SUBPOENA DUCES TECUM IN CIVIL MATTERS

Category: Dispute Resolution
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A *subpoena duces tecum* ("**subpoena**") is a court order which is sued out from the registrar's office on behalf of a party who desires the attendance of someone (a witness) to give evidence or to produce a document or any form of evidence in court.

A party requesting a subpoena must ensure that the subpoenaed person is in possession or in control of the requested documents.

Section 36(5) of the Superior Courts Act, 10 of 2013 deals with the manner in which a witness may be dealt with on refusal to give evidence or produce documents. It says:

> *When a subpoena is issued to procure the attendance of any person as a witness or to produce any book, paper or document in any proceedings, and it appears that —*
>
> *(a) he or she is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in such proceedings; or*
>
> *(b) such book, paper or document could properly be produced by some other person; or*

(c) to compel him or her to attend would be an abuse of the process of the court,

any judge of the court concerned may, notwithstanding anything contained in this section, after reasonable notice by the Registrar to the party who sued out the subpoena and after hearing that party in chambers if he or she appears, make an order cancelling such subpoena.

What to do when you receive a subpoena

A subpoenaed person must submit the requested documents to the registrar within 10 days and, if so required, attend trial on the hearing date to give evidence on the matter.

In the event of failing to comply with a subpoena, the subpoenaed person may be fined or imprisoned.

The subpoena comes into play once it has been served on the addressee by the sheriff. It is also the sheriff's duty to explain the nature and the contents of the subpoena to the subpoenaed person.

Options available to the subpoenaed person

The subpoenaed person may apply to have the subpoena set aside if it amounts to an abuse of the court process. A typical example of an abuse of process is when a party to a civil case requests a subpoena for the production of documents that are irrelevant to the matter at hand. In that instance, the subpoenaed person can challenge a subpoena on the ground that the documents are irrelevant. In this instance, it is unnecessary to show abuse of process, but if it is shown that the documents are clearly irrelevant, then the subpoena will usually also amount to an abuse of the court process.

Another scenario will be where a witness was not given reasonable time to appear as per the subpoena.

In some instances, the subpoenaed person can claim legal professional privilege. For example, if an attorney is subpoenaed to present documents pertaining to written communications between him/her and his/her client falling within the legal privilege realm.

Conclusion

It is mandatory to comply with a subpoena as failure to do so may lead to a warrant of arrest being issued against the subpoenaed person. The subpoenaed person has the option to challenge the subpoena if he/she so wishes or has valid grounds to do so. However, he/she must act timeously and follow the relevant procedures. One can also refuse service of the subpoena where he/she is not the intended addressee.

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