32/97

IN THE SUPREME COURT OF APPEAL
SOUTH AFRICA

CASE NO 457/95

In the matter of:

J L Beinash **Appellant**

and

T Wixley **Respondent**

CORAM: Mahomed CJ, et Nienaber, Schutz, Zulman, Plewman JJA

HEARD: 4 March 1997

DELIVERED: 27-3-97

JUDGMENT

Mahomed CJ

Introduction

The appellant in this appeal ("Beinash") caused a subpoena (the "impugned subpoena") to be issued in the court *a quo* requiring the respondent ("Wixley") to produce certain documents which were said to be relevant in certain proceedings (the "main proceedings") then pending in that court between the appellant as the plaintiff, and certain other parties, as defendants. Wixley was not personally cited as a defendant in the main proceedings.

Wixley succeeded in obtaining an order before Heher J in the then Witwatersrand Local Division setting aside the impugned subpoena with costs on the scale of attorney and own client.

It was contended on behalf of Beinash on appeal that the order made by Heher J should be set aside on four grounds. The first ground was that the court *a quo* wrongly refused to strike out certain parts of the founding affidavit of Wixley. It was contended that these parts of the affidavit were "scandalous,

vexatious, or irrelevant" within the meaning of rule 6(15) of the Uniform Rules of Court. The second attack was that the subpoena should in any event not have been set aside. In support of this attack it was contended that the court *a quo* had erred in concluding that the issue of the subpoena constituted an abuse of process of the court. The third contention was that the application to set aside the impugned subpoena before the commencement of the trial was made at the wrong time: a subpoenaed witness having any objection to the subpoena should offer that objection during the trial, when he or she is called upon to comply with its demands, and not before that. The fourth attack was on the costs order. It was submitted that no basis existed to make a special order of costs on the scale of attorney and own client.

In order to appreciate the merits of these attacks it is necessary to set out the material parts of the history which led to the proceedings in the court *a quo*.

The relevant history

There were three defendants in the main proceedings in which Beinash was the plaintiff. They were the partnership of Ernst & Young ("first defendant"), Ernst & Young Trust Transvaal (Proprietary) Limited ("second defendant"), and P W M Reynolds ("third defendant"). Wixley was the senior partner in the first defendant which was a firm of auditors. He was also the chairperson of the second defendant which had carried on the practice of a liquidator of companies and a trustee of insolvent estates.

The third defendant was appointed as a liquidator of A & E Gerson (Pty) Ltd ("A & E") which was a company described as the Gerson group of companies. In the course of his administration of A & E, he caused an inquiry to be held into the affairs of that company in terms of s 415 of the Companies Act No. 61 of 1973. In his capacity as liquidator the third defendant also made an application to court for the provisional winding-up of a company within the Gerson group known

as Mecklenberg (Pty) Ltd ("Mecklenberg"). This application was opposed by Mecklenberg, which was represented by Beinash who had acquired the shares in that company some time in 1993 for the purposes of instituting an action by Mecklenberg against the third defendant as liquidator of A & E. Stegmann J granted the order, but he made a number of observations critical of the conduct of Beinash, whose firm had acted at some time as auditors of Mecklenberg.

One of the critical issues canvassed in that application was whether A&E was indebted to Mecklenberg in respect of certain wine and other liquor supplied by Mecklenberg. In the proceedings before Stegmann J, Beinash and one Alan Gerson alleged that A&E was indebted to Mecklenberg in respect of the price of certain liquor which had been supplied by Mecklenberg to six restaurants. The third respondent contended that this allegation did not reflect the truth and constituted a recent fabrication "having no purpose other than to create the false appearance of an issue to be tried...". Stegmann J held that there was "very

substantial weight" in this contention.

Another issue in the application for the winding-up of Mecklenberg was whether or not there had been an agreement sometime in 1991 constituting a major "financial restructuring" of A&E and its associated companies, in terms of which A&E was said to have ceded a substantial amount of receivable loans to Alan Gerson personally. Stegmann J held that the allegations of Beinash and Alan Gerson to the effect that there was such an agreement was "outrageously far-fetched". The learned Judge held that it was impossible to accept that these averments were made *bona fide*.

The learned Judge was also critical about certain printouts made by Beinash as auditor of A&E and held that Beinash's printouts were " not as reliable" as one would expect from the records of a qualified chartered accountant. The court also commented on the fact that according to a printout from Beinash's firm, Beinash had simultaneously been both the auditor and a director of A&E.

