REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

15 November 2021. .....

DATE SIGNATURE

In the matter between: **Case No: 2020/13997**

VALUE LOGISTICS LIMITED **Applicant**

and

NADINE VICKY BRITZ **First Respondent**

VANTAGE DIGITAL (PTY) LIMITED **Second Respondent**

FRANK MARTIN VRANY **Third Respondent**

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time of delivery is deemed to be 15

November 2021 at 10h00.

JUDGMENT

GOTZ AJ

INTRODUCTION

[1] This is an application to enforce a subpoena *duces tecum*. The First and Second Respondents have also filed a counter-application to set aside that subpoena.

[2] The Applicant, Value Logistics Limited ("**Value Logistics**"), is the plaintiff in an action for damages brought against one of its ex-employees, Frank Martin Vrany, the Third Respondent ("**Mr Vrany**"), as a result of an alleged breach of a restraint of trade by him.

[3] Mr Vrany was employed by Value Logistics as a National Branding Manager with effect from 7 March 2011 until 31 August 2017. His employment agreement, which he signed on 21 February 2011, contains several covenants in restraint of trade. In particular, it records that:

> "15.2 During your employment and for a period of 2 years after the termination of your employment for any reason:
>
> 15.2.1 you will not knowingly be directly or indirectly employed, have an interest in or be engaged within a radius of 75 kilometres of any of the Company's premises with any company, firm or business which competes with the business of the Company; anywhere in South Africa;
>
> 15.2.2 you will not solicit or tout for any clients of the Company or suppliers or any other connections of the Company, nor shall you seek to solicit, or entice away any of the staff for the time being of the Company or any of the Company's clients."

[4] In the course of Mr Vrany's employment at Value Logistics he established a large format digital printing works for the purposes of producing large format prints.

[5] Mr Vrany's resignation from Value Logistics' took effect on 31 August 2017. Shortly afterwards he joined Vantage Digital (Pty) Limited, the Second Respondent ("**Vantage Digital**"). Vantage Digital was a new company that had been registered on 30 August 2017, the day before his resignation. It is common cause that its sole business is large format digital printing. Mr Vrany was appointed as its "Operations Manager".

[6] It is also common cause that the First Respondent, Nadine Vicky Britz ("**Ms Britz**"), is the sole shareholder and sole director of Vantage Digital and that she is married to Mr Vrany.

[7] Mr Vrany has not opposed the application. Thus, simply for convenience, I will refer to Ms Britz and Vantage Digital, when doing so collectively, as the Respondents.

[8] In essence, Value Logistics' claim against Mr Vrany is that he breached both clauses 15.2.1 and 15.2.2 of his employment agreement. Paragraph 6 of the particulars of claim describes the alleged breach in the following terms:

> "6.1 He commenced, has an interest in and carries on a new business venture through Vantage Digital (Pty) Limited within a radius of 75kms of Plaintiff's principal place of business in Johannesburg which competes with the business of Plaintiff in South Africa.
>
> 6.2 He solicited and touted for clients of Plaintiff and continues to do so."

THE SUBPOENA

[9] The subpoena I am being asked to enforce was issued by the Registrar of this Court on 15 May 2019.

[10] In summary, it calls upon the addressee to produce various specified documents (including correspondence, invoices, quotations and proofs of payment) exchanged between Vantage Digital and each of eight corporate

entities being:

[10.1] Branding Segments CC;

[10.2] Bandit Signs CC;

[10.3] Pinpoint Group (Pty) Limited;

[10.4] SB Outdoor (Pty) Limited,

[10.5] Hit the Ground Running (Pty) Limited;

[10.6] Relativ Media (Pty) Limited;

[10.7] Absolute Outdoor Advertising CC; and

[10.8] Red Dot Billboard Flighting CC.

[11] It is alleged that these entities were customers of Value Logistics when Mr Vrany's resignation took effect on 31 August 2017. They are presently customers of Vantage Digital, a fact which is not disputed by Ms Britz.[1]

[1] See, for example, her Answering Affidavit, para 52.1 (Caselines, 009-26).

Value Logistics alleges in its founding affidavit in this application, albeit not in its particulars of claim, that these customers "*diverted their business away from*" Value Logistics to Vantage Digital.

[12] In relation to each of these eight customers, the following documents are sought:

[12.1] Any and all written correspondence exchanged between Vantage Digital and the customer between 1 June 2017 and 15 May 2019;

[12.2] Any and all invoices and quotations sent by Frank Vrany / Vantage Digital to the customer between 1 June 2017 and 15 May 2019;[2] and

[12.3] Any and all proofs of payments (deposit slips or electronic proof of payments) for payments received by Vantage Digital from the customer between 1 June 2017 and 15 May 2019.

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[2] For the first customer, Branding Segments CC, the formulation is slightly different from the rest. It reads "*Any and all invoices and quotations C received/sent by Frank Vrany / VANTAGE DIGITAL (PTY) LTD from/to* Branding Segments CC" (emphasis added). While the Respondents do not make anything of the difference, this description, with its inclusion of a reference to invoices and quotation *received by* Frank Vrany / Vantage Digital *from* Branding Segments CC, appears to me to be too wide.

