REDDY AJ

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Reportable
CASE NO. J 2291/10

In the matter between:

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| FIROZ CACHALIA | First Applicant |
| BLUE CATALYST INVESTMENTS (PTY) LTD | Second Applicant |
| BLUE IQ INVESTMENTS (PTY) LTD | Third Applicant |
| THE INNOVATION HUB MANAGEMENT COMPANY (PTY) LTD | Fourth Applicant |
| and | |
| DOUGLAS M VINNING | Respondent |

Date of Hearing: 8 September 2011

Date of Judgment: 21 October 2011

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JUDGMENT

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REDDY AJ

*Introduction*

[1] This is an application for:

1 the subpoena issued under case number JS 213/10 to be set aside;

2. the respondent pays the costs of this application on an attorney client scale;

3. a decision on the wasted costs occasioned by the postponement of the trial under case number JS 213/10 on 15 November 2010.

[2] This application is opposed by the respondent.

*Factual background*

[3] The respondent was employed by the second applicant ("Blue Cat") as a Chief Technology Officer. One of his tasks was to build and maintain a virtual network portal (the portal). The employment relationship commenced on 1 July 2003.

[4] It is alleged by the respondent that during 2007, the second respondent ("Blue IQ") took over the assets and removable property of Blue Cat. The respondent continued to be employed by Blue IQ without any change to his terms and conditions of employment. This is disputed by Blue Cat and Blue IQ.

[5] A network portal agreement was entered into between the Blue Cat, Blue IQ and the fourth applicant ("The Innovation Hub") to the effect that the network portal would be transferred from Blue Cat and Blue IQ to The Innovation Hub and the respondent's services would also be transferred. The respondent received

written notification in this regard in April 2009. The transfer of the portal was to take place in July 2009.

[6] Blue Cat and The Innovation Hub are fully owned subsidiaries of Blue IQ. The Gauteng Provincial Government is a 100% shareholder of Blue IQ. At the relevant point in time, the first applicant (Cachalia) held the position of Member of the Executive Committee (MEC) for the Department of Economic Development (DED) of the Gauteng Provincial Government.

[7] Prior to the transfer of the portal taking place but after being informed that his services would be transferred to The Innovation Hub, the respondent was informed that his employment contract would not be extended and that his services would be terminated 30 June 2009. Another employee, Brian Brown (Brown) who worked with the respondent, also received a similar notification of termination of employment, albeit some time earlier than the respondent.

[8] Brown and the respondent referred separate unfair dismissal disputes to the CCMA. Brown proceeded to refer his dispute to arbitration. The respondent did not and waited for the outcome of Brown's arbitration hearing.

[9] Brown received an award reinstating his services with Blue Cat and Blue IQ.

[10] Following the receipt of this award and on 15 October 2009, Blue Cat informed the respondent that his services had been reinstated. A further letter also dated 15 October 2009 was sent by Blue Cat to the respondent informing him that he had been selected for retrenchment.

[11] The reasons for the retrenchment, according to Blue Cat and Blue IQ, was that Blue Cat had not achieved its objectives and was being dissolved; the transfer of the network portal was subject to approval by Cachalia, which was not given and the funds that were available for the operation of Blue Cat were handed back to the Gauteng Provincial Government's treasury. The respondent disputed these reasons and sought to enforce his transfer to The Innovation Hub along with the network portal. Blue Cat and Blue IQ despite this request proceeded with retrenchment consultations with the respondent. The retrenchment was effected on 30 November 2009.

[12] The substantive and procedural fairness of the retrenchment are in dispute.

[13] The following key issues are in dispute and they are recorded as they appear in the response to the statement of claim (the first, second and third respondents referred to below are the second, third and fourth applicants respectively in this application):

"12. There were discussions among the Respondents at that time about transferring the portal to the Third Respondent, but that process was never finalised. There was however a transfer of assets from the First to the Third Respondent.

13. Any discussions between the Respondents on the matter were in any event subject to the suspensive condition of the prior approval by the MEC for Economic Development in the Gauteng Province in terms of s 54(2) of the PFMA and that s 6 of the Blue IQ Act. No such approval for a transfer was given. The portal is currently inoperative.

30. The First Respondent's dismissal of the Applicant was substantively fair.

30.1 The First Respondent is in the process of winding up.

68.2 The dismissal is substantively fair in that:

68.2.1. there was no transfer of the operations of the business of the First Respondent to the Third Respondent;

68.2.2. the portal is no longer operative;

68.2.3. the First Respondent has transferred its funds back to the fiscus and

68.2.4 the MEC never approved the transfer of the First Respondent to the Third Respondent as required by the Blue IQ Act and the PFMA."

