

**LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

**Case: JR 2019-11
J 1748-11**

In the matter between:

NICO HARRIS AND FIVE OTHERS

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

VIRGIL RABIE

Second Respondent

ESKOM HOLDINGS SOC LIMITED

Third Respondent

JUDGMENT

LAGRANGE, J:

Introduction

- ^{1]} This is an application to set aside subpoenas served on six individuals employed by Eskom Holdings Soc Ltd issued by a senior CCMA Commissioner. There is also a related application to condone the non-

compliance of the subpoenas with section 142(2) of the Labour Relations Act, 66 of 1995, which is incidental to the main application even though it was initiated under a separate case number. The subpoenas require the applicants to appear at an arbitration hearing due to commence on Monday, 29 August 2011 to give evidence and to produce certain documents. The applicants request the subpoenas to be set aside on a number of grounds.

Lack of authority

2] The first ground raised by the applicants is that the subpoenas were not signed by the director of the CCMA in accordance with section 142 (2) of the Labour Relations Act 66 of 1995. Section 142(2) states, amongst other things, that a subpoena issued for any purpose in terms of subsection 142 (1) "must be signed by the director". It was common cause between the parties at the hearing that the director had not signed the subpoenas in question. On the face of that fact there was *prima facie* evidence that, whatever the substantial merits of the subpoenas were, they did not comply with the signatory requirement of section 142. In response to this challenge to the legality of the subpoenas, the second respondent, Mr Rabie, obtained various assurances from CCMA officials that the signatory had the necessary delegated authority from the director to sign in her stead.

3] However, at the time the matter was heard, the respondent had been unable to obtain a copy of the delegation of authority itself. Given the fact that the applicants had only raised the issue of the signature in the application itself, which was only served on Rabie the day before the main application was set down for hearing, I granted his attorneys an extended opportunity to obtain proof of the delegation by close of

business the following day. On that day, 25 August 2011, the second respondent filed a further affidavit attached to which was a copy of the delegation he had tried to obtain earlier. According to the affidavit to which the delegation was attached it now emerged that the delegation of authority to sign subpoenas had only been granted to Convening Senior Commissioners or Acting Convening Senior Commissioners. In this instance, the Commissioner who had signed the subpoenas was a senior Commissioner who was not functioning in either of those capacities. Consequently, it must be concluded that the person signing the subpoenas did not have the necessary delegated authority to do so. As such, the subpoenas did not comply with section 142 (2) of the LRA.

4] As a result of this turn of events, the second respondent has asked the court to condone the absence of a properly authorised signatory to the subpoenas and to declare the subpoenas valid and effective. Regrettably, the court has no power to rectify the lack of authority by substituting its own for that of the person designated in the LRA as authorised to sign the same.

5] In consequence, the subpoenas must be set aside for want of compliance with section 142 (2).

Costs

6] The applicants had asked for a cost award in its favour, including the cost of two counsels, in the event that they were successful. This is not a case in which I believe such an order is deserved.

7] Firstly, the applicants only raised the point on which they were ultimately successful at the 11th hour when they launched the application despite being in communication with the second respondent's attorneys for

more than a week prior to the application being launched. Secondly, the applicants ultimately succeeded not on the basis of successfully challenging the substantive merits of the issuing of the subpoenas, but on a fortuitous error on the part of the CCMA. I do not intend to dwell at any length with the substantive merits of the requested subpoenas, but because that issue is relevant to the question of costs I will address it briefly.

8] In the pending unfair dismissal arbitration before the CCMA it is common cause that he was ultimately dismissed for misconduct relating to a failure to disclose his interests in terms of his employer's policy. Much of the documentation requested in terms of the subpoenas was for similar declarations of interest made by the applicants. Other documentation requested in the subpoenas might have been relevant to a claim that one or more of the applicants could have acted in a way which raised a potential conflict of interest, but for which they were not disciplined. The applicants had also objected to the subpoenas on the basis that they disputed the relevance of the documentation requested or that the documentation was specified in insufficient detail. In the course of argument at the first hearing on the main application some possible ambiguities regarding the documentation requested were clarified, and the applicants' counsel conceded that there may have been a *bona fide* misunderstanding about the nature of some of the requests.