THE RELIEF IN THE PRIMARY APPLICATION

[13] A subpoena *duces tecum* is a mechanism to procure evidence in pending proceedings. Section 35(1) of the Superior Courts Act, 10 of 2013 ("**the Act**"), makes provision for it in the following terms:

> "35 **Manner of securing attendance of witnesses or production of any document or thing in proceedings and penalties for failure**
>
> (1) A party to proceedings before any Superior Court in which the attendance of witnesses or the production of any document or thing is required, may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court."

[14] The relevant rule of the High Court is rule 38, which provides, *inter alia*:

> "(1)*(a)* ...
>
> (iii) If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as a "document") or thing which the party requiring the attendance of such witness desires to be produced in evidence, the subpoena shall specify such document or thing and require such witness to produce it to the court at the trial.
>
> *(b)*(i) The process for requiring the production of a document referred to in subrule (1)*(a)*(iii) shall be by means of a subpoena in a form substantially similar to Form 16A in the First Schedule."

[15] Value Logistics initially sought the following relief:

> "By virtue of First and Second Respondents failure to comply with the subpoena issued on 16 May 2019:
>
> l. l That a warrant be issued in accordance with Uniform Rule 30(2) for the arrest of First Respondent and that she be brought before the Honourable Court at a time and place stated in the warrant
>
> 1.2 That in accordance with Uniform Rule 30(4) First and Second Respondents be sentenced to a fine or that First Respondent be sentenced to imprisonment for a period not exceeding three months.
>
> l .3 That First and Second Respondents be directed to comply with the subpoena within five days of date of Order of the Honourable Court."

[16] A costs order against the Respondents, on the attorney and client scale, is also sought.

[17] It ought immediately to be noted that the references to rules 30(2) and (4) of the High Court Rules were incorrect. Neither rule 30(2), nor rule 30(4), invoked in prayers 1.2 and 1.3 respectively, permit the grant of the orders that are contemplated. Value Logistics conceded as much in its heads of argument.

[18] The relevant empowering provision authorising a Court to issue a warrant directing an arrest for failure to comply with a subpoena is section 35(2) of the Act. Section 35(4) of the Act creates a criminal offence for failure

to obey a subpoena without reasonable excuse. It says that: "*(4) Any person subpoenaed to attend any proceedings as a witness or to produce any document or thing who fails without reasonable excuse to obey such subpoena, is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months.*"

[19] At the hearing of this application, I raised a number of questions relating to the appropriateness of prayers 1.1 and 1.2.

[20] In short, my principal concern related to whether it was competent for me, sitting as a judge in the opposed motion court, to convict the Respondents of a criminal offence, this plainly being a necessary precursor to the imposition of the penalties sought in prayer 1.2. A failure to obey a subpoena to appear in court or to produce documents is, at common law, contempt of court committed *ex facie curiae*.[3] But Value Logistics did not ask this Court to find that the First or Second Respondents are in contempt. It sought to invoke 35(4) of the Act which has created a new criminal offence.[4] I was inclined to the view that whether Ms Britz or Vantage Digital have committed such an offence, and I make no finding on whether

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3 *R v Cronje* 1955 (3) SA 319 (SWA); *R v Dhlamini* 1958 (4) SA 211 (N).

4 Note that section 30(4) of the repealed Supreme Court Act 59 of 1959 provided, quite differently, that "*The court may in a summary manner enquiry into such person's invasion of the service of the subpoena or failure to obey the subpoena or to remain in attendance, and may, unless it is proved that such person as a reasonable excuse for such evasion or failure, sentence him to a fine or to imprisonment for a period not exceeding three months*".

they may have, is a matter to be determined by a criminal court, following a criminal trial, with all the Constitutional protections afforded to accused person in such proceedings.

[21] I was also of the *prima facie* view that when there has been a failure to comply with a subpoena *duces tecum*, it may well be appropriate for an applicant to apply for an order enforcing such a subpoena as a precursor to invoking section 35(2) of the Act.[5] At the very least, the issue of the warrant of arrest contemplated in that section might in appropriate circumstances be made conditional upon a failure to comply with an order of enforcement. The Constitutional Court has described a subpoena as "*a court order commanding the presence of a witness under a penalty of fine for failure*".[6] That may be so, but it must also be borne in mind that a subpoena *duces tecum* is an order issued by the Registrar without notice,

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[5] That section says: "(2) Whenever any person subpoenaed to attend any proceedings as a witness or to produce any document or thing —

(a) fails without reasonable excuse to obey the subpoena and it appears from the return of the person who served such subpoena, or from evidence given under oath, that —

(i) the subpoena was served upon the person to whom it is directed and that his or her reasonable expenses calculated in accordance with the tariff framed under section 37(1) have been paid or offered to him or her; or

(ii) he or she is evading service; or

(b) without leave of the court fails to remain in attendance,

the court concerned may issue a warrant directing that he or she be arrested and brought before the court at a time and place stated in the warrant or as soon thereafter as possible."

