THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J 2344/19

In the matter between:

SANDILE JULY **Applicant**

And

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

SENIOR COMMISSIONER SHAWN

CHRISTIANSEN *NO* **Second Respondent**

AYANDA MKHIZE **Third Respondent**

Heard: 17 October 20

Order made: 18 October 2019

Reasons delivered: 21 October 2019

JUDGMENT

VAN NIEKERK J

[1] On 18 October 2019, I issued an order in dismissing the present application, with costs. These are my brief reasons for that order.

[2] The applicant applied, as a matter of urgency, to review and set aside a decision by the second respondent (the commissioner) on 4 October 2019 to issue a subpoena, requiring the applicant to appear before the first respondent (the CCMA) at an arbitration hearing on 22 October 2019. The applicant is the attorney of record for the SABC, the respondent party in the arbitration hearing.

[3] The background facts can be gleaned from the judgment delivered in J 2055/19 on 18 October 2019. The present matter was argued simultaneously with that application, but the cases raise distinctly different issues.

[4] The applicant appears to frame his cause of action in the present instance as a review. In paragraph 16 of the founding affidavit, he refers to a judgment delivered by this court on 16 August 2019 in a dispute concerning the same parties, when the court dismissed an application to set aside a prior subpoena issued on the same basis, on the grounds that no cause of action had been disclosed. The court noted that in the absence of any general empowering provision in terms of which this court could intervene in routine decision-making relating to CCMA proceedings, it was incumbent on an applicant clearly to identify a provision of the LRA (or other legislation) conferring jurisdiction on this court to determine the matter. In paragraph 8 of the judgment, the court referred to the prospect of review, whether by way of the common law, or a so-called

'legality' review, which the court is entitled to entertain in terms of s 158 (1) (g) of the LRA. An application for leave to appeal against the judgment was filed, and subsequently withdrawn.

[5] Despite the reference in the founding affidavit to paragraph 8 of the judgment, it is not clear to me that the present application is framed as an application for review, or that the applicant has properly invoked the provisions of Rule 7A. Section 158 (1) (g) contemplates a review 'on any grounds permissible in law.' There are, of course, a number of possible grounds for review, including a review in terms of PAJA and as I have mentioned, a legality review and a review at common law. All of these forms of review have their own requirements and thresholds for intervention, and it follows that an applicant in a matter such as the present must properly identify the basis for review, and make out a case accordingly.

[6] In the present instance, the applicant does not identify the form of the review that he seeks to pursue, nor does he disclose any grounds for review other than the sweeping statement made in the founding affidavit to which I have referred. The applicant appears to rely on the contention that it is apparent from the written motivation filed in support of the issuing of the subpoena that he is to be questioned regarding certain admissions that he is alleged to have made during the course of the third respondent's disciplinary hearing. The applicant denies having made these admissions, and states that he did no more than make submissions on behalf of the SABC. He states further that these appear from the transcript of the hearing, and that the transcript is not contested. Finally, the applicant avers that he is protected by professional privilege. On this basis, the applicant concludes that the decision to issue the subpoena was irrational and unreasonable, and thus irregular.

[7] The applicant seeks a final order. It is incumbent on him therefore to establish a clear right to the relief that he seeks. There is no dispute that the subpoena was issued in accordance with the procedural requirements established by s 142 of the LRA. The only basis on which the decision to issue the subpoena is attacked

is that it amounts to an abuse of process. The rules of the CCMA require that a party seeking to have a subpoena issued by the CCMA must file a written motivation setting out why the evidence of the person to be subpoenaed is necessary. A request to issue a subpoena may be refused if, amongst other things, the applicant party does not establish why the evidence of the person sought to be subpoenaed is necessary.

[8] I am not satisfied that the applicant has established that the decision to issue the subpoena is reviewable. First, in the absence of any clear basis on which the review is sought, in my view, the application stands to be dismissed solely on that account. There is no proper case for review made out on the papers. Even if I were to attach some significance to the single sweeping statement in the founding affidavit that the decision to issue the subpoena was irrational and unreasonable, the applicant has failed to establish a case to this effect. It does not follow that the applicant's status as the attorney of record for the SABC has the consequence that any evidence that he will be required to give will be the subject of privilege. That is a call that the presiding commissioner must make, after proper objection to any question put to the applicant, in the arbitration proceeding. In so far as the applicant relies on the admission of the correctness of the transcript of the disciplinary hearing, the same principle applies. The third respondent may well have valid questions to put to the applicant regarding what he says are the submissions he made during the hearing, and what the third responded contends are admissions of fact that were made. Again, this is a matter best determined by the presiding commissioner, and not be pre-empted by this court. Of course, there will be those cases where parties seek to have subpoenas issues as a form of harassment, intimidation and abuse, and the court should not hesitate to intervene by way of review where the CCMA fails in its duty to protect the integrity of its own process. But this is not one of those cases. To the extent that the applicant relies on personal inconvenience as a basis on which he contends that the subpoena should be set aside. This is a matter best taken up with the presiding commissioner. A witness attending proceedings under subpoena may always seek to be released until the point in

the proceedings where he or she is likely to testify. Commissioners are granted a great deal of flexibility in how arbitration are to be conducted.

[9] In short: it cannot be said that the decision to issue the subpoena, having regard to the written motivation that served before commissioner, was devoid of rationality and reasonableness. The review application thus stands to fail.

[10] Finally, in relation to costs, there is no reason why costs ought not to follow the result. The threshold of review is deliberately set high, and discourages intervention by this court in routine decision-making by commissioners. Applications such as the present are to be discouraged.

[11] For these reasons, I dismissed the application with costs.

André van Niekerk

Judge

APPEARANCES

For the applicant: Adv. M van As, instructed by Werksmans Inc.

For the third respondent: Adv. M Kufa, instructed by Motlatsi Seleke Attorneys