9] Mohamed CJ said in ***Beinash v Wixley 1997 (3) SA 721 (SCA)*** that the right of a litigant to obtain the issue of the subpoena is one that should not be abused, but by the same token the court should be cautious in exercising its powers to set one aside on the basis that it constitutes an

abuse of process.¹ In the context of subpoenas issued by the CCMA it is arguably even more important that the court should exercise vigilance to ensure that litigation over incidental procedural issues like the issuing of subpoenas by the CCMA does not become an avenue which parties opportunistically exploit with the intention of complicating rather than simplifying arbitration proceedings. The cautious approach of the High Court to the setting aside of subpoenas is particularly apt with reference to the functioning of an arbitral forum, which the legislature clearly intended should be conducted expeditiously and with a minimum of legal formalities. The requirements of fairness, speed, minimal legal formalities and an emphasis on the substantive issues in dispute were clearly identified as the qualities that were considered necessary to ensure that the arbitration channel of dispute resolution would be effective.² These principles must be kept in mind when entertaining applications of this sort.

¹⁰] The applicants may have their own views on the relevance of their own declaration of interests to the respondent's case, but it is not inconceivable that if he can demonstrate that the employer chose to turn a blind eye to other employees with conflicts of interest or if it was aware of other employees who had failed to disclose their interests, such evidence might lay a basis for a case of substantive fairness based on the employer's unfairly selective initiation of disciplinary proceedings. Alternatively, such evidence might cast doubt on employers claim that it regarded such misconduct in such a serious light that it warranted dismissal.

¹¹] Regarding the level of detail in which the requested documents were

1 at 734 H-J

2 See section 138(1) read with section 1(d) of the LRA

specified in the subpoenas, the extent of the documentation requested by the respondent in the subpoenas issued in this instance hardly bears comparison with the vague and wide-ranging request for the production of documentation, which the SCA deplored in Beinash's case.³ Moreover, in the case of subpoenas issued in the High Court, a witness who feels the subpoena is vague can raise the matter once he has been sworn in.⁴

^{12]}Section 142(8)(e) clearly envisages that a witness who shows good cause why they have not produced documents requested cannot be held guilty of contempt. It stands to reason that if the details of documents requested are vague, a subpoenaed witness may raise this at the arbitration and does not need to rush to court as a first resort.

^{13]}In conclusion, I am satisfied that there was nothing clearly vexatious about the respondent's application for subpoenas to be issued and it cannot be said simply on the applicants perception of the merits of his case that the evidence requested might not be relevant, nor was it insufficiently specified. In the circumstances I see no reason why the applicants, whose success rested not on challenging the substantive merits of the subpoena, but on a fortuitous lapse in CCMA procedures should be awarded any costs in this matter.

Order

^{14]}In the circumstances, the following order is made:

- a. The subpoenas issued by the CCMA to the first to sixth applicants are set aside for want of compliance with section 142(2) of the LRA.

³ Described at 728H-729E of the judgment.

⁴ *Davis v Additional Magistrate, Johannesburg* 1989 (4) SA 299 (W) at 305

- b. The application to condone the subpoenas non-compliance with section 142(2) of the LRA is dismissed.
- c. Each party is to pay its own costs.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 24 and 25 August 2011

Date of judgment: 26 August 2011

Attendance:

On 24 August 2011

**For the Applicants: T Bruinders, SC assisted by K Millard and N Mbelle
instructed by Cliff Dekker Attorneys**

**For the Respondent: I E M Delport instructed by Caroline de Villiers
Attorneys**

On 25 August 2011

For the Applicants: A Patel of Cliff Dekker Attorneys

For the Respondent: G Maritz instructed by Caroline de Villiers Attorneys

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