

REPORTABLE

CASE NO: C350/2000

In the matter between

BUILDING INDUSTRY BARGAINING

Applicant

COUNCIL CAPE OF GOOD HOPE (BOLAND AREA)

And

CO Respondent

JUDGMENT

Waglay J. :

[1] The applicant in this matter is a Bargaining council as defined in the Labour Relations Act (Act) . The Respondent is a sole proprietorship. On 31 May 2000 the Applicant instituted these proceedings praying for an order in the following terms :

“1. declaring that the respondent has committed contempt of the applicant in that :

*1.1 the respondent , having been subpoenaed to appear before **Mr S Johnson** , a designated agent of the applicant , without good cause did not attend at the time*

and place in the subpoena ; and

1.2 *the respondent , having been subpoenaed to produce certain books , documents or objects believed to be in his/her possession to **Mr S Johnson** , a designated agent of the applicant , failed without good cause to produce the books , documents or objects specified in the subpoena ;*

2. Directing the respondent to comply with the above-mentioned subpoena on such terms as the above Honourable Court may direct;

the respondent to pay a fine in an amount determined by the above Honourable Court;

the respondent to pay the costs of this application;

such further and/or alternative relief as this above Honourable Court may deem appropriate in the circumstances.”

[2] In the affidavit filed in support of its application , the assistant secretary of the Applicant averred on Applicant’s behalf that:

a. Applicant was a duly registered Bargaining Council as defined by the Labour Relations Act (the Act) ,

b. it was empowered in terms of s 28 of the Act to conclude and enforce collective agreements pertaining to the Building Industry , and

c. it had concluded a Collective Agreement which was extended to non-parties within the Building Industry in terms

of s 32 of the Act -this extension was given effect to by means of Government Notice R661 of 8 May 1998.

[3] The Applicant further averred that the Respondent was bound to the terms of the Collective Agreement by virtue of being involved in the Building Industry within Applicant's area of jurisdiction and that in order for the Applicant to give effect to certain of the terms and conditions of the Collective Agreement , the Applicant issued a subpoena upon the Respondent .

[4] The subpoena called upon the Respondent to appear before one of Applicant's specifically named designated agent with certain documents/records. The purpose for the issue of the subpoena requiring Respondent to present himself with documents before a designated agent was for the Applicant to ascertain whether or not Respondent had complied with and was continuing to comply with the Collective Agreement to which he was bound.

[5] The subpoena was dated 20 March 2000 and required the Respondent to appear before the designated agent on 5 April 2000 the time and place was also recorded on the subpoena. The subpoena was served on 4 April 2000 and the respondent failed to appear as required by the subpoena.

[6] The subpoena was annexed to the founding affidavit. It is a one page document with Applicant's logo on the right hand corner and headed "SUBPOENA BY DESIGNATED AGENT". Under the above heading there is a shaded block in which the following is recorded "SUBPOENA IN TERMS OF SECTION 142(8) OF THE LABOUR RELATION ACT 66 OF 1995." The document then provides space to write in the name and address of the party to be subpoenaed which in this case recorded the name of the Respondent and then records as follows :

" You are hereby required to appear in person before Mr S. Johnson at back section of 141 C Main street ,Somerset West (entrance in oak street) on Wednesday 5 April 2000 at 10h00 and on any subsequent day to which the proceedings or investigation may be postponed.

You are hereby required to appear in person to :

- *to give evidence concerning.....(left blank)*
- *bring with you and produce the books , documents or objects listed below:*

Wage documents for the period 1 November 1999 to date

Signature of secretary_____ (signed)

: J.J Kitshoff

: Cape Town

: 20 March 2000

received copy hereof on “4-4-2000” signed by_____ (signed)

Ref : SLRA 51/2000”

[7] There is a further document filed which can best be described as a return of service . This document records that one Sidney Johnson who is an “empowered agent” served the subpoena on one Natasha Malherbe “ *a person apparently over the age of 16 years and apparently residing or employed at the witness’s place of RESIDENCE / EMPLOYMENT / BUSINESS*” at 12h20 on Wednesday 4 April 2000.

[8] Sidney Johnson, who served the subpoena was also the designated agent before whom the Respondent was required to appear with the documents listed in the subpoena.

[9] Based on what I have recorded above the Applicant submits that since the Respondent failed to comply with the subpoena he has committed “*contempt*” as provided for in s 142(8)(a) and (e) of the Act and I should therefore grant it the order as prayed (see paragraph [1] above). The matter is unopposed.

