

REPORTABLE (40)

(1) NETONE CELLULAR (PRIVATE) LIMITED (2) REWARD
KANGAI
v
(1) ECONET WIRELESS (PRIVATE) LIMITED (2) ZIMBABWE
REVENUE AUTHORITY

**SUPREME COURT OF ZIMBABWE
GOWORA JA, HLATSHWAYO JA & MAVANGIRA JA
HARARE: MAY 26, 2017 & AUGUST 8, 2018**

T. Mpofu, for the appellants

T. Nyambirai, for the first respondent

A. Chinake, for the second respondent

GOWORA JA: This is an appeal against part of the judgment of the Fiscal Appeal Court dismissing an application to set aside a subpoena *duces tecum* issued against the appellants.

The first appellant and the first respondent are both mobile network providers operating in Zimbabwe. At the time of the institution of proceedings in the court *a quo* the second appellant was the Chief Executive Officer of the first appellant and was referred to as its Managing Director. The second respondent is the authority mandated with the collection of taxes and other dues on behalf of the fiscus.

The first respondent is involved in litigation with the second respondent before the Fiscal Appeal Court concerning the reach and ambit of certain classification and tariff rulings on imported base stations for the purpose of calculating import duty. During those proceedings, the first respondent alleged that it was being discriminated against as other companies which also imported base stations in connection with the provision of mobile networks were taxed differently to itself. A specific allegation was made that the first appellant in particular had been accorded a privileged treatment based on its ties with the government. In the dispute between them the first respondent wished to be treated in the same manner as the first appellant.

In order to prove the allegation, the first respondent made efforts to call as a witness on its behalf a former clearing agent who had been engaged by the first appellant to clear base station components imported by the latter. The first respondent claimed that the base stations in question were classified under the duty free tariff regime, and it required the witness to testify and show that the first respondent was being discriminated against in violation of its rights. On becoming aware of this intention the first appellant declined to consent to the agent testifying or producing any documents relating to the importation of the base stations.

The first respondent as a consequence applied in terms of s 6(1) and (2) of the Fiscal Appeal Court Act, (the Act), for the leave of the court to subpoena the second appellant to appear before the court and produce documents relating to the clearance of the first appellant's base stations. The second respondent's counsel was not opposed to the issuance of a subpoena in relation to the second appellant. Neither appellant was before the court as they were not parties to the dispute. No papers, apart from the subpoena itself, were served upon them in relation to the

subpoena. The court ruled that the second appellant should be subpoenaed to appear in court on the next day. The issued subpoena reads:

To: Reward Kangai

Of NetOne Cellular (Pvt) Ltd, 16th Floor Kopje Plaza Building, 1 Jason Moyo Avenue, Harare.

You are required and directed to attend before the Fiscal Appeal Court of Zimbabwe, at the Fiscal Appeal Court, Harare on the 10th day of February 2015 at the hour of 10 o'clock in the morning and so from day to day until the above case is tried, to give evidence on behalf of the Appellant, and also to bring with you and produce at the time and place aforesaid all the import documents, namely, bills of entry, packing lists, invoices and proof of payment of any duty relating to importation of base stations and base station component by Net One duly stamped by the Zimbabwe Revenue Authority at the ports of entry where these base stations or base station parts or components entered into the country for the whole period commencing October 1998 and ending 30 November 2013.

In answer to the subpoena, the second appellant appeared before the court and sought a postponement to seek proper legal advice. On 17 February 2015, the second appellant's legal practitioners addressed a letter to the first respondent's legal practitioners requesting a detailed report of the case before the court and the reasons why their client's testimony was required. The first respondent's legal practitioners responded by letter dated 26 February 2015 stating that their client was of the view it was being discriminated against as it believed that the first appellant's base stations were being imported duty free.

In a letter dated 4 March 2015, the second appellant, through his legal practitioners, objected to testifying. The reasons advanced in the letter are captured in the excerpt below:

- a) The issues to be adjudicated upon by the Honourable Court have no bearing on the evidence that you seek to be adduced from our client. There is clearly no need to call our client to testify and to prove or disprove any of the issues before the court.

