IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JS987/17

In the matter between:

VALERIE CARMICHAEL-BROWN **Applicant**

and

LIQUID TELECOMMUNICATIONS (PTY) LTD **Respondent**

Heard: 07 December 2018
Delivered: 23 January 2019
Summary: Setting aside of the Subpoena

JUDGMENT

MABASO, AJ

Introduction:

[1] The applicant delivered an application to set aside a subpoena issued against her at the instance of the respondent as she opines that this step constitutes an abuse of Court's processes. The applicant also prays that the respondent be ordered to pay costs on an attorney and own client scale. The respondent opposes this application.

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[2] In December 2017, the applicant instituted an action against the respondent in this Court claiming damages that she allegedly suffered as a result of termination of a fixed term contract that she avers existed between the parties. The respondent delivered a notice of exception raising a number of grounds[1] which was argued before Van Niekerk J who on 27 March 2018 consequently dismissed same and ordered the respondent to pay costs on an attorney and own client scale.[2] On 06 April 2018, the respondent delivered a statement of response wherein it raised preliminary points such as that: there was no employment contract that existed between the parties, pleas of *res judicata*, and *lis alibi pendens*. These two latter pleas are generally referred to as pleas in bar, and if argued succesfully, they bar continuation of the case as the *res judicata* plea destroys the cause of action and *lis alibi pendens* postpones the cause of action. Before these preliminary points could be decided, on 20 April 2018 the respondent approached the Registrar of this Court to issue a subpoena against the applicant.

[3] The Respondent submitted that the application before this Court is defective as the applicant has not cited the Registrar of this Court who issued the subpoena. I disagree with this submission, taking into account that in terms of section 155 (2)(a) of the Labour Relations Act[3] (the LRA), the Registrar's responsibilities are the administrative functioning of the Court and nothing beyond that. As common knowledge, the parties approach the Registrar for the issuing of a subpoena and she has no discrection as to whether it should be issued or not.

[4] The subpoena partly reads:

> "INFORM the Applicant...who is also the co-owner of PSO Project Management (Pty) Ltd…that they are required to preserve the following documentation and to ensure that same be produced to the Court upon hearing of the matter, which date will be determined at a later stage and communicated to PSO Project Management (Pty) Ltd:

[1] In terms of Rule 23 of Uniform rules.
[2] Liquid Telecommunication (Pty) Ltd v Carmichael-Brown (JS987/17) [2018] ZALCJHB 153; [2018] 8 BLLR 804 (LC); (2018) 39 ILJ 1779 (LC) (27 March 2018) ,
[3] Act 66 of 1995 as amended.

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…

> AND INFORM the Applicant and PSO Project Management (Pty) Ltd that it should on no account neglect to comply with this subpoena as it may render both the Applicant and PSO Project Management (Pty) Ltd liable to a fine and/or arrest of the owner of PSO Project Management (PTY) LTD."

Points that are of paramount importance in the above excerpt: are that the subpoena was issued against the applicant who is a litigant in the main case, PSO Project Management (Pty) Ltd is a juristic person but not cited, it states that the applicant is a co-owner but the other co-owner/s are not cited and that there is no set down date for trial specified. The applicant and PSO Project Management (Pty) Ltd are threatened with serious consequences of arrest and fine.

[5] The applicant in support of this application, makes a number of submissions. Firstly that the subpoena does not comply with Form 3,[4] secondly that the subpoena only nominates her as a witness and not the company yet the company is directed to preserve documents listed therein and threatened with criminal liability, thirdly, the subpoena does not stipulate that the witnesses identified are to remain in attendance to testify on behalf of any party and to remain in attendance until excused by the court. She contends further that the subpoena is *"only to obtain documentation without the person producing the documentation been reported in the witness box to identify the documentation and to testify about it. The aim is thus solely to harass [her] to produce personal and confidential in the financial and tax documentation without the respondent even intending that [she] be called as a witness to testify about it."* The applicant further states that no reason has been provided for the production of these documents, and that Rule 6(9) of the Rules of this Court provides for a discovery procedure available to the respondent to obtain any such material from her. In essence, with the latter point, the applicant contends that in this case, the immediate step that is available was for the respondent to follow the route of the discovery procedures.