Arising from these and other findings by Stegmann J, and from various aspects of the evidence which emerged from the inquiry into the affairs of A&E, the third defendant addressed a letter on 6 July 1994 to the Public Accountants and Auditors Board which was headed "Complaint against Mr Leon Beinash - Improper Conduct". The letter referred to various findings made by Stegmann J and described the conduct of Beinash as "unprofessional". The letter stated that the actions of Beinash "appear to assist his client in criminal and fraudulent manipulation of the books and records of the companies to which he was auditor". It was further alleged in the letter that from the various inquiries which had been conducted into the affairs of A&E "it became apparent that Mr Beinash was party to the preparation and issuing of audited financial statements which were prepared without adhering to generally accepted accounting principles, or generally accepted auditing standards". The letter further claimed that Beinash had been guilty of a dereliction of his duty and that in the opinion of the third defendant he

was not "worthy of being a member of our institute or the title chartered accountant".

This letter led to the main action in which Beinash as the plaintiff claimed that he had been defamed by the allegations contained in the letter. He averred that when Reynolds wrote the letter of 6 July 1994 he acted personally "and/or on behalf of the first two main defendants". He claimed damages in the sum of R 1 500 000, 00. The defendants pleaded that the passages in the letter relied on by the plaintiff constituted fair comment and the expression of an honestly held opinion on matters of interest to the public and more particularly to the Public Accountants and Auditors Board. It was also pleaded that the letter was published in the discharge of a duty to do so to the board, which had a duty and interest to receive it. In the alternative to these defences it was pleaded that the allegations in the letter were true and were made in the public benefit.

The trial in the main action was set down for hearing on 24 May 1995. On

or about the 31 January 1995 Wixley was served with a subpoena (the "original subpoena") requiring him *inter alia* to deliver to the Registrar of the Supreme Court large numbers of documents which are set out in very general terms in a schedule to that subpoena. This elicited a response from the attorney acting for Wixley, Mr Levenstein ("Levenstein"), in which he pointed out that Wixley was the senior partner of the first defendant in the main action and that the first defendant was in the course of compiling its discovery affidavit, which would be served at the offices of the attorney acting for Beinash, Mr Soller ("Soller"), as soon as it was completed. The letter enquired whether in these circumstances it was necessary for Wixley to comply with the original subpoena or whether such compliance could be postponed until discovery was made. The response of Soller was that compliance with the original subpoena was required forthwith.

This subpoena was followed by another subpoena (the "revised subpoena") on the 14 February 1995, in substantially the same terms as the original subpoena.

Levenstein wrote to Soller objecting to the terms of that subpoena. This letter, dated 16 February 1995, records that Wixley was anxious to comply with his obligations and that he was "willing, formally or informally, to co-operate" with Beinash. The attitude of Soller remained inflexible and on 15 March 1995 Wixley made an application to set aside both the original and the revised subpoenas.

On 11 April 1995 Soller advised Levenstein that the original and revised subpoenas were being withdrawn, and costs were being tendered.

Immediately thereafter, on 19 April 1995, the impugned subpoena was served on Wixley, in substantially the same terms as the previous subpoenas. The application to set aside that subpoena was launched by Wixley on 9 May 1995 and the judgment of Heher J setting it aside appears to have been given on the 22 May 1995.

The impugned subpoena is directed against Wixley in his personal capacity and in his capacity as:

"(a) as the Chairman and/or Managing partner of the partnership known as Ernst and Young ; (a partnership);
(b) as the Chairman and/or Managing director of the company of auditors known as Ernst and Young Trust (Transvaal) (Pty)Ltd ...."

This subpoena requires the applicant to produce a vast range of documents which relate to the affairs of A&E "and/or" a number of other persons and bodies including Alan Gerson, Mecklenberg, Beinash, Beinash and Klompas, Trans-Africa Auctioneering (Proprietary) Ltd, the first and second defendants, and the third defendant (in his personal capacity and in his capacity as a director of the second defendant, and liquidator of A&E). The documents demanded include any "letter, memorandum, report, facsimile, note, or aide' memoire made or received by the witness personally or in any of his capacities as set out above, which directly or indirectly refers to any one or all" of these matters. The subpoena also requires the production of documents in this respect received from the Master of

the Supreme Court "and/or" Boland Bank, Boland Bank Auctioneering, or any branch or office of Ernst & Young worldwide "which relates and/or refers" to any of these matters. It further requires records of inquiries in terms of s 415 of the Companies Act No. 61 of 1973 conducted by the third defendant as liquidator of A&E as well as the practice manual of the first defendant concerning the duties of auditors in relation to companies.

