

NOT REPORTABLE
OF INTEREST TO OTHER JUDGES

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 14474/2008

DATE: 1 DECEMBER 2008

10 In the matter between:

MTN (PTY) LIMITED

Applicant

and

THE ROAD ACCIDENT FUND

1st Respondent

JODI BERMEISTER

2nd Respondent

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JUDGMENT

GAUNTLETT, AJ:

20 This is an application to set aside a subpoena.

The subpoena was issued and served on the applicant ("MTN") on
Friday 5 September 2008, one court day before the

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commencement of the trial action for damages by the second respondent against the first respondent ("the RAF"). The applicant is a mobile telecommunications provider listed on Johannesburg Stock Exchange and the first respondent ("the RAF") is a statutory parastatal entity. The subpoena was directed to "The Manager/Director" of MTN; it was in its terms both a subpoena *duces tecum* (in relation to cellular telephone records of the second respondent, the plaintiff in an action against the RAF, and a number of listed corporate entities in which it was suggested she had an interest), and a subpoena to attend the trial to testify.

The subpoena was the second of its kind, but in slightly wider terms than an earlier variant, issued on 25 August 2008 and withdrawn on 4 September 2008. The withdrawal had followed telephonic discussions between MTN and the RAF's attorneys, and in a letter dated 1 September from the latter to the former. The letter drew attention to constraints imposed by law on MTN's ability to provide customer records, by specific reference to MTN's license, the Electronic Communications Act, 36 of 2005, and the Regulation of Interception of Communications and Provision of Communication – related Information Act, 70 of 2002. The letter concluded:

5 *"The contravention carries a heavy fine of not more than R5million in [the] case of our client and up to R2million or a jail term of not more than 10 years in respect of our client's employees. Even the law enforcement agencies cannot easily obtain the information your client seeks without following the strict procedure contained in various statutes.*

10 *In the light of the explanation provided above we are instructed to request your client to withdraw the subpoena formally within three days from today. Should your client fail to do so our client will launch an urgent application to set aside the subpoena. Furthermore our comments herein should not be made as an admission of the validity of the subpoena or the service thereof.*

15 *We await hearing from you urgently and our client's rights are hereby fully reserved."*

20 The first subpoena was thereafter withdrawn. The RAF asserts in its papers that this was not done by way of reaction to the telephonic discussions, or the letter to which reference has been made. It is not necessary to determine whether or not this is plausibly so.

25 On Friday 5 September there were two developments. The first is that it became apparent that no judge could be allocated for the trial action due to commence on Monday 8 September. This fact, it is common cause, was not communicated to MTN's attorneys – whether through their failure to respond to telephone messages allegedly left for them by the RAF's attorneys', or by the RAF's

attorneys' failure in the circumstances to convey the information via fax or e-mail once it was clear that MTN's attorneys could not be reached telephonically.

5 The second development was that the subpoena in issue now was issued and served that day.

MTN's attorney flew to Cape Town in response on Monday 8 September. MTN launched and served an urgent application on 10 that day to set aside the subpoena on several grounds. These included its contended vagueness (as noted, it was addressed to "The Manager/Director" of MTN, which, as might be expected from a national telecommunications operator and listed company, has many who fit that description); and furthermore it gave 15 unreasonable notice, especially in regard to the volume of information which would be required to be extracted and collated and the need to comply simultaneously with the legal limitations on disclosure to which I have referred.

20 When no judge was forthcoming on Monday 8 September to deal with the application or the trial pending between the second respondent and the RAF, by consent the present application to set

aside the subpoena was postponed to today, with directions as to the filing of papers and argument.

5 The RAF responded to the founding papers – short and to the point – with some 180 pages of answering affidavits and annexures. Little of all this is remotely relevant to three basic issues. The first is whether the subpoena is valid on its face, regard being had to the various grounds of attack specified in the founding affidavit. The second is whether it in any event
10 unenforceable in the absence of a tender of witness fees. The third, most simply, is whether an unreasonable period of time was allowed for the extraction of the documentation and for the various legal hurdles relating to disclosure to be addressed.

15 Ultimately in oral argument today counsel for the RAF conceded that the time allowed to respond to the subpoena was “inherently unreasonable”. The concession was correctly made. It should however have been made, forthrightly, in the answering affidavits, or at least the heads of argument. Instead the former are replete
20 with its relevancies to the central issues, personalised skirmishing, and the most irresponsible burdening of the record. The heads of argument filed for the RAF equally failed to grasp the nettle of unreasonably short notice; it is unfortunate that it

should only have been in the course of oral argument that the most obvious fundamental in the case should have been recognised and conceded.

5 Ultimately conceding the inherent unreasonableness of the subpoena, counsel for the RAF however argued that it was "not necessary" for MTN to have responded to it. The argument was that, notwithstanding the prior concession, the present application should be dismissed and a punitive costs order made against
10 MTN. It was simply "unnecessary" – so counsel argued - for MTN to have instituted an urgent application on the morning of 8 September for the subpoena to be set aside.

In my view the argument lacks any responsible foundation. This
15 is so for several reasons.