[6] *Minister of Police v Premier of the Western Cape* (CCT 13/13) [2013] ZACC 33 (1 October 2013); 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC) at footnote 1

without hearing the recipient and without any prior judicial scrutiny. The Registrar, when issuing such a subpoena, is not required to consider many of the questions that ordinarily arise in relation to whether a person, who is necessarily not a party to the litigation, ought to comply with it. These questions may include whether the documents sought to be produced for inspection are relevant to the action at all, or whether the person subpoenaed may have any other "*reasonable excuse to obey the subpoena*". Plainly, a Court cannot be expected to "*issue a warrant directing that he or she be arrested and brought before the court*" before such issues are considered. Indeed, on a proper interpretation of section 35(2)(a) of the Act,[7] that a person has no "reasonable excuse" for failing to obey a subpoena *duces tecum* appears to me to be a jurisdictional fact that ought to be established before a warrant is issued. If it is not, a number of a subpoenaed person's Constitutional rights may be infringed. Further, the interests of the administration of justice might well be better served if a subpoenaed person were given an opportunity to comply with an order of enforcement duly given by this court before being arrested, detained and brought before it.

[22] It is not necessary for me to finally decide these issues. Mr Kaplan, who appeared for Value Logistics, following an admittedly enlightening

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[7] Even when read with section 36 of the Act. Section 36(1) and (2) deal with the manner in which a witness may be dealt with if he or she refuses to give evidence or produce documents pursuant to a subpoena. They operate only after a warrant of arrest has already been issued.

debate, ultimately abandoned the first two prayers of the notice of motion. He persisted only with the request, in terms of prayers 1.3, that the Respondents be directed to comply with the subpoena (and that they pay the costs of the application).

[23] The decision to abandon prayers 1.1 and 1.2 also made it unnecessary to decide whether the incorrect reference to, and reliance upon, rules 30(2) and (4) of the High Court Rules, was fatal to the application.[8]

THE RESPONDENTS' OBJECTIONS

[24] The Respondents continue to oppose the residue of the relief sought by Value Logistics. They do so on a number of grounds.

[25] First, Ms Britz and Vantage Digital take a point that the subpoena *duces tecum* has never been served on Vantage Digital. The parties appear to be in agreement that Vantage Digital was the intended recipient or addressee of the subpoena. Indeed, Mr Bishop, who appeared for the Respondents, said in his heads of argument that: "*It is common cause that the subpoena, issued by the Registrar on 15 May 2019, is addressed to Vantage for the*

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[8] It is more probable than not that Value Logistics had *sections* 30(2) and 30(4) of the repealed Supreme Court Act 59 of 1959 in mind, rather than some provision of the Uniform Rules. These sections clearly catered for the relief framed in prayers 1.1 and 1.2. It would not have been competent to found prayers for relief on the provisions of a repealed statute.

attention of Ms Britz". It is also common cause, however, that the Sherriff's return of service records that the subpoena was served upon Ms Britz on 16 May 2019 personally, in terms of rule 4(1)(a)(i),[9] rather than in terms of rule 4(1)(a)(v)[10]. In these circumstances, the Respondents argue that Vantage Digital cannot be found to be wanting in its compliance with a subpoena directed at it, but not served upon it and, conversely, Ms Britz cannot be found to be wanting in her compliance with a subpoena that was directed at Vantage Digital but which the Sheriff served upon her in her personal capacity.

[26] Second, Ms Britz and Vantage Digital ask me to find that Value Logistics has no *prima facie* underlying cause of action against Mr Vrany, or at least that it has conceded in the affidavits filed in this application that it has no case, and thus that the subpoena should not be enforced.

[27] Third, the Respondents argue that the subpoenaed documents are not

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9 This rule provides that service on a person shall be effected: "*by delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability*".

10 This rule governs service of process a corporation or company, and says that it shall be effected "… *by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law*".

relevant to any issue in the action.

[28] Fourth, Ms Britz and Vantage Digital rely on the fact that the documents contain information that is confidential to Vantage Digital and each of its customers. This information, they allege, could, if it fell into the hands of Value Logistics, be used by it to compete unfairly with Value Logistics. On this basis, the Respondents contend that they are entitled to decline to provide the documents.

[29] Fifth, the Respondents take the point that the subpoena is overbroad on the basis that it asks for the production of documents from 1 June 2017, in circumstances where Vantage Digital was only registered on 30 August 2017.

[30] In my view, the primary question before me is whether any of these grounds of opposition constitutes a "*reasonable excuse to obey the subpoena*". I deal with each of them in turn below.

THE FIRST GROUND – NO SERVICE ON VANTAGE DIGITAL

[31] The subpoena *duces tecum* issued by the Registrar of this Court on 15 May 2019 instructed the Sheriff to inform:

> "NADINE VICKI BRITZ
>
> VANTAGE DIGITAL (PTY) LTD
>
> Unit 3 Martin Crescent
>
> Greenhill Industrial Estate
>
> Gauteng"

that she is required to e-mail a copy of the documentation referred to in Annexure "A" attached to the subpoena by no later than 27 May 2019 to Plaintiff's attorney of record, alternatively, at her election to deliver the documentation to the Registrar of the High Court by no later than 27 May 2019.

[32] The subpoena was served on 16 May 2019. The return of service, signed by the Deputy Sheriff of Germiston North on 20 May 2019, certifies:

> "That on 16 May 2019 at 15h00 at C/O VANTAGE DIGITAL (PTY) LTD UNIT 3 MARTIN CRESCENT, GREENHILL INDUSTRIAL ESTATE, GERMISTON NORTH being the Witness's place of employment a copy of the Subpoena Duces Tecum was served upon NAD1NE VlCKY BRITZ personally after the original document was displayed and the nature and contents thereof explained to her. Rule 4(1)(a)(i)."

