



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J930/24

In the ex parte application of:

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Applicant

NTJATJA KCLASS APHANE

Second Applicant

In re:

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Applicant

NTJATJA KCLASS APHANE

Second Applicant

and

**DISCOVERY CONNECT DISTRIBUTION
SERVICES**

First Respondent

TEBOGO GOODMAN

Second Respondent

APHELELE TAPILE

Third Respondent

Heard: 26 February 2025

Delivered: 03 July 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] On 27 September 2024, the first applicant, the Commission for Conciliation, Mediation and Arbitration (CCMA) made an *ex parte* application to this Court referring a contempt ruling made by the second applicant, Commissioner Aphane, in terms of section 142(9)(b) of the Labour Relations Act¹ (LRA).

[2] The contempt referral is intended to find the respondents guilty of contempt of the second applicant's ruling dated 24 July 2024, in relation to a disclosure ruling made by another Commissioner, Coen Havenga dated 13 June 2024 in the dispute in which the first respondent was directed to disclose certain information to its former employee (Seelan Pillay) in pursuance of the constructive dismissal held on 4 June 2024 at CCMA Johannesburg, under case number GAJB5265-24.

[3] The respondents have now been called to appear before Court on 26 February 2025, to show cause why the second applicant's contempt ruling should not be confirmed for failing to comply with the disclosure ruling, and in the absence of providing an explanation to the satisfaction of the Court or failing to appear in this Court despite being properly served, the first applicant has prayed that the Court should confirm the second applicant's finding of contempt in respect of the respondents and incarcerate the third respondent as the Court may deem appropriate, or be fined an amount the Court may deem appropriate, or any other manner deemed appropriate by the Court.

¹ Act 66 of 1995, as amended.

[4] Furthermore, it was prayed that the third respondent be ordered to comply with the disclosure ruling and provide information as stated in the ruling of the second respondent, on a date to be determined by the Court.

[5] The respondents appeared in Court on 26 February 2025 and also filed the affidavits as directed by the Court on 7 February 2025 in response to the contempt proceedings.

Background

[6] The first respondent, Discovery Connect Distribution Services (the company), is the former employer of Seelan Pillay (the employee), who lodged a constructive dismissal dispute with the CCMA under case number GAJB265-24, which was scheduled for con/arb on 25 March 2024. The dispute remained unresolved, and Commissioner Malesela Maboya issued the certificate of outcome. The second and third respondents are employed by the first respondent as the IR Manager and IR Consultant, respectively.

[7] The arbitration proceedings were held on 4 June 2024 before Commissioner Havenga. The employee filed an application in terms of Rule 29 of the CCMA Rules² (the CCMA Rules) for the disclosure of audio recordings and documents related to the dispute, arguing that the audio recordings are relevant to substantiate his claim on substantive and procedural grounds, as well as his individual key performance indicators (KPIs), and those of the team members he was working with to substantiate his claim. The employee submitted that the only recordings of 16 January 2024 were provided to him, and the rest of the recordings were not provided, as well as the information requested was not disclosed, thereby failing to comply with the disclosure ruling. The second respondent wrote to the employee and said, *'The Company does not believe that it bears the responsibility of transcribing the recordings'*.

² GN R3318 of 2023: Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration, effective 24 April 2023.

[8] Commissioner Havenga took submissions from both parties and issued a disclosure ruling on 13 June 2024, in terms of Rule 29 of the CCMA Rules, which allows a commissioner to *'make an order as to the disclosure of relevant documents or material relevant to the dispute'*. The disclosure ruling ordered the respondents to provide Mr Pillay with a memory stick or by any other means the recordings of MS Teams meetings conducted on 8 June 2023, 6 September 2023, November 2023, 11 January 2024, 16 January 2024, and 18 January 2024; bundle of documents; transcript of the audio recordings; and the individual KPIs of the employee's team members specified and deleting all personal information contained in the KPIs in order to protect the privacy of the persons involved. These documents were to be provided within 14 days of the date of the ruling being served. The ruling was served by the CCMA on the parties on 14 June 2024.

[9] During the arbitration proceedings on 16 July 2024, the employee applied for the company to be held in contempt of the disclosure ruling and for an order to compel the company to comply with the disclosure ruling in the CCMA. On 4 July 2024, the second respondent sent an email to the employee and indicated that he has been provided with the recordings that could be retrieved, and information that compares his performance with the performance of his colleagues, showing that they were reaching and exceeding their targets despite having higher minimum targets than that of the employee. The first respondent further indicated that the company does not believe that it bears the responsibility of transcribing the recordings.