[14] In the *addendum* to the pre-trial conference minute dated 3 November 2010 and at paragraph 2.2, the second to fourth applicants repeat paragraphs 12 and 13 above. This is in response to the pre-trial issue calling on the employer to respond to the employee's response to the question whether he admits in general that there was a need to retrench.

[15] Among the issues in dispute in the pre-trial minute are:

> "3.11 Whether or not the transfer of the portal was subject to suspensive [sic] condition of the prior approval by the MEC for Economic Development in the Gauteng Province in terms of section 54(2) of the PFMA and s 6 of the Blue IQ Act, under the circumstances of this matter [sic].
>
> 3.12 Whether or not the Portal remains fully operational at the time of preparing the Applicant's statement of claim [sic] or afterwards or whether or not the portal, whether in the same or similar form exists or has been shut down by the Second and or Third Respondent.
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> 3.16 Whether or not the MEC approved the transfer of the portal to the Third Respondent.
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> 3.19 Whether or not the funds already allocated to the First Respondent for its operations and to conduct its business was legally capable to be returned to the fiscus, which resulted in the alleged retrenchment of the Applicant.
>
> 3.20 Whether or not the First Respondent had adequate funds to continue with its operations as was budgeted."



[16] Among the issues to be decided by the trial Court (as recorded in the pre-trial minute dated 1 June 2010) are:

> "4.13 Whether the suspensive condition (the MEC's approval), if any is found to exist under these circumstances, permitting [sic] a transfer of the portal was satisfied.

4.14 Whether there was a transfer of the portal as envisaged in terms of section 197 to the Third Respondent."

[17] Although paragraph 4.13 quoted above is somewhat clumsily worded it is clear that the parties intend the trial Court to decide, among other issues, whether the alleged suspensive condition existed as a term to the agreement amongst Blue Cat, Blue IQ and The Innovation Hub, and if it did exist whether it was satisfied.

[18] These issues are fundamental to the question of whether there was a need to retrench the respondent. The respondent alleges that his services were to be automatically transferred to The Innovation Hub and that there was no suspensive condition to be met. The second to fourth applicants allege that the transfer of the network portal could not take place until the MEC approved it and in any event he did not give his approval, therefore the portal was not transferred and remains inoperative.

[19] The import of these issues is plain. The trial Court will have to decide these material disputes of fact. If the trial Court finds that the suspensive condition was not part of the agreement then there was no need for MEC to approve the transfer of the portal and the respondent's services could accordingly have been transferred. The respondent may thus be able establish that the retrenchment was unfair. If the trial Court finds that the suspensive

condition was part of the agreement and if it finds further that the approval by the MEC was in fact given then, on the second to fourth applicants' version, there was no need to retrench the respondent as his services should have been automatically transferred with the network portal. If the approval was not given by the MEC, the second to fourth applicants will have to establish why despite the agreement between them (they are fully owned subsidiaries of the Gauteng Provincial Government) the approval by the MEC was withheld. Further issues regarding the dissolution of Blue Cat and whether the portal remains operational must also be decided by the trial Court.

[20] These issues and the supporting documentary proof are pivotal to the determination of the retrenchment dispute and whether the respondent is entitled to the relief he claims.

[21] The pleadings in the main trial have been filed under case number JS 213/10. The pleadings have closed. The parties have filed a pre-trial minute and an *addendum* to the pre-trial minute. The trial was set down for hearing for five days from 15 November 2010.

[22] Shortly before the trial could commence and on 3 November 2010, the Registrar of this Court issued, at the instance of the respondent, a subpoena *duces tecum*. The subpoena called on

1. The Gauteng Provincial Government and

2. Cachalia

"to appear in person before court on the 15th day of November 2010 at 10:00 and to remain in attendance until excused by the court, in order to testify on behalf of the Applicant in regard to all the matters within his knowledge relating to the action pending in the court" in which the respondent claims, *inter alia*, relief for an unfair dismissal.

[23] The subpoena further directed the Gauteng Provincial Government and Cachalia to bring and produce to Court documents, but more on this issue later.

[24] The issuing of the subpoena resulted in the second to fourth applicants applying for a postponement of the trial on 15 November 2010 pending an application to set aside the subpoena.

[25] The application for postponement was granted. The application to set aside the subpoena was later filed which application is the subject of this judgment.