[33] Ostensibly, the Deputy Sheriff served the subpoena on Ms Britz personally in terms of rule 4(1)(a)(i) of the Uniform Rules. No reference is made in

the return of service to rule 4(1)(a)(v), which governs service on a company or corporation.

[34] In these circumstances, Ms Britz, who deposed to the answering affidavit in her personal capacity, as well as in her capacity as the sole director of Vantage Digital, duly authorised to act on its behalf, has highlighted that: "*When regard is had, however, to the return of service (Annexure "FA2.2" to the founding affidavit), it is clear that in the mind of the deputy sheriff, Mr Sidima Madliwa, he believed that he was serving the subpoena directed to Vantage on me in my personal capacity, as if the subpoena was directed at me for its compliance by me in my personal capacity*."

[35] At the same time, and as noted above, it is common cause between the parties that the subpoena was directed at Vantage Digital, the company, for its compliance. Vantage Digital was the intended addressee. Ms Britz was referred to in the issued subpoena in her capacity as sole director of Vantage Digital and therefore as its agent.

[36] It follows that the Respondents' concern is not that the subpoena was, in substance, addressed to or directed at the wrong person. It is that being addressed to the *company* for its compliance, the subpoena ought to have been served on the company in terms of rule 4(1)(a)(v).

[37] I am not persuaded that this is a fatal defect. I have little doubt that if

greater care had been taken to ensure that the instruction to the Sheriff was clear, much confusion could have been avoided. The subpoena could, for example, have been addressed to: "*Vantage Digital (Pty) Ltd, C/O Nadine Vicki Britz (in her capacity as Director)*". But the fact that the subpoena was erroneously served on Ms Britz personally in terms of rule 4(1)(a)(i) does not in my view render it unenforceable against Vantage Digital.

[38] The correct approach to these matters is to inquire whether there has been substantial compliance with rule 4(1)(a)(v). In *Arendsnes Sweefspoor CC v Botha*[11] the plaintiff instructed the sheriff to serve summons on the defendant close corporation at its registered office. The corporation had, however, ceased activities at the registered office and had no employee or representative present when the sheriff arrived. The sheriff then served the summons on a person at the correct premises but who was employed by another entity. The Supreme Court of Appeal found that this was substantial compliance with rule 4(1)(a)(v) and thus that the defendant's special plea of prescription could not be upheld. The SCA said:

> "[11] In the present case, it is common cause that the deputy sheriff served the summons on 14 December 2006 at the registered office on a Mr Pretorius, an employee of the restaurant on the premises, a person not less than 16 years of age, by exhibiting to him the original and handing him a copy thereof and by explaining the nature and exigency thereof. (In terms of s 36(2) of the Supreme Court Act 59

[11] (471/12) [2013] ZASCA 86; [2013] 3 All SA 605 (SCA); 2013 (5) SA 399 (SCA) (31 May 2013)

of 1959 the return of service presented by the deputy sheriff constitutes prima facie evidence of the matters therein stated).

[12] Counsel for the defendant submitted that the service was not in terms of Rule 4(1)*(a)(v)* because first Mr Pretorius was not an employee of the defendant, second that in the absence of such employee a copy of the summons should have been affixed to the main door of the registered office. …

[13] … The court, if service is contested, must determine whether service was good and legally recognized or substantially compliant with the rules of service. The cause of action and the consequences resulting from the process served are irrelevant to the question whether proper service took place.

[14] In *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 at 481 (KZP) Van Zyl J, (writing for the full court) in para [15] said:

> 'Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address (not being an employee of the company) willing to accept such service, has been recognised as a good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises', Van Zyl J also referred with approval to *Chris Mulder Genote Ing v Louis Meintjies Konstruksie (Edms) Bpk* 1988 (2) SA 433 (T).

Brangus is the most recent high court judgment which, in my view, is authority for the proposition that effectiveness of the service of a court process or substantial compliance should trump the form. In other words by reason of the fact that a copy of the summons was served at the registered office of the defendant there had been substantial compliance with the requirement of *Rule* 4(1)*(a)(v), [e]*ven though the service did not strictly comply with the Rule. ….

> [15] It would not be a proper exercise of a court's discretion to uphold the special plea in circumstances where there was substantial compliance with the rules."

[39] In this case, the subpoena was indeed served "at the registered office" of Vantage Digital, being Unit 3 Martin Crescent, Greenhill Industrial Estate, Germiston North, Gauteng. This appears clearly from the Sheriff's return of service.