In the first place there is the fact of the conduct of the RAF's attorney on 4 September in issuing the new subpoena in an, *ex confesso*, "inherently unreasonable" timeframe. This was
20 exacerbated by the failure immediately thereafter to ensure that the subpoena, once issued, was immediately put in abeyance, when it became known (on the same day) that the trial could not commence on 8 September. When MTN responded by engaging

its attorney, an attorney in turn flew to Cape Town and instituted, he had acted in my view in a way which was predictable. MTN was entitled to respond to a subpoena which compelled attendance to answer it, on pain of criminal sanctions.

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When MTN's attorney had not replied to the telephone messages which it is said were left for him, a simple step would have been to e-mail or fax him in the course of Friday 5 September to ensure that the changed circumstances had been communicated.

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In the second place the argument that the response on 8 September was "unnecessary" rests – counsel for the RAF confirmed – on the argument that a litigant confronted with a warrant, or a writ, or a judgment, or a subpoena which he or she considers invalid, should ignore it. That, it seems to me, on the most elementary legal principle and supported by the most trite authority is not so. Even arguably invalid legislative, executive or administrative acts may have force until and unless set aside. There is a continuing legal debate regarding the question of degrees of invalidity (cf Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)). Consequently, a litigant – most of all a litigant in pressed circumstances – may properly consider it prudent to respond (as after all, the subpoena on its

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orders it to do) by ensuring that a legal representative is present to challenge the validity and enforcement of the particular subpoena. The converse proposition – that the logic of MTN's conventions of invalidity of the subpoena means that it should have disregarded it – is risible (cf Oudekraal supra at 242B-C).

This leads to the third aspect. The test is not – as counsel for the RAF would have it in argument – whether a litigant *ex necessitate* must go to court to set aside a subpoena. The question is whether he or she is entitled to do so. Where a subpoena is patently unreasonable as regards what it enjoins (as has ultimately been wrung in concession from the RAF), and otherwise defective, then that subpoena is an abuse, and it may be set aside (cf Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) 385 (SCA) at 411B).

The proper stance for the RAF on Monday 8 September was to have conceded that the second subpoena was as issued on unreasonably short notice, relating as it did to considerable material which could not – the RAF's attorneys had been reminded on 1 September – without prior compliance with a number of confidentiality constraints imposed by law. It was also directed to a patently vague subject (“the Manager/Director”), and there was

no accompanying tender of witness fees (which, although not specified by Rule 38 or s.30 of Act 59 of 1959), is a trite requirement for enforcement: Swart v Cronje 1991 (4) SA 296 (T) at 299 A-E). In these circumstances, the subpoena was as incompetent as the first. The RAF's attorney, moreover, had the opportunity to think further on the matter in the ensuing two days, before the consent order was made on 10 September. By then the second respondent had provided under cover of an affidavit the bulk of the documentation requested, or sought in the subpoena and available to her. In fact the RAF stance now is that the subpoena is "now moot", and that the RAF, for its part, does not seek to enforce it against MTN. Yet it has persisted in resisting the relief in this matter, filing the discursive affidavit and annexures that I have referred to, and advancing today an argument which in my view lacks any responsible foundation whatsoever.

The RAF has compounded matters by lodging an extensive application for the striking out of passages from the replying affidavit. I invited counsel for the RAF at the outset to explain how this material constituted new matter in the proper sense (and not merely as evidential or argumentative expansion upon the matter already to be found in outline in the first set of affidavits),

and why it was prejudicial, in the sense clearly laid down in Beinash v Wixley. It became apparent that neither aspect could adequately be demonstrated, and counsel chose to curtail the exercise.

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MTN in its papers had intimated, too, an application to strike out. In the event, however, that this was not lodged or argued, and not time taken up in oral debate by it, and I was merely invited to regard certain criticised passages as irrelevant.

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MTN has asked for a special order as to costs. In my view, costs orders of this kind should be sparingly granted. I am however persuaded that in the circumstances of this particular matter the conduct of the RAF in this litigation has been unreasonable, and markedly so. Only in oral argument has the time allowed for compliance with the subpoena, given its amplitude, and the legal restraints on confidentiality, been conceded to be wholly unreasonable. The attempt still to defend the application on the basis that it was "not necessary" for the litigant threatened with criminal sanctions to appear, has no responsible basis. The attachments to the answering affidavit were unnecessary in the extreme.

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Whether through point of pride, or professional antagonism, or simple obduracy, unnecessary costs have been generated since 8 September, notwithstanding the fact that on that day – it seems – the RAF itself came to the conclusion that the subpoena was 5 “moot”. The scale on which paper has been generated in this matter, baseless argument advanced, and this hearing necessitates, are all exacerbating features.

Although both sides engaged two counsel the issues were 10 anything but matters warranting the costs of two counsel. Correctly no claim was made in this regard.

The order I accordingly make is as follows:

- 15 1. That the subpoena *duces tecum* addressed to the applicant dated 5 September 2008 be set aside;
2. The application to strike out by the first respondent is dismissed;
3. In relation to 1 and 2 above, the first respondent is 20 directed to pay costs on the scale of attorney and client.

A handwritten signature in black ink, appearing to read 'AJ Gauntlett', written over a horizontal line.

GAUNTLETT, AJ