[4] Rule 32(2) of the Rules of the Labour Court (the Rules).

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[6] Both representatives for the parties put their respective reliance on the cases of *Beinash v Wixley*[5] and *Mogwele Waste (Pty) Ltd v Brynard*[6] respectively. I deal with relevant passages of these authorities below.

[7] As the consideration in this matter is whether or not the respondent in following the subpoena route is abusing the court's processes, one has to take into account what Mohammed CJ said in *Beinash* (and recently reiterated by the Constitutional Court in the judgment *of Lawyers for Human Rights v Minister in the Presidency and others*),[7] where he held that the determination as to what constitutes an abuse of process of the court, needs to be based on the circumstances of every case, meaning there is no precise definition of abuse of process.

[8] The respondent argued that it has used the correct step by making use of the subpoena process in order to obtain the documents to advance its case and pursue the truth. There are two ways of securing documents in this Court, first is the discovery procedure, and the other, the subpoena procedure. The purpose of the discovery procedure, after delivery of a statement of response, is to place each party in a position to properly prepare for trial in order to avoid unnecessary delays and suprises.

[9] In *Mogwele Waste*[8] the Labour Appeal Court (LAC) reiterated the principle that litigation in this Court "*should be conducted with minimum legal formalities and speed*".[9] This Court has its own rules, which are not the same as the uniform rules. The point of departure herein is section173[10] of the Constitution[11] which provides that:

> *"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."*

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[5] [1997] 2 All SA 241(A).
[6] (2016) 37 ILJ 2051 (LAC),
[7] 2017 (4) BCLR 445 (CC) at para 21.
[8] *Supra* n 6 at para 19.
[9] Ibid.
[10] Read with section 159 of the same Act.
[11] Act 108 of 1994.

[10] When an applicant, has delivered a statement of case, the respondent is expected to deliver a statement of response. Once this has been done the Rules of this Court provide that a pre-trial conference shall be held by the parties, and this must be done within ten (10) days after the delivery of the statement of response. In the pre-trial minutes, the parties are expected to *inter alia,* attempt to reach a consensus on the following:

> *"(vi)**discovery and the exchange of documents**, and the preparation of a paginated bundle of documentation in chronological order."*
>
> if there is no agreement in the respect of discovery of documents, either of the parties may use provisions of rule 6 which reads thus
>
> *"Discovery of documents*
>
> *(6) (9) ...*
>
> *(b) If the parties cannot reach an agreement regarding the discovery of documents and tape recordings, either party may apply to the court for an appropriate order, including an order as to costs. (the interlocutory application)*

[11] Mohammed CJ, in *Beinash*[12], reiterated that the purpose of discovery is to enable a litigant to discover documents in possession of its opponent.[13] The interlocutory application, in terms of Rule 6(9)(b), gives the Court a discretion to decide as to whether discovery should be made or not, taking into account the relevance of the disputed documentation in the case, whether there are any legally recognised grounds to refuse to discover such material, and set a timeframe for doing that.[14] Since the court has the discretion to decide as to whether the discovery of certain documents is justifiable or not, the party objecting to the discovery has an opportunity to present his case in resisting the discovery of such materials.[15]

[12] Whereas, Rule 32 provides that:

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[12] *Supra* n 5.
[13] See also *Mogwele Waste* at paras 14 and 18.
[14] Ibid, para 14.
[15] Ibid, 16.

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"(1)Any party who requires **a witness** to attend any proceedings to give evidence may have a subpoena issued by the registrar for that purpose.

(2)A subpoena must comply with Form 3.