[40] Rule 4(1)(a)(v) moreover provides that service of process may be effected on a company "*by delivering a copy to a responsible employee thereof at its registered office* ...". Whatever the Deputy Sheriff's intention may have been, as a matter of fact there was delivery of a copy of the subpoena to a responsible employee of Vantage Digital, being Ms Britz as its sole director. In my view, the fact that the return of service does not state that the subpoena was served on Ms Britz as a responsible employee of the company, cannot change the objective fact that she was a responsible employee, at the registered office of Vantage Digital, when the subpoena was delivered to her.[12]

[41] It is also significant that Ms Britz has acknowledged that the subpoena was served upon her as agent for Vantage Digital. This appears clearly from the correspondence that was exchanged between the parties before this

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[12] See *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP) at 480G–H and 481C–F

application was launched.[13] For example, in a letter dated 13 June 2019 addressed to Heidi Jonker, an attorney acting for Value Logistics at the time, Ms Britz stated: "*We refer to the subpoena duces tecum as served on the writer hereof, on behalf of Vantage Digital (Pty) Ltd.*" Even in her answering affidavit, Ms Britz accepted that "*It is clear … that the subpoena was served upon me purely as agent for Vantage. The subpoena is directed at Vantage for its compliance*".[14]

[42] The Respondents have relied upon the apparent belief and intention of the Deputy Sheriff when serving the subpoena. In my view, what signifies more is the belief and understanding of Ms Britz in receiving it. In her mind, the summons was served upon her in her capacity as agent (being the sole Director) and thus a responsible employee of Vantage Digital.

[43] I have a discretion to find that there has been substantial compliance with the requirements of the rules relating to service.[15] In the exercise of that discretion, I am of the view that the service of the subpoena complied in substance with the provisions of rule 4(1)(a)(v).

[44] It is immediately important for me to note, however, that a necessary consequence of this finding is that it would be inappropriate to grant the

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13 See

14 Respondent's answering affidavit, para 11.

15 *Arendsnes Sweefspoor CC*, *supra*, at paras [18] to [19].

enforcement order sought, or costs, against Ms Britz. It is, as I have noted, common cause that the subpoena was directed at Vantage Digital. The implication of my finding that there was substantial compliance with rule 4(1)(a)(v) is that the subpoena was duly served on Vantage Digital. Thus, while it would have been permissible to cite Ms Britz for any interest that she may have in this application, I do not think that it is competent for Value Logistics to seek relief against her. It is Vantage Digital that must comply with the subpoena, if compliance is required. Of course, Ms Britz will probably be the person to take the necessary steps to ensure that the company does comply. A subpoena *duces tecum* requiring production of documents held by a company should be directed to the company itself.[16] This may require a proper officer to act so as to ensure compliance. But it does not mean that enforcement relief should be sought or granted against her.

THE SECOND GROUND – THE UNDERLYING CAUSE OF ACTION

[45] The Respondents have asked me to find that the subpoena should not be enforced because there is no *prima facie* underlying cause of action against

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[16] In *Penn-Texas Corporation v. Murat Anstalt (No. 2)* (1964) 2 QB 647, at 663 Lord Denning M.R. said: "*it is no good serving a subpoena duces tecum on any of the officers or servants of the company: for each of them can say that he has no authority from the company to produce them, and that would be an end of any proceedings against him*." A corporation is a separate legal person and while the proper officer must give effect to the subpoena, he or she acts on behalf of the corporation.

Mr Vrany. They contend that I should make this finding on the basis of the evidence on the papers in this application

[46] Thus, for example, Ms Britz and Vantage Digital contend that it appears from their version in the answering affidavit, which they say must be accepted in accordance with the *Plascon-Evans* rule,[17] that Mr Vrany has not solicited or touted for any of the clients of Value Logistics. They refer in this regard to a series of allegations that are confirmed by Mr Vrany in an attached confirmatory affidavit. These are to the effect that at the time when Mr Vrany left the employ of Value Logistics, there was nobody in its employ competent to continue operating its large format digital printing works. Thus, as far as Mr Vrany is aware, the large format digital printing works at Value Logistics have not run for a significant period of time, and this has been the situation from not long after his departure from the employ of Value Logistics. On this basis, the Respondents conclude, and ask me to make a finding, that Mr Vrany did not breach the restraint by soliciting or touting for the customers.

[47] Similarly, the Respondents highlight that Value Logistics has stated in paragraph 20.2 of its founding affidavit that the eight customers "*diverted their business away from Applicant to Second Respondent*", while not simultaneously alleging that this was due to any conduct on the part of Mr

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17 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) at 635

Vrany. This, they contend, and ask me to find, constitutes a concession that Mr Vrany has not committed any conduct that offends the covenant in restraint of trade.

[48] I do not think that it is competent for me to make pre-emptive findings of this nature. To do so would be anticipate the outcome of the trial. Value Logistics chose to launch an action, rather than an application, no doubt anticipating disputes of fact in relation to precisely these issues. The Respondents (who it should not be forgotten are merely third parties, not litigants in the underlying dispute) are effectively asking me to close the doors of the Court to the plaintiff, and find that it has no cause of action, on the strength of a few, ambiguous statements made in the affidavits filed in this application. To do so might well deny Value Logistics the right to lead evidence in full at the trial as well as the right to cross-examine Mr Vrany, assuming that he is ultimately called.

[49] I have considered whether a finding that the affidavits in this application establish that Mr Vrany did not act in breach the restraint (and hence that Value Logistics has no underlying cause of action) could be construed as interlocutory in nature, much like a finding made by a court deciding an application for interim relief, and thus not binding on the trial court. Even if that is so, my discomfort lies in the fact that I am being asked to decide a disputed issue, on paper, in circumstances where, of necessity, not all of the evidence is before me. I do not think that is my role in proceedings of

this nature. I have also been given no authority, nor have I found any, to support a proposition that it is.