*Application to set aside the subpoena*

[26] The application is made on the ground that the issuing of the subpoena was an abuse of process and should be set aside for the following reasons:

1. The documents required in terms thereof are vague and it is left to Cachalia to determine what documents are relevant to the issues.

The applicants submit that the subpoena is not a *bona fide* legal process used by the respondent. Rather it is being used as a "fishing expedition" to gather information that may assist the respondent in the trial.

2. The timing of the subpoena was too close to the trial which would have necessitated an adjournment for the second to fourth applicants to prepare on the documents subpoenaed.

3. Cachalia cannot give evidence as he has nothing to add and he is no longer the MEC.

4. The documents ought to have been obtained through the discovery process.

5. The documents have no bearing on the pleaded issues and are not relevant.

[27] The grounds under items 1, 4 and 5 above relate to the relevance of the documents to the trial issues and will be dealt with simultaneously. The grounds under items 2 and 3 will be dealt with separately.

*Cachalia cannot give evidence as he is no longer the MEC and has nothing to add.*

[28] The applicants submit that it is not clear from the respondent on exactly what Cachalia is expected to testify. On the applicants' version, he can only testify as to a section 197 transfer from Blue Cat and Blue IQ to The Innovation Hub. As no transfer took place, he has nothing of value to add to the trial issues. It is also submitted that it is not the respondent's case that Cachalia made a decision regarding his future employment and his evidence will be of no relevance to the trial issues.

[29] Further, the applicants submit that as the respondent has not pleaded that a section 197 transfer is applicable, he cannot rely on this issue during the trial.

[30] The respondent submitted that the evidence of Cachalia is fundamental to the trial issues for the following reasons:

1. The trial issues are wider than simply whether a section 197 transfer occurred. The issues relate to the fairness of a retrenchment in circumstances where the respondent was informed that his services would be transferred with the network portal that he had created and there was agreement amongst Blue Cat, Blue IQ and The Innovation Hub that the portal would be transferred along with the respondent's services.

2. R100 million was made available by the Gauteng Provincial Government for the creation of the portal. After it was created, the portal was to be transferred to The Innovation Hub. There was an agreement between Blue Cat, Blue IQ and The Innovation Hub to this effect. Prior to the transfer taking place, the funds for the operation of the portal were withdrawn and returned to the fiscus. The decision to withdraw the funds was made by the Gauteng Provincial Government. The withdrawal of the funds led to the retrenchment of the respondent.

3. There were a number of meetings and various items of correspondence between the Gauteng Provincial Government and Blue Cat and Blue IQ which canvassed the issue of the funds and the withdrawal thereof.

4. The bundle that will be used at trial contains documents which are signed by Cachalia.

[31] Having regard to those submissions listed in paragraph 30 and the pleadings as recorded in paragraphs 5 to 16 above, I am persuaded that Cachalia was involved in his capacity as MEC in the discussions and the decisions that ultimately led to the respondent's retrenchment. He has knowledge of issues relating to the return of the funds to the fiscus, to the

existence of the suspensive condition that he was required to approve the transfer of the portal and if he did not approve the transfer the reasons therefore. The fact that he is no longer the MEC is of no import to the relevance of the evidence that he will be able to place before the trial Court. Of relevance are his knowledge of and participation in the events that led to the respondent's retrenchment.

[32] Insofar as the applicants' submissions that it is not the respondent's case that a section 197 transfer applied and that Cachalia made a decision regarding his future employment are concerned, these are issues that are pleaded by the Blue Cat, Blue IQ and The Innovation Hub and can be seen at paragraphs 12, 13, 19, 30.2, 31, 51.1, 52, 59.1 and 68.2.4 of the response to the statement of case. They are clearly part of the issues before the trial Court and require evidence to be led.

[33] I am persuaded that Cachalia will be a useful witness to the trial. His evidence is relevant and he will make a meaningful contribution to the issues that must be decided by the trial Court.

[34] The applicants submitted further that Cachalia's evidence is of relevance to Blue Cat and Blue IQ's defence to the unfair retrenchment claim. If he is subpoenaed as the respondent's witness, he can only be led in evidence in chief by the respondent. The fact that Cachalia may be able to explain why the

retrenchment was fair implies that he should be a witness for the defence rather than for the respondent and that he should be cross-examined by the respondent. By subpoenaing him, the respondent will not be able to cross-examine him.