Paragraph 2.6. of the impugned subpoena extends the ambit of that subpoena to:

> "Any documentation relating to any complaint made to or lodged with the Public Accountants and Auditors Board arising from or in relation to the conduct or activities of Ernst & Young, Ernst & Young Trust (Tvl) (Pty) Limited in or about the affairs, audit and/or administration or winding up of:
>
> 2.6.1 The 'Masterbond' Group;
>
> 2.6.2 The Alpha Bank Group; National Properties Limited; Interboard Limited; Steiner Services (Pty) Limited;
>
> 2.6.3 A & E Gerson (Pty) Limited;
>
> and/or to any complaint made within the preceding (3) three years against

Ernst & Young and/or Ernst and Young Trust (Transvaal) (Pty) Limited made to or lodged with the Registrar of Financial Institutions and/or the Master of the Supreme Court or the SA Police and/or the Financial Services Board and/or the Nel Commission of Enquiry."

Before considering the merits of the attack launched by the appellant on the orders made by the court *a quo*, in the light of this background, it is necessary to deal with two preliminary issues. The first is whether or not these orders were "appealable". The second is whether or not the failure of the appellant timeously to lodge the record in these proceedings in terms of rule 5(4) of the rules of this court, should be condoned.

Appealability

Counsel for the respondents contended that the purported appeal against the order made by Heher J in the court *a quo* should be dismissed on the simple ground that it was not "appealable".

Section 20(1) of the Supreme Court Act of 1959 provides that "[a]n appeal from a judgment or order of the court of a provincial or local division in any civil proceedings...shall be heard by the appellate division or a full court, as the case may be",(depending upon the terms of the leave to appeal granted by the court against whose judgment it is sought to appeal in terms of s 20(2)). In the present case Heher J granted leave to the appellant to appeal to this court against the order made by him.

There can be no doubt that the decision of the then Witwatersrand Local Division to set aside the impugned subpoena was a 'judgment or order' in the ordinary sense of the word which, if wrong, could be corrected on appeal. The real question is whether it can be corrected forthwith and independently of the outcome of the main proceedings or whether the appellant is constrained to await the outcome of the main proceedings before the decision can be attacked as one of the grounds of appeal - in which event the decision of the court *a quo* now

under discussion would not be a 'judgment or order' in the technical sense but a ruling.

> "The question which is generally asked ... is whether the particular decision is appealable. Usually what is being asked relates to not whether the decision is capable of being corrected by an appeal court, but rather to the appropriate time for doing so. In effect the question is whether the particular decision may be placed before a court of appeal in isolation, and before the proceedings have run their full course." (per Nugent J in *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 676 H.)

This problem often arises when one or other party seeks to appeal against some preliminary or interlocutory decision, which is made by a court before it has arrived at a final conclusion on the merits of the dispute between the parties. The approach of the court in such circumstances is a flexible approach. In the words of Harms AJA in *Zweni v The Minister of Law and Order* 1993 (1) SA 523 (A) at 531J - 532A:

"The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution."

What the court does is to have regard to all the relevant factors impacting on this issue. It asks whether the decision sought to be corrected would, if decided in a particular way, be decisive of the case as a whole or a substantial portion of the relief claimed, or whether such decision anticipates an issue to be determined in the main proceedings. The objective is to ascertain what course would best "bring about the just and expeditious decision of the major substantive dispute between the parties." (*Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 (A) at 868; *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 585E-I.)

What is the effect of this approach in the circumstances of the present case? What Beinash sought in the main proceedings were the damages which he

allegedly suffered in consequence of the defamatory letter which was written by the third defendant on 6 July 1994 to the Public Accountants and Auditors Board. No part of that relief is anticipated in any way by the order of the court *a quo* setting aside the impugned subpoena. No portion of the relief claimed in the main proceedings is disposed of by that order. Indeed Wixley is not even a party to the main proceedings. No relief at all is sought against Wixley in those proceedings. The impugned subpoena is extraneous to the parties in the main proceedings. The order to set aside that subpoena is only final and definitive between the parties to the proceedings before Heher J. The trial court in the main proceedings could not in any way reverse the decision of Heher J.