[50] It is not wholly inconceivable that a Court could refuse to enforce a subpoena on the basis that there is clearly no merit to the underlying action, but this should not lightly be done. There is insufficient warrant to do so in this case.

THE THIRD GROUND – RELEVANCE

[51] The purpose of a subpoena is to secure the attendance of a witness or the production of documentary evidentiary material at court proceedings in order to facilitate the presentation of the evidence in such proceedings. A subpoena therefore serves to facilitate the administration of justice by making available a mechanism to compel the production of evidence.

[52] In *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734G it was held:

> "Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of 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."
>
> (Emphasis added.)

[53] And in *Meyers v Marcus and Another* 2004 (5) SA 315 (C), it was said:

> [49] The defendant has also referred to certain passages in the judgment of Van Zijl J in *S v Wessels*, to the effect that there is a general duty resting upon every member of the public to give what evidence he is capable of giving and
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> > '(i)f the courts are prevented from arriving at the truth there can be no justice. It is for this reason that the court will allow no one to stand between it and the truth.'
>
> … The search for the truth – vital as that quest undoubtedly is – must, in the context of litigation and in the interests of justice, be confined to evidence that is relevant to the issues in any particular case."[18]
>
> (Emphasis added.)

[54] The relevance of a document sought to be produced pursuant to a subpoena must be given careful consideration. This is all the more so given that a subpoena *duces tecum* may well intrude on the privacy rights of persons who are not party to the underlying litigation, and who may have little or no knowledge of the issues in dispute in it.

[55] The case law makes it clear that the test for relevance is the same as that for whether a document is discoverable under rule 35. In *Antonsson and*

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[18] See also, generally, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) (2008 (8) BCLR 771; [2008] ZACC 6) at para 25.

Others v Jackson and Others 2020 (3) SA 113 (WCC), the Court held:

> "[48] A generous approach is taken towards relevance in the sense that documents will be relevant if they contain information which *may*, either directly or *indirectly*, enable the party who seeks them to advance his or her case or damage the opponent's case.[19]
>
> [49] In *Rellams (Pty) Ltd v James Brown & Hamer Ltd*[20] the following was said:
>
> 'After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", BRETT LJ stated the principle as follows:
>
> > "It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."'

[56] Relevance must be determined, first and foremost, with reference to the

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[19] Citing *Compagnie Financiére et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA), quoted in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 316G.

[20] 1983 (1) SA 556 (N) at 564A–B.

pleadings.[21]

[57] At the time that the subpoena was issued, and this was still the position when this application was launched, the important paragraphs of Value Logistics' particulars of claim read as follows:

> "6. In breach of the terms of the agreement and from September 2017, Defendant breached the agreement in that:
>
> 6.1 He commenced, has an interest in and carries on a new business venture through Vantage Digital (Pty) Limited within a radius of 75kms of Plaintiff's principal place of business in Johannesburg which competes with the business of Plaintiff in South Africa.
>
> 6.2 He solicited and touted for clients of Plaintiff and continues to do so.
>
> 7. As a result of the aforesaid breach Plaintiff has suffered damages in the sum of R5 032 400.00 made up as follows:
>
> 7.1 Loss of gross income to Plaintiff for the restraint period (two years) due to Defendant soliciting Plaintiff's customers to Defendant ' s new business = R21 800 000.00;
>
> 7.2 Defendant's profit margin before tax = 23%;
>
> 7.3 23% of R21 800 000,00 = R5 032 400.00.

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[21] *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W)

[58] These allegations are denied in Mr Vrany's plea.

[59] Paragraph 7.2 must be highlighted. It refers to the "*Defendant's profit margin*". The defendant is Mr Vrany, raising the immediate question of how damages could be calculated on the basis of *his* profit margin. A great deal of the Respondents' answering affidavit was devoted to pointing out that the documents in issue could not possibly be relevant to Mr Vrany's profit margin. Value Logistics then conceded in its replying affidavit that this was an error in its particulars of claim. The reference to "*Defendant's*" profit margin before tax should have read "*Plaintiff's*" profit margin before tax. The particulars of claim were amended after the Respondents' answering affidavit was filed. Nevertheless, this mistake has caused considerable confusion. It also meant that the Respondents were put to the time and expense of addressing the wrong question. If paragraph 7.2 had been correctly worded, it would have been a simple matter for Ms Britz to say that the subpoenaed documents could not possibly throw any light on Value Logistics' profit margin and were thus entirely irrelevant to this aspect of the claim. She could have done so in a single paragraph.

[60] In paragraph 20.3 of the founding affidavit, Value Logistics alleges that the documentation subpoenaed is relevant to:

> "20.3.1 establishing the business which Applicant lost by virtue of the said corporate entities diverting their business away from Applicant to Second Respondent;

20.3.2 the quantification of Applicant's claim for damages."

[61] These are the only allegations in the founding affidavit that address the relevance of the documents. Reference is, however, also made to a letter dated 3 July 2019 from Value Logistics' attorneys to Vantage Digital, which seeks to explain the relevance of the documents. It says:

> "3.6 Our client contends that Vantage Digital was set up as a vehicle to disguise the fact that Vrany was breaching the terms of the covenant in restraint of trade which he gave to our client (and that your sole director and you are assisting in such obfuscation);
>
> 3.7 The documentation which is subpoenaed duces tecum will establish that our client's customers took their business to Vantage Digital in breach of the aforesaid covenant in restraint of trade which Vrany gave to our client and will assist our client in establishing its claim for damages against Vrany."