(3)If **a witness** is required to produce in evidence any document or thing in the witness's possession, the subpoena must specify the document or thing to be produced."[16]

[13] The primary objective of a subpoena is to secure production of material from persons who are not necessary parties in the main application.[17] It is conspectus that this rule specifically refer to *"a witness"* instead of "*any person*" as compared to Rule 38 of the Uniform Rules. It must also be remembered that the applicant is not a witness but a party in this litigation. The subpoena route does not give a party an opportunity to contest subpoenaed material as compared to the discovery process.

[14] As I have mentioned above the proceedings in this Court have to be conducted with minimum legal formalities and speedy resolution,[18] it is important to emphasise that the Court Rules are structured in order to facilitate management of cases within its jurisdiction.[19]

[15] In *casu*, my view in respect of the Rules of this Court, taking into account the interests of justice is that parties before this Court are required to strictly comply with provisions of the Rules as the Rules are there to regulate the management of the matters in this Court. Rule 6 clearly emphasises that what is required is that a litigant, either a respondent or an applicant, will have to use the provisions of Rule 6(4) and (9) if there is material that has to be discovered if such material is intended to be used during the trial. As the provisions of sub-rule 6(4) form part of the pre-trial conference issues, it is my view that this makes the provisions of Rule 6 (4) and (9) to be in line with *"generously and purposively interpreted so as to give the holders of the right*

[16] Court emphasis.
[17] Ibid, at para 18 said "A subpoena *duces tecum* is a mechanism ordinary applied to obtain documentary evidence in possession of non-parties."
[18] as espoused by section 3 of the LRA,
[19] *PFE International Inc (BVC) and others v IDC of Sout*h Africa 2013 (1) BCLR 55 (CC), paras 30: "Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice", and 31.

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the fullest protection they need",[20] as the LAC in *Mogwele Waste,*[21] indicated that the discovery process will give the other party an opportunity to object if need be to the material that is intended to be used. Under the circumstances, I conclude that the right process that should have been used by the respondent is the discovery procedure as opposed to the subpoena procedure. Meaning it should have dealt with the issue of the subpoenaed material during the pre-trial. No plausible reason has been proffered by the respondent as to why it did not use the discovery route in order "to advance [its case] and pursue the truth".[22]

[16] Further, the subpoena is issued against the applicant, who is a party in the main case and not against the company which is a juristic person and/or against all the owners of the company as the subpoena states that the applicant is a co-owner. The applicant is threatened with arrest and/or fine without being given an opportunity to properly raise any valid defence that she might want to raise which would have been a good opportunity had the discovery procedure been followed. The subpoena was issued immediately after the statement of defence had been delivered and the dismissal of the respondent's exception, before the set down date could be allocated.

[17] In the statement of defence, the respondent has raised special pleas, *res judica and lis pendes*, and if granted, the entire case of the applicant would collapse, therefore it beggars belief why the respondent caused for the subpoena to be issued before the special pleas are determined. In the papers, there is no evidence that parties attempted to engage in the pre-trial conference whereby the issue of discovery would have been discussed. It is my view that, under the circumstances, a subpoena in this Court cannot be issued against a litigant if discovery processes have to be followed. The way Rules 6(9) and 32 of the Rules of this Court are structured, the definition of *"a witness"* does not include a party/litigant in an action in question. The only inference that I can draw is that the respondent was abusing the court process and that the respondent was abusing the process of subpoena.

[20] Fn 19 above, at para 25.
[21] At para 15.
[22] Para 55 of the answering affidavit.

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[18] Wherefore, I make the following order:

Order

1. The subpoena issued against the applicant on 20 April 2018 is set aside.

2. The respondent is ordered to pay costs.

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S. Mabaso

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Adv JL Basson

Instructed by: Alet Uys Attorneys

For the Respondent: Adv Boda SC

Instructed by: Cliffe Dekker Hofmeyr Inc

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