- b) The evidence required from our client will not serve any material purpose to the case before the court because whether or not our client paid duty on the relevant components is not the determining factor on whether or not your client should or should not pay the duty.
- c) The evidence that you seek to adduce from our client, and in particular the documents our client must produce, are documents confidential to it and to its business. Your subpoena's effect is to call upon our client to disclose its private business making the disclosure to the public, and most objectionably to its competitor (your client).
- d) Our client has a constitutionally protected right to privacy as it is not a party to this pending case. The subpoena and the nature of the evidence required from our client, constitutes a gross invasion of this right. There is no basis upon which our client can justify the infringement of this right to the court.
- e) The subpoena also states that the Managing Director, Reward Kangai, is the one who should come to testify. The Managing Director is also required to bring several bulky documents dating back to 1998. All of the documents demanded are operational in nature hence their confidential status aforesaid and the Managing Director subpoenaed is not the custodian of these documents. As such what this subpoena demands is also legally untenable.
- f) It is clear from the afore-going that the subpoena served on our client is actually an abuse of court process and must therefore be set aside.

Notwithstanding the objections spelt out in the letter, the first respondent persisted with its demand that the second appellant appear in court or face contempt of court charges. As a

result the appellants applied to the Fiscal Appeal Court on 17 March 2015 for an order for the setting aside of the subpoena *duces tecum*.

The court *a quo* found that the requested documents were relevant to the determination of the real issues between the first and second respondents and that the first appellant's right to privacy was countervailed by the first respondent's right to access of information. Relating to the second appellant, the court held that he was a competent and compellable witness and could testify on the pertinent issues found in the subpoenaed documents. The court also held that the scope and reach of the documents was unavoidable given the nature of a base station. Ultimately, the court refused to set aside the subpoena and dismissed the application.

The appellants were aggrieved by the decision and appealed to this Court on the following grounds:

1. The court *a quo* erred in failing to consider that the evidence which first respondent wanted to force appellants to produce is in the possession of second respondent and first respondent could consequently enforce production of same from the party against whom it seeks substantive relief.
2. *A fortiori* the court *a quo* erred in not concluding that the taking out of the subpoena was consequently an exercise in mischief and was meant to be unduly oppressive to the appellants under circumstances where such invasion was contrary to the appellant's right to privacy.
3. Having come to the conclusion that what was at issue was a subpoena *duces tecum*, the court *a quo* erred in failing to consider that such a subpoena does not require the testimony

of a particular person and that the identification of second appellant on the subpoena was vexatious and unduly burdensome.

4. The court *a quo* erred in failing to come to the conclusion that the impugned subpoena was far too generalized and speculative being in essence a trawling exercise in search of unknown evidence.
5. Regard being had to the circumstances under which it was taken, the court *a quo* erred in not concluding that the subpoena *duces tecum* was a retaliatory measure and is on consideration of that circumstance an abuse of court process and is in breach of appellant's right to the protection of the law.

At the initial hearing of the appeal, the first respondent moved a preliminary point advanced in its heads of argument to the effect that the appeal was not properly before us on the grounds that the judgment in the court *a quo* was interlocutory. To that end it had been argued that the appellants should have sought and obtained leave of the High Court before noting the appeal.

In a judgment by PATEL JA (with which Hlatshwayo JA and I concurred), the preliminary point was dismissed with costs and the court ordered that the appeal proceed on the merits.

When the appeal hearing resumed on 10 July 2017 at the commencement of the hearing, the court intimated to the parties that the second appellant was allegedly discharged from the first appellant's employ and inquired from Miss *Mahere* who appeared for the first respondent whether that had a bearing on the present matter. Miss *Mahere* submitted that the second appellant

had been merely suspended and that as a consequence one could not predict the outcome of those proceedings. She also submitted that while the second appellant is not cited in his official capacity, the substance of the subpoena is that the Managing Director of the first appellant should testify.

Mr *Mpofu* for the first appellant submitted that the second appellant's employment was in fact terminated and made an undertaking to bring before the court the record of proceedings pending before the High Court relating to the termination. This was also confirmed by Mr *Chinake* who appeared for the second respondent. The court proposed to take an adjournment and give Miss *Mahere* time to take instructions concerning the new development and all parties were amenable to the proposal. After a brief adjournment, Miss *Mahere* confirmed that she had taken instructions and stated that her client insisted that the matter proceed because it would be prejudiced if crucial findings of the court *a quo* were set aside on that basis. The court allowed the matter to proceed and indicated that the point would be dealt with in this judgment.