[62] As slim as these allegations are, I am unable to find that the documents sought to be subpoenaed are not relevant to the issues in dispute between Value Logistics and Mr Vrany. In certain cases it may be necessary to allege more in a founding affidavit to establish relevance, but on the facts of this one, Value Logistics has clearly pointed to the central disputes on the pleadings. These are whether Mr Vrany in fact solicited or touted for the customers in breach of the restraint and what damages may have been

suffered as a consequence.

[63] The correspondence sought is, on the broad test that must be applied in these matters, clearly relevant to the question of whether Mr Vrany in fact solicited or touted for the customers. It is not difficult to imagine that Mr Vrany, as the Operations Manager of the new Vantage Digital, may have penned some letter or e-mail to Value Logistics' erstwhile customers, nor that such correspondence might bear directly on the issue of whether Mr Vrany in fact acted as alleged in paragraph 6.2 of the particulars of claim.

[64] The documentation is in my view also relevant to the quantification of Value Logistics' damages.[22]

[65] In paragraph 7.1 of the particulars of claim, Value Logistics makes the allegation that it has lost gross income in the amount of R21 800 000.00 due to Mr Vrany soliciting Value Logistics' customers to his new business. Such loss can, at least in theory, be calculated by comparing the revenue that Value Logistics was earning from large format digital printing after Mr Vrany's departure with the income that Vantage Digital earned from the eight erstwhile customers of Value Logistics for the same service for

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[22] I have already pointed out that it cannot be relevant to the now corrected allegation in paragraph 7.2 that *Value Logistics*' profit margin before tax is 23%. Vantage Digital's documents could not throw any light on that allegation. Information that relates to Value Logistics' profit margin would lie within the knowledge of its employees and be contained in its documents.

the period of the restraint. Obtaining documents, such as correspondence, invoices and proofs of payment, from Vantage Digital showing what it has earned from the eight customers for the two-year restraint period, from 1 September 2019, may have a direct bearing on this calculation.[23]

[66] I should again emphasise the point made by the SCA in *Beinash v Wixley* that the process of a subpoena is designed to protect the right of a litigant, in the pursuit of truth, to obtain the production of any document that may relate to his or her case. The ends of justice would be prejudiced if that right was impeded.[24]

[67] Given the broad test for relevance that our courts have adopted, I find that the documents are indeed relevant.

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[23] A plaintiff's financial loss for breach of contract is generally determined by comparing its patrimonial position after the breach with the hypothetical patrimonial position that would have been occupied had the contract been properly performed. I have not been referred to any authority, nor could I find any, to the effect that it would not be permissible for Value Logistics to quantify its contractual damages with reference Vantage Digital's gain. Value Logistics is still claiming its positive *interesse*. Questions of causation might arise, but these are ones for the trial court.

[24] It is this consideration that has motivated our courts to say that a court should not lightly exercise its power to set aside a subpoena. It has been said that "*The Court must be satisfied, before setting aside a [subpoena], that it is obviously unsustainable, and this must appear as a matter of certainty and not merely a preponderance of probability*." See, *Antonsson and Others v Jackson and Others*, supra, at para 50, citing *Sher and Others v Sadowitz* 1970 (1) SA 193 (C) at 195D.

THE FOURTH GROUND – CONFIDENTIALITY

[68] The Respondents have objected to the production of the documents on the basis that that they contain confidential information.

[69] This is not, however, a valid basis to resist the production of the documents. Confidentiality is seldom, if ever, a legitimate reason to refuse to discover a document[25] and the same approach must be adopted in relation to subpoenas. In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services*,[26] the Constitutional Court said:

> "Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* (*Crown Cork*):[27]
>
> > "[A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful

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25 *Crown Cork & Seal Co v Rheem SA (Pty) Ltd* 1980 (3) SA 1093 (W) at 1096A–B and 1099G.

26 Supra, at para 27.

27 1980 (3) SA 1093 (W).

> appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part."

(Emphasis added.)

[70] There is no real dispute that the documents may contain confidential information.

[71] Mr Kaplan accepted that it was permissible for me to impose an order protecting Vantage Digital's confidentiality,[28] and I intend to do so.

THE FIFTH GROUND – OVERBREADTH

[72] Finally, the Respondents take issue with the fact that the subpoena requires the production of documents "*from 1 June 2017*". It is common cause that this was three months before the registration of Vantage Digital. Value Logistics has never explained why documents are sought from this date.

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[28] See in this regard, *Bridon International GmbH v International Trade Administration Commission and Others* [2012] 4 All SA 121 (SCA); 2013 (3) SA 197 (SCA) at para 35.

[73] Nevertheless, I do not think that this renders the subpoena unenforceable on the basis that it is overbroad. It is open to me to adjust the date in the order that I make.