[10] Commissioner Aphane recorded that the company did not oppose the application *'and submitted that it will await the contempt ruling and act accordingly'*. The IR Manager, Tebogo Goodman, represented the company at the contempt hearing. From the record before this Court, it appeared that the IR Manager offered no explanation on the first respondent's non-compliance with the disclosure ruling.

[11] On 24 July 2024, Commissioner Aphane issued a contempt ruling and found the company to be in contempt of the CCMA ruling in terms of section 142(9)(a) of the LRA as it was aware of the disclosure ruling and information required by the employee but failed to comply fully with the disclosure ruling as well as all

information that was not provided. In making the contempt ruling, the Commissioner found that the company did not comply with the disclosure ruling, that it did not challenge the disclosure ruling with the Labour Court by way of a review application, that the company gave no reasons for not providing all the recordings to the applicant, and that the company's only objection to the disclosure ruling related to its non-responsibility to transcribe the recordings.

[12] On 13 August 2024, the first applicant sent communication to the first respondent requesting compliance with the disclosure ruling within five days of delivery of the correspondence. Failing which, the first applicant will refer the contempt ruling to the Labour Court for an order confirming the contempt finding and will also seek an order that the respondents' representatives be incarcerated or fined.

[13] Subsequently, an *ex parte* application was launched in terms of section 142 (9)(b) of the LRA for the Court to confirm, vary or set aside the finding that the respondents are in contempt of the CCMA disclosure ruling. The Court granted an order on 9 January 2025, and it was extended until 26 February 2025 to allow the respondents to show cause why the Court cannot grant the order.

[14] The Court further directed the applicant to file the replying affidavit within five days of the date of the order. The respondents filed a supplementary answering affidavit on 10 February 2025. This is an irregular process. The first applicant also filed its replying affidavit as directed by the Court on 7 February 2025. The respondents have therefore opposed the application for a contempt order. As both parties have filed affidavits, the Court must consider and decide on the contempt application.

[15] The applicant further submitted that it has demonstrated that the contempt ruling was in existence, the respondents were aware of the disclosure ruling, and has not been in full compliance, and its failure to comply is due to wilful and *mala fide* conduct which seriously prejudiced the employee by failing to adhere to the disclosure ruling.

[16] The respondents in the answering affidavit submitted that on 21 January 2024, the employee addressed an email to the HR officials and manager of the first respondent and informed them of the CCMA ruling and further requested that they source the necessary documents and audio recordings from the IT department urgently. The IT department performed the searches on the system for the requested audio records of the MS Teams meetings and subsequently, Ms Vuyo Fulani, a Configuration Analyst in the IT Team, sent the records to the employee together with a transcription generated by the Teams software for the dates directed by the Commissioner for 6 September 2023 and 16 January 2024. After further searches, no other recordings could be found, except those of 9 June 2023, 9 January 2024 and 19 January 2024, which were also sent to the employee.

[17] The respondents further submitted that the Excel spreadsheet indicating the team and individual KPIs (deleting names of individuals) was transferred to an external memory stick and informed the employee to collect the memory stick from the respondent's offices, which he duly did.

[18] It is indicated that the email sent by the employee showed he was complaining that he had not been provided with certified transcripts prepared by professional transcriber, and this was not the order by the Commissioner in the disclosure ruling, hence it is stated that the company does not believe that it bears the responsibility of transcribing the recordings, which statement seemed to have been misconstrued by the Commissioner, not that the respondent intended to disregard the disclosure ruling.

[19] The respondents submitted that on 16 July 2023, it made it clear to the second applicant that it has complied with the disclosure ruling and provided details of what was provided to the employee, but that the second applicant nevertheless made a finding that the respondents must comply fully even if it indicated the missing audio recordings and the nature of the transcripts available. It was argued that the reason for not challenging the contempt ruling was that the respondent got legal advice not to do so, in that, it would delay finalisation of the main dispute as it would take more time and was cost effective to supply the transcribed recordings of the

meetings by qualified transcriber which the respondents did. A copy of the transcript was sent by email to the employee on 25 October 2024, attaching the transcripts.