After the hearing, this Court was furnished with the record of proceedings in the matter between the second appellant and the first appellant under case number HC 11003/16. The record contains a letter of termination of the second appellant's employment on notice dated 12 October 2016 and the proceedings seek to challenge the letter of termination. In *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) at 173A-B McNally JA said-

“It seems clear from the judgment in which the learned judge *a quo* granted summary judgment that he made reference to the papers in case number HC 3406/84. In so doing he was undoubtedly right. In general the court is always entitled to make reference to its own records and proceedings and to take note of their contents- Halsbury 4 ed Vol 17 paragraph 102; *Boyce NO v Bloem & Ors* 1960 (3) SA 855 (T); *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 ZLR 498 (HS) at 503-4 (this case was upset on appeal but not on this point). The position is *a fortiori* when the defence involves a reference to the previous proceedings, as this one does.”

In the event, this court is entitled to take note of the record of proceedings in HC 11003/16. The record confirms indeed that the second appellant had been discharged from the first appellant's employ. The subpoena sought his attendance at the disputed proceedings between the first respondent and his erstwhile employer in his capacity as its Managing Director. In view of the discharge it can no longer be possible for him to attend in such capacity. He would no longer have the right to access any documents belonging to the first appellant. Thus it is no longer possible for him to fulfil the terms of the impugned subpoena.

I turn now to the substance of the appeal.

The first appellant took issue with the fact that the subpoena specifies an individual to come and testify. It submitted that the court *a quo* failed to appreciate that the subpoena issued in this matter is one *duces tecum* which does not require the attendance of a particular person on the premise that a subpoena *duces tecum* which compels the production of documents does not in the same vein require the giving of oral testimony. For this submission, the appellant relied on the case of *Poli v Minister of Finance and Economic Development & Anor* 1987 (2) ZLR 302 (SC) in which DUMBUTSHENA CJ quoted *Fisher v United States* (1976) 425 US 391;48 Led 2d 39 where it was stated:

“A subpoena that demands production of documents ‘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 my view this authority is support for the principle that a subpoena *duces tecum* can only demand the production of documents as opposed to compelling a witness give oral testimony.

This fortifies the position taken by the appellants that a subpoena *duces tecum* could not demand the production of documents as well as compelling the attendance of a witness to give oral testimony on the documents being sought to be produced.

I must agree.

The court *a quo* made a finding that the second appellant was a competent and compellable witness and could testify on the pertinent issues found in the subpoenaed documents. Whilst the appellants have not challenged this finding, which in any event they could not, such finding does not, however, sanction the summoning of the second appellant to give oral testimony on the basis of a subpoena *duces tecum*.

The impugned subpoena was issued by the court *a quo* following an application by the first respondent in terms of s 6 of the Act, which provides as follows:

6 Summoning and privileges of witnesses

- (1) The Court shall have power to summon witnesses, to call for the production of and grant inspection of books and documents and to examine witnesses on oath.
- (2) A subpoena for the attendance of witnesses or the production of books or documents shall be signed by the registrar of the Court and served in the same manner as if it were a subpoena for the attendance of a witness at a civil trial in a magistrates court.
- (3) Any person subpoenaed to give evidence or to produce any book or document or giving evidence before the Court shall be entitled to the same privileges and immunities as if he were subpoenaed to attend or were giving evidence at a trial in the High Court.

Although in *Poli v Minister of Finance and Economic Development (supra)* the learned Chief Justice sought reliance from an American authority on this issue, it is a principle of our law

of evidence which seems to have been settled in *Waterhouse v Shields* 1924 CPD 115, wherein GARDINER J made the following remarks:

“As far as I have been able to ascertain there is no such general provision in our statutes with regard to civil cases, but seeing that in criminal cases and in many instances in civil cases, the law of England in regard to evidence, where there is nothing to the contrary in our law, is to be followed, it seems to me as a general rule we should follow the law of evidence in England. Our system of procedure and our practice is based in the main upon the English system and not upon the system which used to prevail in the Courts of Holland. Now, in England if a witness is subpoenaed, *duces tecum*, and is simply called to produce, without giving evidence or identifying the documents he need not be sworn.”

This position of the principle underlying the subpoena *duces tecum* was confirmed in *Bladen and Another v Weston and Another* 1967(4) SA 4129, at 431D-E, where CORBETT J, (as he then was) had occasion to remark:

“It would appear from authorities quoted by counsel for the applicants that the procedure whereby a witness, who is subpoenaed *duces tecum* to produce documents, is not initially required to go into the witness-box and take an oath prior to producing those documents to the Court, is basically one of convenience. It is also probably dictated partially by the undesirability of such a witness being exposed to a lengthy cross-examination on the case generally.”