THE ERRORS

[74] The Respondents have made much of the number of defects and errors that characterise Value Logistics' pleadings as well as this application. I have referred to many of these errors above. But there are others. For example, Value Logistics repeatedly, but mistakenly, refers to a subpoena being issued on 16 May 2019 (instead of 15 May 2019).[29] Other mistakes are more significant. These include Value Logistics' erroneous reliance on rules 30(2) and (4) in the Notice of Motion. There is also the mistaken reference to Mr Vrany's profit margin in paragraph 7.2 of the particulars of claim.

[75] While the Respondents have at times suggested that all of these errors, taken cumulatively, render the application as a whole defective, I am not persuaded that I should dismiss it on this basis.

[76] Instead, I am of the view that these errors should impact on the question

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[29] I do not think that this anything more than another error. The relevant subpoena is attached to the founding affidavit as FA2.1. The Respondents could thus be left in no doubt this is the subpoena sought to be enforced.

of costs. Even though Value Logistics has been partially successful, it cannot be disputed that the manner in which this application has been brought has resulted in the Respondents incurring a certain amount of unnecessary expense.

[77] Value Logistics also only abandoned prayers 1.1 and 1.2 at the hearing of this application. Until that moment, it was necessary for the Respondents to deal with this relief.

[78] In these circumstances, I am of the view that Value Logistics should not be awarded its costs and all parties must bear their own.

THE COUNTER-APPLICATION

[79] Given the conclusions to which I have come, the Respondents' counter application to set aside the subpoena cannot succeed.

[80] I have found that the subpoena was directed at Vantage Digital for its compliance. Indeed, this is common cause between the parties. It follows that there is no basis for the subpoena to be set aside against Ms Britz. It was never directed at her in the first place.

[81] There is also no justification for it be set aside against Vantage Digital.

The documents sought are relevant to the action between Value Logistics and Mr Vrany, and Vantage Digital has not otherwise established that it is an abuse of this Court's process.

[82] It should be noted the application to set aside the subpoena was intimately intertwined with the main application for enforcement. The Respondents filed an answering affidavit that also served as their founding affidavit in the counter application. Value Logistics followed suit by filing a replying affidavit in the main application, which served as an answering affidavit in the Respondents' counter application. It will not be an easy matter to separate these proceedings for the purposes of determining costs.

[83] Thus, in relation to this application too, I think all of the parties must bear their own costs.

ORDER

[84] Accordingly, I make the following order:

1. The application for enforcement of the subpoena *duces tecum* issued by the Registrar on 15 May 2019 ("**the subpoena**") against the First Respondent is dismissed;

2. The application for enforcement of the subpoena against the Second Respondent is granted;

3. The Second Respondent is directed to comply with the subpoena by delivering the documents listed in 3.1 to 3.3 below to the Applicant's attorneys of record, within 15 (fifteen) days of the date of this Order:

3.1 Any and all written correspondence exchanged between the Second Respondent and each of the following entities, between 30 August 2017 and 15 May 2019:

3.1.1 Branding Segments CC (Registration Number: 2003/037459/23);

3.1.2 Bandit Signs CC (Registration No: 1997/036898/23);

3.1.3 PinPoint Group (Pty) Limited (Registration No: 2016/062796/07);

3.1.4 SB Outdoor (Pty) Limited (Registration No: 2012/176887/07),

3.1.5 Hit the Ground Running (Pty) Limited (Registration No: 2012/1259979/07);

3.1.6 Relativ Media (Pty) Limited (Registration No: 2008/018645/07);

3.1.7 Absolute Outdoor Advertising CC (Registration No: 1999/047741/23); and

3.1.8 Red Dot Billboard Flighting CC (Registration No: 2008/0 92993/23).

("**the customers**")

3.2 Any and all invoices and quotations sent by the Third Respondent / the Second Respondent to each of the customers, between 30 August 2017 and 15 May 2019; and

3,3 Any and all proofs of payments (deposit slips or electronic proofs of payments) for payments received by the Second Respondent from each of the customers, between 30 August 2017 and 15 May 2019;

4. The Applicant is directed to instruct its attorneys of record that the documents delivered in terms of paragraph 3:

4.1 are to be kept confidential; and

4.2 will be used only for the purposes of the litigation against the Third Respondent; and

4.3 subject only to any further agreement between the Second Respondent and the Applicant regulating access, or any further order of this Court, may be made available for such use only to:

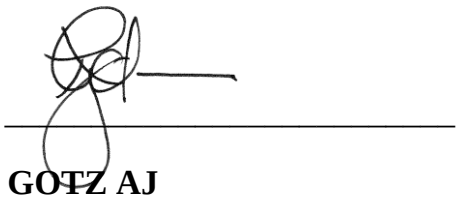
4.3.1 the Applicant's attorneys and counsel;

4.3.2 the Third Respondent, his attorneys and counsel, and/or

4.3.3 any independent expert that either the Applicant or the Third Respondent may engage for the trial.

5. The First and Second Respondents' counter application to set aside the subpoena is dismissed.

6. All of the parties must bear their own costs in relation to both the application and the counter application.



GOTZ AJ

Date of hearing: 19 May 2021 (with supplementary submissions on 25 May 2021)

Date of judgment: 15 November 2021

Appearances:

Counsel for the Plaintiff:	Adv J L Kaplan
Instructed by:	Ian Levitt Attorneys
Counsel for the Defendants:	Adv Anthony Bishop
Instructed by:	J J R Botha Attorneys