[35] It is not Blue Cat, Blue IQ and The Innovation Hub's case in opposition to the subpoena that they will call Cachalia as their witness. It is not clear to this Court why Blue Cat, Blue IQ and The Innovation Hub are resisting Cachalia's being subpoenaed when he would, on their version, assist in their defence to the respondent's claim. The respondent was within his rights as a litigant to have Cachalia present at the trial Court.

[36] Insofar as the evidentiary context in which Cachalia's evidence is to be dealt with, this is a matter that the trial Court is best placed to decide. The trial Court will be guided by the rules of evidence in obtaining the best evidence. This issue is not pertinent to the question of whether Cachalia's evidence is relevant to the trial issues – which is the issue before me. As stated above, I am persuaded that he is a relevant witness to the trial issues.

*The documents that are subpoenaed*

[37] The subpoena further directed the Gauteng Provincial Government and Cachalia to bring and produce to Court:

"1. the 1st, 2nd and/or 3rd Respondent's submissions to the Department and the Department's response to such submissions regarding the returning of all "surplus funds" which formerly financed the 1st Respondent and the subsequent creation of the new entity under the 2nd Respondent, referred to as the Gauteng Motorsport Company, that led to the return of the 1st Respondent's "surplus funds" to the Department / Treasury; and

2. The MEC's memorandum to Chairpersons and Chief Executive Officers of DED Public Entities dated 29 May 2009 and minutes of meetings and all relevant reports to show what consultation occurred or processes were followed, if any, regarding the alleged closing down of the 1st Respondent. "

[38] There are several grounds of attack on the documents that are subpoenaed. I will deal with them in turn.

*The documents have no bearing on the pleaded case and are not relevant:*

[39] The documents identified in paragraph 1 of the subpoena are limited to submissions by Blue Cat, Blue IQ and The Innovation Hub to the DED and its responses on the issue of returning the surplus funds. As one of the reasons for the respondent's retrenchment is the return of the surplus funds these documents are relevant to the fairness of the dismissal. As can be seen from paragraphs 3.19 and 3.20 of the pre-trial minute (recorded at paragraph 16 above) the issue regarding the transfer of the surplus funds is in dispute.

[40] The documents identified in paragraph 2 of the subpoena are limited to the issue of the winding down of Blue Cat. This is another reason, submitted by Blue Cat and Blue IQ, for the retrenchment of the respondent, as recorded in

paragraph 30.1 of the response to the statement of case (see paragraph 13 above).

[41] I find that the documents have a bearing on the pleaded case and they are relevant to the trial issues.

*The documents are vague and Cachalia is left to determine which documents to bring to Court*

[42] The issues before this Court are whether the Blue Cat was dissolved; whether the agreement to transfer the portal was subject to the approval of Cachalia; whether that approval was withheld and the reasons therefore; whether the funds were and could have been validly returned to the treasury.

[43] I have already concluded that Cachalia played an important role in the above decisions and that his knowledge of the issues is vital to the trial proceedings. Blue Cat, Blue IQ and The Innovation Hub have cemented Cachalia's involvement in the issues. There is no doubt in my mind that Cachalia (through his participation in the processes that, on the applicants' version, led to the retrenchment of the respondent) must know what these documents are.

[44] Whilst I do not find that the subpoenaed documents are vague, even if Cachalia is unaware of what those documents are, he would be more than entitled during his testimony to declare to the trial Court that the documents were

vague and explain any difficulties he may have had in identifying them [See *Davis v Additional Magistrate, Johannesburg* 1989 (4) SA 299 (W) at 305 and Nico *Harris and Five Others v CCMA and Others* unreported JR 2019-11 and J1748-11].

*Cachalia cannot produce the documents as he is no longer the MEC*

[45] The subpoena does not cite Cachalia in the capacity MEC. Although he is not longer the MEC, he remains an employee of the Gauteng Provincial Government, which is also directed in the subpoena to bring the relevant documents to Court.

[46] Whether Cachalia himself or another member of the Gauteng Provincial Government brings those documents to Court, is immaterial. Given Cachalia's intimate knowledge of the issues there is no reason for him not to assist any other member of the Gauteng Provincial Government in identifying the documents.

*The documents should have been obtained through the discovery process*

[47] The respondent submitted that despite attempts to obtain the documents through the discovery process, they were unsuccessful.

[48] The respondent further submitted that the subpoenaed documents are not documents that belong to Blue Cat, Blue IQ and The Innovation Hub so they

would not have been in a position to release them. In response to this it was submitted that Blue Cat, Blue IQ and The Innovation Hub have all the documents in their possession.