What is clear is that if the court *a quo* had refused to set aside the impugned subpoena, that order would clearly have been appealable at the instance of Wixley, even if such an appeal had been made before the commencement of the main proceedings. Were it otherwise Wixley would not have had any machinery to

cause a wrong judgment to be corrected or to reverse any order of costs which might have been made against him in the proceedings to set aside that subpoena.

The question which needs to be considered, however, is whether the result should be otherwise because it is not Wixley, but Beinash who seeks to appeal. The difference is that Beinash is a party in the main proceedings whereas Wixley is not. In my view this is not a difference which can assist the respondent in the present appeal. Wixley still remains a stranger in the main proceedings. He is not a party. Regardless of the fate of the main proceedings, the trial court in those proceedings would have had no jurisdiction to revive the subpoena which Heher J had set aside, whatever be its attitude in respect of any other further subpoena which might thereafter have been issued. Moreover the trial court would not be entitled to reverse the order which Heher J made directing Beinash to pay the costs of Wixley in the proceedings to set aside the impugned subpoena because Wixley would not be a party before him.

It accordingly follows that an appeal against the judgment of Heher J at the instance of Beinash was and is competent. It matters not that such an appeal was made before the commencement of the main proceedings.

The preliminary objection made on behalf of the respondent on this ground must, in these circumstances, fail.

Condonation

It is common cause between the parties that the appellant has failed timeously to lodge with the Registrar copies of the records of the proceedings in the court *a quo* within the time stipulated by rule 5(4) of the rules regulating the conduct of proceedings of this court.

In terms of rule 5(4)(c) the record of the proceedings in the court *a quo* was required to be lodged with the Registrar and delivered to the respondent on or before 16 November 1995. Before the expiry of that period and on 6 November

of that year, Soller wrote to Levenstein requesting an extension of the period allowed for the lodging of the record. It was stated that the appellant's attorneys would need "at least" until 12 December 1995 to lodge the record in terms of the rules because the firm Datavyf (which was described as the "official recorders" for the preparation of appeal court records) had been unable to complete the preparation of the record, partly due to the fact that some documentation necessary for this purpose had become lost in the office of the Registrar in the court *a quo*.

The record from Datavyf was in fact received on behalf of the appellant only on 18 January 1996. The firm of attorneys representing the respondent was served with copies of this record some three weeks later on 12 February 1996. Although it is not entirely clear on the record, copies were apparently lodged with the Registrar on the same date. The record was therefore lodged nearly three months after the last date contemplated by rule 5(4)(c). More than two months of this delay of three months was caused by the inability of Datavyf to complete the

preparation of the record. The remaining period of approximately three weeks which elapsed between the receipt of the record from Datavyf and its lodgement in terms of the rules, was explained on the basis that Soller had to peruse and consider the record before the completing the process of service and lodgement.

Although all this process might quite arguably have been completed somewhat earlier, by a greater measure of diligence and tenacity on the part of the appellant's representatives, the delay which in fact ensued has not prejudiced the respondent in any way, and is not so substantial as to justify a refusal of the application for condonation which was competent in terms of rule 13 of the Rules of this Court. (See *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362G; cf *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 120E-F.)

Application to strike out

In his founding affidavit to set aside this subpoena Wixley narrated the historical background which preceded the issue of the subpoena. Beinash sought to strike out paragraphs 13 to 34 of this narrative on the grounds that they were irrelevant.

Paragraphs 13 to 19 simply describe the relevant history of the dispute between the parties following upon the original subpoena which was served on Wixley. The contents of that subpoena are referred to and Wixley's anxiety not to be in contempt is expressed. He describes the letter which Levenstein wrote to Soller suggesting that compliance with the original subpoena be postponed until after Beinash had had the benefit of considering the discovery affidavit of the defendants which was being prepared. He goes on to describe the inflexible attitude adopted to these suggestions by Soller.

In paragraphs 20- 34 the founding affidavit describes the events which

followed upon the withdrawal of the original subpoena served on him and its substitution by the revised subpoena in substantially the same terms. He annexes a copy of the revised subpoena, and articulates various complaints about its contents by referring to its wide, generalised and unspecified ambit and how difficult it had been for him to react properly to its demands. He refers to further correspondence which was exchanged between the attorneys and more particularly to the letter written by Levenstein on 16 February 1995, in which several complaints are made about the contents of that subpoena, to which I have previously referred. This letter contained various complaints. Included in those complaints were that it called for documents which appeared to be quite irrelevant to the issues in the main case, and that it was so generalised as to make it impossible for Wixley to make a proper judgment as to what he should or should not produce. The letter asks Soller to provide a list specifying precisely what documents are required for the trial in the main proceedings, and repeats that the

discovery affidavits were being prepared which would disclose relevant documents. Wixley then goes on to describe the reaction of Soller to this letter: an insistence that the subpoena be complied with and that if it was not so complied with the law would have to take its course. Wixley then explains how seriously he took this threat and why he decided to launch the proceedings in the court *a quo* to set aside the revised subpoena.