[10] The first issue that requires attention is the subpoena itself . A subpoena ordinarily is a legal document summoning a party to either attend a legal or quasi-legal hearing and/or deliver something at a legal or quasi-legal hearing. As a formal document compliance is obligatory , non-compliance will therefor result in a criminal sanction being imposed on a party who fails and/or refuses to comply with a subpoena.

[11] Being a document which obliges compliance it is important that a party upon whom a subpoena is served , by a reading of the document becomes aware of :

- (a) the importance of the document and
- (b) the possible consequences for failing to comply therewith-

a mere reference to a section of an Act which section may spell out the above , is I believe neither helpful nor sufficient warning to a party on whom a subpoena is served that his/her/its failure to comply may result in some penalty being imposed upon him/her/it.

[12] Notwithstanding the above I am not satisfied that the document referred to as a subpoena in the Act is in fact a subpoena as ordinarily understood. In fact reference to a subpoena in s 142 of the Act is a misnomer .This is so because the authority issuing the subpoena - the Commission or Council has no power to impose any criminal sanction against a party that fails or refuses to comply with the subpoena. The Act simply empowers a commissioner to subpoena parties and/or documents to assist him/her to resolve disputes and provides that non-compliance amounts to contempt of the commission - that is all. When there is this contempt of the commission as provided for by the Act , the matter must be referred to this Court . In terms of s 142 therefore , a commissioner is empowered by way of a document called a subpoena to summons parties to , appear before him/her and/or produce documents for the sole purpose of resolving disputes . Where a party “subpoenaed” fails to comply with the subpoena such a party is in terms of the Act said to have committed contempt of the institution that issued the subpoena .

[13] Where a subpoena is issued in terms of s 142 of the Act and the party subpoenaed fails and/or refuse to comply with the subpoena and has thus prima facie committed contempt the institution that issued the subpoena must refer the matter to this Court for this Court to decide what it believes to be an appropriate

order to be made against the party subpoenaed having regard to the reasons :

- (i) for the issuing of the subpoena and
- (ii) for the failure/refusal to comply therewith.

[14] As the Act makes no provision for a penalty to be imposed for refusing to comply with the subpoena but provides for this Court to decide on the appropriate order once the matter is referred to this Court, this Court has a discretion as to the order it will make. The appropriate order may in certain circumstances include the imposition of a criminal sanction. In this respect I disagree with the judgment in **National Bargaining Council for the for the Road Freight Industry v Meyer t/a Oakly Carriers (2000) 5 BLLR (LC)** which held that criminal sanction is not what was possibly contemplated by the drafters of the Act.

[15] The appropriate order that this court may make in terms of s 142(9) is an order that will ensure that the objects of the Act is not defeated by deliberate, negligent and/or calculated acts or omissions by employers or employees that seek to undermine the various Acts that regulates employer/employee relationship. This Court must ensure that the institutions created by the Act and other labour legislation are able to function and to this end lend such support to these institutions as it is in law able to provide.

[16] An important aspect of s 142(8) is the issue of contempt. While in the present matter it is the non-compliance by the Respondent of a subpoena issued in terms of the Act which led to Applicant seeking this court to declare that the Respondent is in contempt of it as provided for in s 142(8), this is a finding that can only be made by having the Respondent before this Court and he/she/it either admitting that he /she/it is in contempt after being explained when one would be in contempt or on being questioned the Court being satisfied that the Respondent did in fact commit contempt.

[17] To state the obvious, the test for finding a party in contempt is not, a balance of probabilities test, but that which is applicable in a normal criminal trial. This is so because, as I have said earlier, there is a possibility that this court may in appropriate circumstances impose a criminal sanction upon a party for being in

contempt as provided for in s 142(8) and no criminal sanction can be imposed without the party upon whom criminal sanction may be imposed being given all such rights that are ordinarily available to an accused person in a criminal trial.

[18] In the present matter and assuming that Applicant was entitled to issue the subpoena, having regard to the inadequacy of the subpoena (see paragraph [11]) and the fact that the Respondent was not brought before me to explain:

- (i) whether or not he received the subpoena,
- (ii) whether he has a just cause for not complying with the subpoena-

I am not prepared to declare that the Respondent has committed contempt of the Applicant.