In my view, these authorities fortify the position taken by the appellants that a subpoena *duces tecum* could not demand the production of documents as well as compelling the attendance of a witness to give oral testimony on the documents being sought to be produced. In their book *Principles of Evidence* 3ed, the learned authors Schwikkard and Van Der Merwe at p 363 state that a person who attends court in obedience to a subpoena *duces tecum* is not necessarily a witness and consequently need not take an oath unless he is required to prove the document, that is where he is required to go onto the witness stand and hand in a document.

In addition, it seems to me that a reading of s 6 of the Act would further confirm that the submission by the appellants on the nature and intent behind a subpoena *duces tecum* as being one for the production of documents and not the giving of oral testimony is in fact correct. Certainly, from a perusal of the provision there does not appear to be a requirement that the production of documents by a witness must be accompanied by oral evidence in proof of the same. This construction of the provision is keeping with the views expressed by DUMBUTSHENA CJ in *Poli v Minister of Finance and Economic Development & Anor (supra)*.

In my view, within our jurisdiction the above authority is support for the principle that a subpoena *duces tecum* can only demand the production of documents as opposed to compelling a witness give oral testimony.

It is legally incompetent for a subpoena *duces tecum* to compel the giving of oral testimony on the premise that by its nature, it demands the production of documents. A subpoena *duces tecum* differs from a standard subpoena, also known as a “subpoena *ad testificandum*,” because the subpoena *duces tecum* does not require the person named in it to give oral testimony. Instead, the subpoena *duces tecum* only orders the person to produce the items stated in the document. On this basis alone, the court *a quo* should have found that the subpoena as framed by the first respondent could not stand and consequently had to be set aside.

In my view, this ground on its own is capable of disposing of the appeal. However, the other issues raised sufficiently pertinent legal issues calling for their determination.

I will now proceed to deal with the remainder of the issues raised by the parties which are:-

1. Whether or not the subpoena *duces tecum* is an abuse of court process
2. Whether or not the subpoena *duces tecum* violates the appellant's right to privacy

1. Whether or not the subpoena *duces tecum* is an abuse of court process

It is submitted by the appellants that the subpoena was an abuse of court process. The appellants submit that the subpoena itself has nothing to do with the pursuit of the truth and that it is oppressive, thus constituting an abuse of court process. What constitutes abuse of process was discussed in *Beinash v Wixley* 1997 (3) SA 721 (SCA) by MAHOMMED CJ at 734E-735A as follows:

“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 Anor* 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.’”

Whether a proceeding or certain conduct related thereto constitutes an abuse of the process of the court is a matter which can only be determined by the circumstances of each case. Consequently, there can be no all-encompassing definition of the concept of abuse of processes. However, it can be said in general terms 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)

It is trite that any document may be made the subject of a subpoena *duces tecum* if it is or may be relevant to the conduct of the litigation by the party seeking its production. That said, 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 Lapperman Diamond Cutting Works (Pty) Ltd* 17411/93)

What can be gleaned from the above remarks is that a court should not permit a subpoena *duces tecum* to be used to pursue a motive other than the securing of evidence by the party requiring it which is important to advance its case. In other words, the party seeking to issue a subpoena *duces tecum* should show that it has a legitimate purpose.

In the court *a quo* the first respondent was able to show that the classification by the second respondent of parts of base stations imported by the first appellant is relevant to the classification of the same equipment imported by other importers. This is important in the determination of whether or not the second respondent is discriminating against the first respondent which is the substance of pending proceedings before the Fiscal Appeal Court.

However, given the background to the dispute between the two parties, the scope of the subpoena is questionable. The first appellant is required, in terms of the subpoena, to produce to the court and to the first respondent documents dating back to 1998 in a matter that involves importation of base station components during the period extending from 2009 to 2013. The

appellants contend that this is clearly untenable in light of the voluminous nature of the documents which would place an overbearing burden on the first appellant.

The court *a quo* made the following observation:

“The scope and reach of the documents is unavoidable given the nature of a base station. It appears that the nature of the base stations require the 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 the futile pejorative sense.”

The above dictum shows that the learned judge *a quo* appreciated the burdensome nature of the subpoena issued against the second appellant. In my view, once the court *a quo* found that the extent of the subpoena was burdensome, it ought to have related to the period over which documents were being sought to be produced. It was necessary, in view of the inclusion of a period in the subpoena predating the source of the dispute, for the court to have decided on the issue of the relevance for the inclusion of that period in the exercise. After all discovery in litigation is a process meant for securing evidence in the pursuit of truth in the particular dispute. The relevance of documents predating the issues before the court *a quo* should have exercised its mind in deciding whether to set aside the subpoena or to uphold it.