Rule 6(15) of the Uniform Rules upon which Beinash relies to strike out these parts of the founding affidavit made by Wixley provides that:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

What is clear from this rule is that two requirements must be satisfied before an

application to strike out matter from any affidavit can succeed. First the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.

I have considerable difficulty in appreciating why the narration of the background which preceded the application to set aside the impugned subpoena should be characterised as irrelevant. On the contrary the substance of this narration appears to be quite relevant and indeed very useful in understanding the reason and need for, and the cogency and legitimacy of, the attack made by Wixley on the impugned subpoena. The averments contained in the relevant paragraphs of the founding affidavit are also clearly relevant in assessing whether or not Wixley was justified in his decision to launch the proceedings to set aside the impugned subpoena before the commencement of the trial. They appear to me to impact on whether or not the issue of the impugned subpoena, in all the

circumstances, constituted an abuse of the process of the court. They can not properly be said to fall within the ordinary meaning of what the Oxford Dictionary describes as irrelevant matter: allegations which do not apply to the matter in hand or which do not contribute one way or another to a decision of such matter (See *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285).

Mr Zar who appeared for the appellant contended, however, that even if the substance of this narration was relevant the particular allegation contained in the second sentence of paragraph 30 of the founding affidavit was nevertheless irrelevant and indeed scandalous or vexatious.

Paragraph 30 refers to a letter dated 13 February 1995, which had been written on behalf of Beinash to Wixley, in which it was said that if Wixley did not comply with the subpoena referred to in the letter, recourse would be had to the sanction of the law. Wixley says that he regarded this as a threat to imprison him which he took seriously. It is necessary to have regard to this background in order

to understand para 30. Para 30 reads as follows:

> "The respondent's threats of the implementation of sanctions against me were not lightly received. I have personal knowledge of baseless proceedings he has recently brought for the imprisonment of Reynolds and the chairman of Boland Bank Ltd in related litigation."

I am not persuaded that this averment can properly be said to be "scandalous, vexatious or irrelevant". It is part of the historical background and it appears to be relevant both to the reasons why Wixley brought an application to set aside the impugned subpoena before the date of the commencement of the trial, and on the issue as to whether or not the impugned subpoena constituted an abuse of the process of the court. It also impacts on the issue of costs in the court *a quo*.

In any event, even if it could properly be said that this or any other part of the averments made in the impugned affidavit were indeed "scandalous, vexatious

or irrelevant", it does not follow that the application to strike out this paragraph should succeed. I am not persuaded that Beinash suffered any prejudice if this allegation, or any other allegation contained in the impugned paragraphs of the founding affidavit, was not struck out. No such prejudice was relied upon in argument. The application was heard by a judge and not by any layperson. He was able to disabuse his mind of any vexatious, scandalous or irrelevant matter contained in the affidavit. There could be no prejudice to Beinash (*The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa* 1987 (1) SA 614 (SWA) at 621F-G; *Vaatz v Law Society of Namibia* 1991(3) SA 563 (NmHC) at 566B; *Steyn v Schabort an Andere NNO* 1979 (1) SA 694 (O)).

The merits of the attack on the order setting aside the subpoena

Counsel for the respondent on appeal contended that the issue and service of the impugned subpoena on Wixley, in the circumstances of the present case,

constituted an abuse of the process of the court and that the court *a quo* was therefore correct in making an order setting aside that subpoena.

There can be no doubt that every court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:

> "When ... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse."

What does constitute 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 of process takes place where the procedures permitted by the rules of the 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. (The unreported judgment of Marais J in the WLD *Wachsberger v Wachsberger* on 8 May 1990 in case no 8963/90 and the unreported judgment of Plewman J in the WLD on 6 October 1993 in the case of *Lincoln v Lappeman Diamond Cutting Works (Pty) Ltd* 17411/93.)

