stations they constructed over that period and the components they imported for such base stations. In the light of this fore knowledge the subpoena is not oppressive. The subpoena was not generalised. It particularised the required documents and does not seek all the importation documents of the first applicant. As already mentioned, the second applicant understood the request and required just three weeks to compile these documents. In my view, the first respondent is not on a fishing expedition. It has always desired to call the evidence of the former agent to testify on these very documents. That witness did not keep custody of the documents he processed for the first applicant. The necessity to call the custodian of those documents was established.

I do not see how calling a custodian of the subpoenaed documents can be equated to an abuse of court process. In my view, the present subpoena is distinguishable from those in both *In re Maville* and *Beinash* v *Wixley* where language of the widest possible amplitude represented by the phrases such as "all other", "and / or" and "directly and indirectly" swept within its reach every considerable document however remotely or tenuously connected to the issues for determination. In addition the circumstances surrounding the impugned subpoena differ from those that confronted both Mohamed CJ and Simonds J. In the present case, the subpoena was issued following an order of court upon satisfaction that the requested documents would materially assist the Court in determining the appeal and not in the ordinary exercise of the registrar's r 9 jurisdiction. The applicants have not been cooperative with the first respondent and have not suggested how the burden of producing the vast array of the requested documents may be ameliorated.

It seems to me that the underlying reason for launching the present application has more to do with the applicants' reluctance to testify for a competitor than any of the other proffered reasons. In the present matter the subpoena serves a legitimate purpose of establishing whether the appellant is being discriminated against. The evidence requested by the first respondent will help determine what the second respondent regarded as base stations components and whether it levied duty on those components that did not constitute the complete knocked down parts. The subpoena may have unintended consequences for the

applicants that will have to be sacrificed in pursuit of truth. I am satisfied that the application has no merit.

Two considerations militate against the imposition of costs of any form against the applicants. The first is that they genuinely believed that it was improper for them to disclose sensitive information of their operations to a competitor and legitimately challenged the contents of the subpoena. The second is the unfairness inherent in burdening the applicants with an order of costs for a legal obligation forcibly thrust upon them by the Court.

Accordingly, it is ordered that:

1. The application be and is hereby dismissed.
2. Each party shall bear its own costs.

Mhishi Legal Practice, applicants' legal practitioners
Mtetwa & Nyambirai, 1st respondent's legal practitioners
Kantor and Immerman, 2nd respondent's legal practitioner