[19] I may also add that even if the subpoena was a valid one, was properly served and that the Respondent refused to comply therewith as averred by the Applicant and that such failure automatically constituted contempt I would still not declare respondent's conduct to constitute contempt of the Applicant as Applicant cannot expect a Respondent party to comply with a subpoena on the notice it gave the Respondent. To serve a subpoena on a party at about midday the day before you require that party to attend a designated place with records is totally unreasonable. Where a party is to be subpoenaed such subpoena must be served at least 5 days before it is required to appear and/or present documents unless of course there is good reason why a shorter period is necessary. In this case there was no reason whatsoever for the subpoena being served on the Respondent on the proverbial last minute.

[20] With regard to the Applicant's second prayer that I order the Respondent to comply with the subpoena - for me to do so I must be satisfied that the subpoena issued by the Applicant does in fact comply with s 142 read with s 33 of the Act.

[21] The Applicant is empowered to enforce collective agreements within the Building Industry. To do so it has to have possession of or access to certain information of those parties that fall under its jurisdiction . Where it is not in possession of the necessary information it is entitled, so Applicant argues, to subpoena the necessary information and this is what it has done in the present matter i.e. unlike in the matter of **Meyer** supra , the subpoena issued upon the Respondent in this matter was not for the purposes of an arbitration hearing or to resolve a dispute but for the Respondent to present himself with the wage records of his business for Applicant to investigate and ascertain whether or not the Respondent was complying with the collective agreement to which he was bound.

[22] Having regard to s 33 and s 142 of the Act , s 33(3) confers on the designated agent all such powers conferred on a commissioner in terms of s 142 save those listed under ss (1)(c) and (d) thereof. The power conferred on the commissioner and thus available to the designated agent in terms of s 142 is the power to take certain steps to facilitate the resolution of disputes i.e. a commissioner's powers to utilize the provisions of s 142 are limited to matters relating to resolution of disputes and not for purposes of investigating whether or not there has been compliance of any provision of a collective agreement . In the circumstances unless there is evidence of at least an alleged dispute and a commissioner is appointed to resolve that dispute he/she cannot utilize the provisions of s 142 . The powers of the designated agent is limited to the powers of a commissioner . A designated agent cannot therefor in the absence of there being a dispute as defined by the Act utilize the provisions of s 142 and even then only to the extent that the exercise of the power is related to the resolution of a dispute .

[23] In the present matter all I am told by the Applicant is that it subpoenaed the Respondent to come before its designated agent and to bring with him "wage records" for a specified period. I am not told that a dispute was lodged with the Applicant against the Respondent which Applicant's designated agent was appointed to resolve and that the Respondent's presence with the wage records was for the purposes of resolving that dispute . This court is simply informed that the purpose of the subpoena being issued upon the Respondent

was to obtain information to determine whether or not there has been compliance with the Collective Agreement. s 142 does not provide for subpoena being issued in those circumstances and the subpoena as it stands is thus , assuming it complied with the other issues raised earlier in this judgment , invalid . Applicant's second prayer is therefor also dismissed .

[24] I am mindful of the fact that Bargaining and Statutory Councils have a very important role to play in giving effect to the maintenance of good Labour Relations .To be able to play this role they need to be given the scope to administer those agreements they are empowered to administer , effectively and efficiently. In playing their role they also need to be given the necessary support by this Court. However in giving this support this Court cannot overlook non-compliance by a Council of the provision of the Act , nor simply order the arrest or impose a fine upon those who fail to comply with Council's request or demand . Where the Council such as the Applicant finds it necessary to have access to information , which information it is lawfully entitled to have access to and its request for such information does not meet with any success , the procedure it must follow is to apply to this Court for an order that the party supply the Council with the information the Council requires , stating inter alia :

- (i) why it is entitled to and requires the information
- (ii) what attempts it has made to obtain that information ,
- (iii) the probabilities that the Respondent does possess the information required-

If the court is then satisfied that the Council is entitled to the information it would make an order for the Respondent party to provide that information with such order as to costs as the Court deems to be lawful and equitable.

[25] If the order of this court is then flouted by a Respondent party , it so open to the Applicant party to apply to

this court to have the Respondent party found to be in contempt of Court and be visited with a criminal sanction.

[26] In the instant matter therefor I am satisfied that the subpoena issued by the Applicant was not one as contemplated by s 142 of the Act and the Applicant is not entitled to any relief . In so far as the Applicant sought an order that Respondent be compelled to produce the wage records I am not prepared to do so as I have nothing to satisfy me why I should make such an order.

the application is dismissed.

Waglay J.

Unopposed matter : Mr Rossouw appeared for the Applicant

ent : 06 April 2001