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 background which I have described previously, in dealing with the circumstances which led to the issue of the impugned subpoena and the appellant's persistence in seeking to enforce its terms, manifests three very crucial and conspicuous features. Each of these features impacts upon the question as to whether or not the issue of the impugned subpoena and the attempt made to enforce it constitutes an abuse of the process of the court.

The first is the generality and wide ambit of the demands contained in the subpoena. The language used is of the widest possible amplitude including within

its sweep every conceivable document of whatever kind, however remote or tenuous be its connection to any of the issues which require determination in the main proceedings. The possible permutations are multiplied with undisciplined abandon by a liberal and prolific recourse to the phrase "and/or". Its potential reach is arbitrarily expanded by the demand that the documentation must be produced whether it be "directly or indirectly" of any relevance to a large category of open-ended "matters". Not the slightest basis is suggested to support the belief that any of these documents exist at all or that, if they do, they can be of any assistance in the determination of any relevant issue which might impact on the relief sought in the main proceedings. No attempt is made to have regard to the specific requirement of rule 38(1) of the Uniform Rules which expressly requires that a subpoena *duces tecum* shall "specify" the document or thing which the witness concerned is required to produce. The demand in the impugned subpoena includes the production of documentation which is said to arise from or "in

The third feature which emerges is the timing of the impugned subpoena. Although Wixley is required to produce the documentation demanded not only in his personal capacity but also in his capacity as chairperson or managing partner of the first defendant and as chairperson or as managing director of the third defendant, Soller had previously made it clear that he was not prepared to wait until the discovery affidavit which was being prepared by these defendants was received. A perfectly reasonable suggestion on behalf of Wixley, that the enforcement of any subpoena should be deferred until the appellant's attorneys had studied the discovery affidavit and the documents discovered pursuant thereto, was immediately met by the threat that the sanctions prescribed by law would be put into operation unless there was compliance. Soller persisted in that attitude even in the face of a suggestion by Levenstein to the effect that Wixley would be "willing, formally or informally to co-operate" with Beinash in respect of any investigation which was required to be undertaken, and even in the face of a

a further suggestion that efforts would be made on behalf of the Wixley "to resolve the issue of subpoenas without the necessity to resort to litigation".

Regard being had to these circumstances, the question which arises on appeal is whether the issue and attempted enforcement of the impugned subpoena constituted a *bona fide* exercise of the rights of a litigant in terms of the rules of court to pursue and ventilate the truth in the dispute which had developed between the parties to the main proceedings and then pending in the court *a quo*. In my view it did not. The court *a quo* was justified in concluding that it constituted an abuse of the machinery provided by the rules of court to assist litigants in obtaining properly specified documentation relevant to issues properly identified in any pending proceedings.

A *bona fide* litigant seeking to invoke the machinery of rule 38(1) would have had regard to the need for specificity in the identification of documents required to be produced by a potential witness. He or she would not have

disregarded that need in the flagrant and oppressive way in which the appellant sought to do through the expansive and generalised reach of the terms of the impugned subpoena. Even more telling is the timing of that subpoena. A *bona fide* litigant would, in the circumstances of the present case, have regard to the possibility that any or all of the documents required for the purposes of advancing the case of such a litigant or attacking the case of the adversary might, in any event, be accessible through the discovery machinery of rule 35 (including the provision made in subsec. 3 for additional discovery). Such a litigant would not insist on the enforcement of the subpoena on pain of imprisonment if necessary, regardless of that possibility. A *bona fide* litigant would have seized the opportunity offered by Levenstein to examine the documentation produced in consequence of the discovery which was about to be made by the defendants in the main proceedings and would be anxious to pursue the further offer of co-operation and review of the adequacy of the discovery which Levenstein recorded.

Significantly, the appellant declined all of these opportunities. The inference which I am forced to draw is that the appellant's objective in invoking the machinery of rule 38(1) did not constitute a *bona fide* attempt to secure documentary evidence which he thought he needed for the preparation of his case. The impugned subpoena appears to me to be intended as a missile to oppress and harass the respondent.

Mr Zar contended that the discovery provisions of rule 35 and the subpoena provisions of rule 38 constitute independent and separate instruments, both of which a litigant is entitled to employ in the preparation of a case. I have no doubt that this is indeed so. The objective of rule 35 is to enable a litigant to discover documents in the possession or control of another party to the proceedings whereas the primary objective of rule 38 is to secure the production of documents from persons who are not necessarily parties in the main proceedings, such as Wixley. The distinction is perfectly sound, but the machinery contained in both

of these rules must be utilised in a *bona fide* manner and not for the purposes of pursuing ends extraneous to the real objectives sought to be attained through these rules. The existence of *bona fides* is the basic precondition upon which both of these rules are premised.