[20] It is apparent that the employee was still not happy with the disclosure and insisted that the CCMA proceed with contempt proceedings as he disagreed with the first respondent that it had complied in respect of the recordings. In its replying affidavit, by the CCMA Director, Cameroon Morajane, the first applicant conceded that the first respondent sent an email with the transcribed records, but argued that it was not fully complied with the ruling on dates of recordings in the contempt ruling by the second applicant as it has disclosed one recording of 16 February 2024, and failed to disclose recordings for 8 June 2023, 6 June 2023, late November 2023, and 11, and 18 January 2024.

Procedure and relief in section 142(9)(b) referrals

[21] This Court on 9 January 2025 directed the applicants to make submissions in terms of general contempt rules set out in Clause 13 of the since-repealed Practice Manual, and Rule 58 of the current Labour Court Rules³ with regards to CCMA contempt referrals, and these submissions were provided to the Court on 14 November 2024.

[22] The applicants' first prayer is that this Court subpoena the company, and in the alternative, subpoena the IR manager and/or the IR consultant to appear in court to show cause why Commissioner Aphane's contempt ruling should not be confirmed by this Court.

[23] The respondents have been called to appear before this Court on 26 February 2025, to show cause why the second applicant's contempt ruling should not be confirmed for failing to comply with the disclosure ruling, and in the absence of providing an explanation to the satisfaction of the Court or failing to appear in this Court despite being properly served, the first applicant has prayed that the Court should confirm the second applicant's finding of contempt in respect of the

³ GN 4775 of 2024: Rules Regulating the Conduct of Proceedings of the Labour Court.

respondents and incarcerate the second or alternatively the third respondent as the Court may deem appropriate, or that the second respondent and third respondent be fined an amount the Court may deem appropriate, or any other manner deemed appropriate by the Court. Furthermore, it was alternatively prayed that the respondents be ordered to comply with the disclosure ruling and provide information as stated in that ruling.

[24] The relevant provisions of section 142 provide as follows:

‘ ...

(8) A person commits contempt of the Commission –

...

(e) if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a commissioner;

(f) if the person wilfully hinders a commissioner in performing any function conferred by or in terms of this Act;

...

(i) by doing anything else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.

(9) (a) a commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8).

(b) the commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11).

(10) Before making a decision in terms of subsection (11), the Labour Court –

(a) must subpoena any person found in contempt to appear before it on a date determined by the Court.

(b) may subpoena any other person to appear before it on a date determined by the Court; and

(c) may make any order that it deems appropriate...

(11) The Labour Court may confirm, vary or set aside the finding of a commissioner.

(12) If any person fails to appear before the Labour Court pursuant to a subpoena issued in terms of subsection (10) (a), the Court may make any order that it deems appropriate in the absence of that person.’

[25] In terms of section 142 (10) (a) of the LRA, the Court '*must subpoena any person found in contempt to appear before it on a date determined by the Court*'. In terms of section 142 (10) (b) of the LRA, the Court '*may subpoena any other person to appear before it on a date determined by the Court*'. The IR Manager and IR Consultant were found in contempt by the second respondent, and they were subpoenaed by the Court previously as they are both best placed to explain the company's non-compliance with the disclosure ruling and to assist the Court in exercising its powers under section 142(11) of the LRA.

[26] Section 142(9) (b) of the LRA provides that a commissioner may make a finding that a party is in contempt of the Commission's rulings for any of the above reasons and that the commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its discretion in terms of section 142 (11).

[27] It was submitted by the respondents that the application is also flawed due to failure by the CCMA to provide the record of the applicable proceedings. It is correct that the CCMA has not provided the Court with the record of the contempt proceedings. If the record was provided, it would have put the Court in a better position to assess how the proceedings were conducted in relation to the submissions made by both parties during the contempt proceedings, which led the Commissioner to arrive at the contempt ruling. It is also not clear how the Commissioner arrived at the contempt ruling, as it does not seem to appear that there was a formal application made in terms of the CCMA Rules for contempt, because on that hearing date of 16 July 2024, the matter was scheduled for an arbitration process.

[28] I will not rule on the issue of whether the *ex parte* procedure is inappropriate as argued by the respondents, as this Court order has made a determination on this issue in the judgment handed down by my brother Ramji AJ on 9 January 2025.