The learned Judge however failed to consider that not all required documents were necessary to advance the first respondent’s case. The fact that the documents were named does not clothe them with the particularity required for the issue of a subpoena *duces tecum* when one considers that they span over fifteen years. What emerges is that the first respondent is not sure which documents will specifically show that it is being discriminated against and hopes to find its

answer in the requested documents. This is the kind of disclosure that courts frown upon. In *Arab Monetary Fund v Hashim and Others* [1992] 2 All ER 911 (No5), HOFFMAN J had occasion to comment on the oppressive effect of a subpoena *duces tecum* lacking specificity. This is what he had to say:¹

“What he did say, however, was that the terms of Peter Gibson J’s order were so general in identifying the categories of documents to be disclosed that they were an oppressive use of the Bankers Trust procedure against a third party. They required the solicitors to go through their documents and make the sort of selection which would normally be required of a party to the action by way of discovery. It is of course well established that a third party liable only to be called as a witness or under subpoena *duces tecum* cannot be required to produce documents by relevance to issues but must be given more specific detail of what documents are required ... the specificity of the order can in my view be sufficiently dealt with by making amendments to the schedule.”

A subpoena *duces tecum* cannot be used indiscriminately, as though one was on a "fishing expedition." Only specific documents relevant to the case can be requested. General, sweeping requests are improper and this is one such request. As the Second District Court of Appeal in America said in *Walter V. Page*, 638 So.2d 1030 (Fla. 2d DCA 1994):

“We agree with the appellant that the subpoena *duces tecum* was too broad. The rule authorizing a subpoena *duces tecum* requires some degree of specificity, and the documents or papers sought should be designated with sufficient particularity to suggest their existence and materiality. *Palmer v. Servis*, 393 So.2d 653 (Fla. 5th DCA 1981); Fla.R.Civ.P. 1.350(a). The subpoena in the instant case was too broad in seeking virtually all of appellant's personal financial documents. The subpoena *duces tecum* is not the equivalent of a search warrant, and should not be used as a fishing expedition to require a witness to produce broad categories of documents which the party can search to find what may be wanted.”

These remarks are apposite. A court should be wary of permitting litigants to use the machinery of a subpoena *duces tecum* to request large amounts of information in the hopes that

¹ At 916g-h

some of it may prove useful. An order for the production of documents under such subpoena should not be given unless the court is of the opinion that the documents are necessary for disposing fairly of the cause or matter. The impugned subpoena is a dragnet sweeping every fish in its path to see if a particular species turns up in the net. The subpoena does not pass the test of bona fides. Even though a litigant is entitled to seek the production of documentation that he alleges would be vital in the prosecution of his case, the request for such production must relate to the dispute which is being litigated. There can be no justification for a subpoena that defies the rules for relevance in court proceedings.

The contention by the appellants that the subpoena is an exercise in mischief would appear to be well founded. It is an established principle that the purpose of a subpoena *duces tecum* is that of obtaining evidence and is not meant for purposes of obtaining mere discovery which might lead to something else. The appellants are being asked to discharge a duty which should rightfully in this case fall upon the second respondent.

The view I take is that *in casu*, the subpoena does not constitute a genuine exercise by a litigant to prosecute a dispute. It was not shown in the court below that the subpoena, wide as it is, was necessary for disposing fairly of the cause or matter. It cannot be allowed to stand in the circumstances because it is clearly an abuse of process and the court has inherent power to prevent this abuse. – see *Makaruse v Hide and Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S).

The court *a quo* therefore erred in failing to find that the subpoena was an abuse of process.

2 Whether or not the subpoena *duces tecum* violates the appellants' right to privacy

The appellants submit that upholding the *subpoena duces tecum* will undermine the first appellant's right to privacy and in the process would constitute a contravention of both the Constitution and common law principles relating to privacy. Section 57 of the Constitution of Zimbabwe, 2013 provides that every person has a right to privacy. The right to privacy was explained in *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC) as follows:

“The right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life.”

Simply put, every person has a right not to be subjected to scrutiny of his or her personal life or business. The right is also accorded to juristic persons. However, while this right is protected, it is subject to limitations. Section 86 (2) of the Constitution provides for the limitations of rights and freedoms as follows:

- “(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms 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.”