Lastly if Beinash was *bona fide* in seeking to secure the production of documents relevant to the main proceedings in the possession or control of Wixley, he would have sought to help Wixley to do so by identifying clearly the documents which he required. He would not have sought to leave the witness guessing by imposing on him the burden of establishing what might or might not fall within his legitimate needs. He would not have compelled Wixley to make complex judgments under the shadow and threat of criminal sanctions if he erred. Nor would he have subjected Wixley to a minute search of what must be a vast quantity of documents potentially targeted by the expansive and uncertain reach of the subpoena. The impugned subpoena reflects no discipline in its choice of

targets. The reach of its boundaries is unascertainable. It is oppressive and onerous in what it demands of Wixley. It suggests again an abuse of the rule for the purposes of obtaining some illegitimate tactical or other advantage ulterior to the purposes of the relevant rules.

Counsel for the appellant contended that even if the objections of Wixley to the impugned subpoena were well-founded, the proper time to raise these objections was when the witness came to court in the main proceedings, and not in application proceedings before the commencement of the trial. For this submission counsel relied on a line of cases originating in the case of *Cave v Johannes NO and Others* 1949 (1) SA 72 (T) (referred to thereafter in *R v Mkwayi* 1956 (3) SA 406 (E); *Cline and Another v Magistrate, Witbank and Another* 1985 (4) SA 605 (T); *Davis v Additional Magistrate, Johannesburg and Others* 1989 (4) SA 299 (W)).

Cave's case, *supra*, arose from a subpoena which had been issued requiring

a witness to produce certain documents at a preparatory examination which was being held in terms of the Criminal Procedure Act of 1917. This subpoena had been issued at the instance of one of the accused, but the Crown, as it was in those days, called the witness in support of its own case. During the proceedings counsel appearing for the witness made an application to the magistrate to rule that the subpoena which had been issued should be struck out. The magistrate refused the application, and ruled that those documents should be produced. The witness refused to produce some of the documents sought in the subpoena and an application was then made in the Transvaal Provincial Division to declare that the rulings of the magistrate were erroneous.

The court in *Cave*'s case was concerned with the proper interpretation of sec 67 of Act 31 of 1917 which provided, *inter alia*, that whenever any person appeared in court either in obedience to a subpoena or in consequence of certain other circumstances (not material to the present matter) he could be committed

to gaol, if he refused to answer any questions put to him or if he refused or failed to produce any document which he was required to produce. In terms of sec 67(3), however, no person was bound to produce at the preparatory examination any document or thing not specified or otherwise sufficiently described in the subpoena, unless he actually had it with him. The court rejected the submission that the terms of the subpoena were too vague and therefore not binding upon the witness, but it stated that even if the relevant parts of the subpoena were unduly wide that would not be a ground for setting aside or striking out a subpoena. It came to that conclusion on a proper interpretation of sections 64(1) and 67 of Act 31 of 1917, and at 81 Ramsbottom J expressed himself as follows:

> "In my opinion, the question whether a document has not been sufficiently described arises at the time the document is called for and not before. If a document which a witness has been subpoenaed to produce is called for and the witness does not have it in court, the question arises whether that document was sufficiently described. If it has not been sufficiently described then, in terms of sec. 67(3), he would not be ordered to produce

it unless he has it in his possession. If it has been sufficiently described and he has failed to produce it then he could be dealt with by the magistrate but it would be a question of fact in relation to the particular document; a question of fact which would have to be decided when it arose."

Mr Zar relied on this passage to support his submission that the proper time to set aside a subpoena issued to a witness is the time when the witness appears in the trial and not before.

There is, in my view, nothing in the judgment of *Cave* which supports such a general submission. In the first place, the court in the case of *Cave's* case was concerned only with the proper construction to be placed on the particular section of the statute in issue, dealing with criminal proceedings. Moreover, the attack on the subpoena in that case was that it was too vague, and not that its issue and service constituted an abuse of the process of the court.

I am unable to appreciate why a court cannot at any stage set aside a subpoena, if it is satisfied even before the commencement of the trial, that the

issue of the subpoena indeed constituted an abuse of the process of the court. Were it otherwise the witness who is subpoenaed would have to continue to endure the oppressive consequences of the demands made in the subpoena under the threat of criminal sanctions, until he or she was relieved of that obligation by the trial court in the future, however distant or uncertain it may be. Moreover rule 38(1) now obliges him to do so "as soon as possible".