[29] The requirement for an order to be granted in contempt proceedings is that it must be established by the applicant, who has the onus to show beyond reasonable doubt the wilfulness and *mala fides* of the respondents. The applicant submitted and

argued that the respondent did not comply with the disclosure ruling as only one recording of 16 January 2024 was disclosed; and did not oppose the application for contempt made by the employee; and further that the respondents did not offer a plausible excuse for non-compliance. It is common cause that the first respondent did not review the contempt ruling to this Court in terms of section 145 of the LRA.

[30] The requirements for a finding of contempt of court were formulated as follows by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*⁴:

‘ ...

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.’

[31] When assessing the submissions made before this Court, I am satisfied that there was indeed an existing order in the form of a contempt ruling which the respondents were aware of. The next question for determination is whether or not the respondents have complied with the order, and whether the applicants have been able to establish if their failure to comply is due to the wilful and *mala fide* conduct on the part of the respondents.

[32] I find that the respondents have partially complied with the disclosure ruling, but even if the respondents have not fully complied with the disclosure order, the respondents have, however, given an acceptable and reasonable explanation for the partial compliance with the order. The respondents have been able to show what attempts were made to search for the audio recordings of the MS Team meetings, and whatever was found after the diligent search by the IT team from the system

⁴ 2006 (4) SA 326 (SCA) at para 42.

was given to the employee. These submissions were not disputed by the first applicant. The first applicant has not submitted a confirmatory affidavit by the employee in these proceedings insofar as it relates to the submission of the audio recordings by the respondents directly to him, as it appears from their exchange of communication between them.

[33] It also appears clearly from the email communication between Petunia Soni of CCMA and the employee on 25 November 2024 that the CCMA could not ascertain the compliance of the respondents and requested the employee to do so as the information was sent to him by the first respondent, but the employee persisted that the CCMA must proceed with the contempt proceedings as, in his view, the respondents have not fully complied when the CCMA wanted him to confirm the records that he has received.

[34] The employee complained about the format of the information supplied by the respondents when the comparative information of the KPIs of his fellow team members was actually submitted. It is clear that the employee did not want to consider the fact that the respondents indicated that there were some audio recordings that could not be found. It is also evident that the respondent has also given the employee typed transcribed records of the available audio recordings of the meetings found as advised by its legal team, even though it communicated that it bears no responsibility for transcribing the recordings.

[35] Under the circumstances, it cannot be found that the respondents are in wilful defiance of the disclosure ruling. It is clear that the CCMA proceeded to launch the contempt proceedings, on persistence by the employee, although it was fully aware that the respondents had disclosed whatever was available and also indicated that some of the information requested of the MS Teams meeting audio recordings could not be found in the IT system. Failure to provide recordings that could not be found, despite a diligent search, is clearly a plausible explanation for the respondents' failure to comply in that regard, and it cannot be held that such non-compliance is wilful and *mala fides*. The respondents cannot be compelled to disclose information it does not have in its possession, as it is clear that such information cannot be found in the first respondent's IT system.

[36] It was held in *Pheko and Others v Ekurhuleni Municipality*⁵, that while the courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect of judicial authority. All what is required is evidence that the contemnor is obstinately disobedient or rebellious. It ought to be shown that, on the balance of probabilities, the non-compliance was born out of willfulness and *mala fide*. In this case, the applicants have not shown that.

Conclusion

[37] Given the fact that the first applicant is required to prove beyond reasonable doubt that the respondents have acted in a wilful and *mala fide* defiance of the disclosure order, it has dismally failed to prove such. Despite the non-submission of the record of the proceedings by the CCMA, the respondents have been able to show that there was no intention to disregard or fail to comply with the disclosure ruling due to efforts made to comply with the order.

[38] The respondents are therefore not found to be in contempt of the disclosure ruling issued under the auspices of the first applicant dated 13 June 2024.

Costs

[39] Insofar as costs are concerned, bearing in mind the provisions of section 162(1) of the LRA, and consideration of the requirements of law and fairness, I am disinclined to make a cost order.

[40] In the results, the following order is made:

Order

1. The contempt ruling issued by the second applicant under case number GAJB5264-24 dated 24 July 2024 is set aside.

⁵ 2015 (5) SA 600 (CC) at para 42.

2. The first applicant must proceed and set down the constructive dismissal dispute for arbitration proceedings.
3. There is no order as to costs.

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the First and Second Applicants: Vongani Nghonyama

For the Respondents: G A Fourie SC

Instructed by Brian Bleazard Attorneys