This provision is clear that derogation from a fundamental right is permissible if two conditions are fulfilled. These are firstly, that it should be prescribed in terms of a law of general application and secondly, that such derogation is fair, reasonable and justifiable in a democratic society. The limitation in *casu* is prescribed in terms of s 6 (1) and (2) of the Fiscal Appeal Court Act [*Chapter 23:05*] which gives the court power to summon witnesses, to call for the production of and grant inspection of books and documents and to examine witnesses on oath therefore that requirement of it being prescribed by a law of general application is satisfied.

What is reasonably justifiable in a democratic society is a concept which cannot be defined with precision. As this Court said in *Re Munhumeso & Ors* 1994 (1) ZLR 49 (S), at p 64B:-

“What is reasonably justifiable in a democratic society is an elusive concept - one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily invades the enjoyment of a constitutionally guaranteed right. See, generally, *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C, 1990 (2) SA 260 (ZS) at 265B-266D.”

The import of these remarks is that the limitation imposed on a right should not arbitrarily infringe upon the right guaranteed in the Constitution. It is the appellant’s case that the subpoena issued in compliance with the law arbitrarily infringes upon its right to privacy. The court *a quo* as highlighted, made a finding that the appellants’ right to privacy is countervailed by other rights such as the first respondent’s right of access to information. This position is supported in *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 67 where the following pronouncement was made:

“The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another

citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”

This constitutes confirmation that the right to privacy can be limited by other rights that accrue to other citizens and that as an individual engages with the community in business or other social interactions, the scope of such right becomes limited. Whilst this principle is accepted, the appellants contend that the subpoena issued by the first respondent was too wide in its scope such that it cannot be accepted as fair and justifiable in a democratic society. It allows the first respondent to have access to its competitor’s information which information has not been shown to be necessary for the advancement of its cause. In fact, no attempt has been made to justify its wide ambit. The only issue upon which the first respondent relies is that the second appellant is its competitor in the provision of cellular services and it wishes to find evidence that it was being treated differently by the second respondent. It has not justified the intrusion in respect of the period from 1998 to 2009.

The lack of particularity and specificity of the subpoena opens avenues for an unwarranted invasion of the first appellant’s privacy. The first respondent in its heads of argument cites the English case of *Home Office v Marman* [1982] 1 All ER 532, 540 where the following view was expressed:

“Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant’s affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and

public interest in the maintenance of confidentiality. But the process should not be allowed to place on a litigant any harsh or more oppressive burden than is strictly required for the purpose of securing that justice is done. In so far as that must necessarily involve a certain degree of publicity being given to private documents, the result has to be accepted as part of the price of achieving justice.”

This case buttresses the point that invasion of privacy when permissible should be rational and should not unnecessarily place a harsh and oppressive burden on the party whose right is infringed. When the first appellant’s right to privacy is weighed against the other rights that accrue to the first respondent, it is clear, in the circumstances of this case, that the first appellant’s right to privacy must prevail.

Unless justification has been clearly established for such, no person or litigant should have their private information indiscriminately summoned to court even for the purpose of protecting other rights.

In the event, the subpoena should not have been upheld, primarily on three grounds. Firstly, that it was wrongly taken by requesting second appellant to personally attend at court and testify orally on the documents. Secondly, the subpoena was clearly a fishing exercise and lastly that it constituted an unwarranted invasion of first appellant’s privacy on the part of the first respondent. Thus, the court *a quo* should have set aside the subpoena *duces tecum*.

On the question of costs, the ordinary rule is that costs follow the outcome. Given the abuse of the court’s process which has been highlighted above, it is proper that an order of costs on the higher scale be imposed to mark the court’s displeasure with such abuse of its processes.

In the result the following order will issue:

1. The instant appeal succeeds.
2. The judgment of the court *a quo* is set aside and in its place is substituted the following:
“The application is granted in terms of the draft order and accordingly:
 - i. The subpoena *duces tecum* issued in this matter by the registrar of the Fiscal Court on the 9th of February 2015 be and is hereby set aside.
 - ii. The first respondent shall bear the costs of suit.”
3. The costs of this appeal shall be borne by the first respondent on the scale of legal practitioner and own client.

HLATSHWAYO JA:

I agree

MAVANGIRA JA:

I agree

Mhishi Legal Practice, appellants’ legal practitioners

Mtewa & Nyambirai, 1st respondent’s legal practitioners

Kantor & Immerman, 2nd respondent’s legal practitioners