The cases of *Mkwayi, Cline* and *Davis, supra*, which had regard to *Cave*'s case, also do not assist the appellant in the present appeal. None of these cases deal with a substantive application to set aside a subpoena on the grounds that its issue and enforcement constituted an abuse of the process of the court. Nor do they deal with the application of rule 38(1). The observations I have previously made about the right of the court, in appropriate circumstances, to set aside a subpoena *duces tecum* on the grounds that it constituted an abuse of process apply also with the same force to these cases.

I am therefore of the view that Wixley was entitled, in the circumstances of the present case, to ask the court to set aside the impugned subpoena on the ground that it constituted an abuse of the process of the court, notwithstanding the fact that that application was made before the commencement of the main proceedings in which the documents demanded by the subpoena were allegedly required by Beinash.

This conclusion makes it unnecessary to consider whether it would be competent for a court to set aside a subpoena *duces tecum* before the commencement of the main proceedings, where the ground of attack on the subpoena is not that it constitutes an abuse of process of the court but that it is vague and lacking in specificity. There is much to be said, however, for the view that the principle should equally be of application where the objection is founded on the vagueness of the subpoena. This view finds cogent support in the judgment of Plewman J in *Lincoln*'s case, *supra.* In that case the applicant sought to set

aside a subpoena *duces tecum* requiring him to produce certain documents which were said to be relevant in certain civil proceedings which had not yet commenced. There was an objection to the subpoena on the grounds that it was vague and "too wide". The court, following *In re Mayville Hose Ltd* [1939] 1 Ch 32, held that in appropriate circumstances a subpoena could on this ground be struck down even before the commencement of the main proceedings.

Costs

Mr Zar conceded that if the appeal failed, both the costs in the court *a quo* and the costs on appeal should be paid by the appellant, and that such costs should include the costs of two counsel. He submitted, however, that there was no justification for the special order made by the court *a quo* directing Beinash to pay the costs of Wixley on the scale of attorney and own client and that we should reverse that order.

The issue as to what order of costs would be appropriate in the circumstances of any particular case falls primarily within the discretion of the court of first instance. It is trite law that this court on appeal will not interfere with a costs order made by such a court, unless it had failed to exercise a proper and judicial discretion (*Kruger v Le Roux* 1987 (1) SA 866 (A) at 871G; *Cronje v Pelser* 1967 (2) SA 589 (A) at 592H-593C; *BST Kombuise (Edms) Bpk v Abrams* 1978 (4) SA 182 (T) at 185H-186A).

In my view there is nothing to suggest that Heher J did not exercise a proper and judicial discretion. There were substantial grounds which justified a special order of costs on the scale of attorney and own client. On the basis of the conclusion to which I have arrived Beinash abused the process of the court by causing the impugned subpoena to be issued. The terms of that subpoena were so wide and unspecific as to constitute a form of harassment and oppression for Wixley. Beinash had been alerted to the objection to the subpoena by the

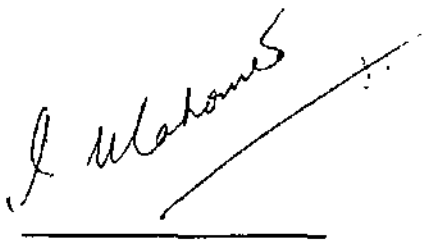
objections made on behalf of Wixley to the previous subpoenas, in substantially the same terms. Every reasonable attempt to resolve the dispute arising from the issue of the subpoenas was rebuffed by a rigid insistence that criminal sanctions would be sought against Wixley if they were not immediately complied with. That insistence was communicated in language which was aggressive and combative. No attempt whatever was made to discover whether the defendant's discovery documents, which were in the course of preparation, would or would not include the documents demanded in the subpoena and, if not, whether the matter could satisfactorily be resolved either by negotiations between the attorneys or by the machinery to compel better discovery in terms of rule 35(3).The cumulative effect of all these circumstances, in my view, clearly justified the special order of costs which was made by Heher J.

Order

In the result the following order is made:

1. The appeal is dismissed.

2. The appellant is ordered to pay the costs of the respondent including the costs of two counsel.



I Mahomed CJ:

Nienaber JA}

Schutz JA }

Zulman JA }

Plewman JA}