[49] It is unclear to me how Blue Cat, Blue IQ and The Innovation Hub can on the one hand state that the documents are vague and they have no idea what documents Cachalia is required to bring and on the other hand submit that they have all the documents. Clearly, there is no confusion in the minds of Blue Cat, Blue IQ and The Innovation Hub as to the identity of the relevant documents. Further, if they are in possession of them, they should have been discovered when called upon to do so.

[50] In the matter of *Binash v Wixley*[1] it was held that a Court must be cautious in exercising powers to set aside a subpoena. It must be clear that there is an abuse of power and it must be a certainty that the witness subpoenaed will be of no assistance to the Court in determining the issues raised at trial. If there is a *bona fide* attempt to pursue and ventilate the truth in the dispute between the parties, then the subpoena is not to be set aside.

[51] In this matter, I find that the respondent's issuing of the subpoena is *bona fide* and that he is not abusing any rights he has as a litigant. I am satisfied that

[1] 1997 (3) SA 721 SCA page 734 D.

the subpoena is not vexatious and when effected will assist the trial Court in ventilating the truth in the dispute between the parties.

[52] Should the subpoena be set aside, the dispute between the parties will not be properly ventilated. The respondent’s right to be heard will be infringed.

[53] I am persuaded that the interests of justice direct that the subpoena should not be set aside.

*Costs of the postponement of the trial on 15 November 2010*

[54] The subpoena was issued on 3 November 2010 and served on Cachalia on 4 November 2010. The trial was set down for five days from 15 November 2010. The applicants brought the application to postpone the trial pending the outcome of this application.

[55] The applicants submitted that the subpoena ought to have been issued at the time the trial was set down for hearing. It was further submitted that the late issuing of the subpoena had necessitated the postponement of the trial as Cachalia was not available on such short notice and Blue Cat, Blue IQ and The Innovation Hub would not have been properly prepared to proceed with the trial if the documents per the subpoena had to be used at the trial. They would have required time to prepare on these further documents.

[56] The respondent was under no obligation to inform Blue Cat, Blue IQ or The Innovation Hub that he intended calling Cachalia as a witness. Cachalia was not employed by any of them and he was only after the service of the subpoena, represented by their representatives. Further, it was reasonable for the respondent to believe that Cachalia's testimony would be welcomed by Blue Cat, Blue IQ and The Innovation Hub as it would have assisted in the ventilation of the disputes.

[57] There is also no applicable time limit for the issuing of subpoenas. In the matter of *Building Industry Bargaining Council Cape Of Good Hope (Boland Area) V Hatlin T/A The Homestyles Co,*[2] it was held that a party must be served with a subpoena at least five days before he is required to appear in court. In this case, Cachalia was served more than five days before he was required to appear in court.

[58] The time that was available to Cachalia to gather the documents was sufficient given his knowledge of the issues. It is not a reasonable explanation that Cachalia was too busy to avail himself to assist the Court.

[59] It was conceded by the applicants' representative that the trial need not have been postponed *sine die* as the matter could have stood down for Blue Cat, Blue IQ and The Innovations Hub to consider the subpoenaed documents. If on

[2] (2001) 22 ILJ 1143 (LC).

their previous submission they were in possession of all the relevant documents, they would not have been taken by surprise. If however they had not seen the subpoenaed documents before, and required more time to prepare, they would have been entitled in fairness to a short postponement of the matter for a day or two to give them sufficient time to prepare and the trial could have proceeded thereafter.

[60] For the above reasons I am not persuaded that Blue Cat, Blue IQ and The Innovation Hub were entitled to a postponement of the trial. This application could have been brought on 15 November 2010 for decision before the trial commenced. If the subpoena was set aside, the respondent would have had to continue with the matter. If it was not set aside, time could have been given to Blue Cat, Blue IQ and The Innovation Hub to prepare on the documents.

[61] After having considered all the facts, the issues and the legal principles, I make the following order:

1. the application to set aside the subpoena issued under case number JS 213/10 is dismissed;
2. the applicants are to pay the costs of the respondent in this application;
3. the wasted costs occasioned by the postponement of the trial on 15 November 2010 are to be paid by Blue Catalyst Investments (Pty)

Ltd, Blue IQ Investment Holdings (Pty) Ltd and The Innovation Hub Management Company (Pty) Ltd.

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Reddy AJ

Appearances:

1. For the applicants: Mr Orr instructed by Mkhabela Huntley Adekeye Inc

2. For the fourth respondent: Mr Scheepers of Marius Scheepers and Co Attorneys.