(IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN)

Reportable

Case no: CA15/2015

In the matter between:

MOGWELE WASTE (PTY) LTD **Appellant**

and

GERHARD MATTHYS BRYNARD **Respondent**

Heard: **23 February 2016**

Delivered: **20 April 2016**

Summary: Employee causing a *subpoena* for the production of documents – Labour Court dismissing employer's application to set aside *subpoena*. Although raised at the appeal stage, employer contending that employer ought to have used the discovery procedure of rule 6(9) of the Labour Court Rules. Court holding that the objective of rule 6(9) is to enable a litigant to discover documentation in the possession or under the control of the other party to the proceedings, whereas a *subpoena* in terms of rule 32 is to obtain documentary evidence in possession of non-parties. Court finding that the failure of the employee to bring an application under rule 6(9)(b) to compel discovery and the issuing of a *subpoena* against the employer is an abuse of process. Labour Court's judgment set aside and *subpoena* set aside.

Coram: Waglay JP, Tlaletsi DJP *et* Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the judgment of the Labour Court (Sleenkamp J) declining to set aside a *subpoena duces tecum* which the respondent caused to be issued on 23 April 2015 in anticipation of a trial that was set down to commence at a future date.

[2] In terms of the *subpoena*, the respondent required the appellant to produce all its annual financial statements as well as management statements for the financial years 2010, 2011, 2012, 2013 and 2014 ("the financial documents"). The *subpoena* is vague in its formulation. It calls upon Mr. Kishor Chita, a director of the appellant and states that the appellant is required to bring the identified documents to court. It gives no details of the time and location of the proceedings in question and *prima facie* does not conform to Form 3 as required by rule 32 of the Labour Court Rules.

[3] The appellant contends that the Labour Court erred because it ought to have set aside the *subpoena* on four grounds. (1) the respondent should have made use of the provisions of rule 6(9) of the Labour Court Rules dealing with the discovery of documents by parties to proceedings (as opposed to issuing a *subpoena*); (2) the *subpoena* is too general and wide in its nature and effect; (3) the information contained in the financial documents under the *subpoena* is either irrelevant to the issues to be determined or confidential and consequently serves no legitimate purpose and could potentially cause prejudice to the appellant in the event of the confidential information falling into the hands of a competitor; and consequently (4) the *subpoena* constitutes an abuse of process.

[4] The appellant manufactures corrugated cartons in the Western Cape. It is one of the companies in the Golden Era Group of companies with its head office based in Johannesburg. The respondent was employed by the appellant as the financial manager of its operations in Atlantis, Western Cape. He was

responsible for the financial affairs of the appellant, compiling financial information and reporting to head office on the financial position of the company. The appellant terminated the respondent's employment on 18 March 2014. The respondent initially alleged that the appellant terminated his employment due to operational requirements. It has subsequently become common cause that the respondent's employment was not terminated for reasons relating to the appellant's operational requirement grounds. The appellant contends that it terminated the respondent's employment because it lost confidence in the respondent and could no longer trust him due to various incidents involving alleged financial irregularities that occurred over a number of years.

[5] The appellant has also instituted four counterclaims against the respondent alleging negligence and mismanagement on the part of the respondent in relation to i) stock-takes resulting in the appellant having to write off or dump stock to the value of some R3 million; ii) failure to control pallets sent to clients resulting in their not being returned and a consequential loss of R802 230.00; iii) mismanagement of the leave of the appellant's employees resulting in a loss of some R85 080.00; and iv) negligent payment for repairs to forklifts whilst under warranty in terms of service and maintenance contracts to the value of some R350 000.00. The respondent denies that he was negligent as alleged or that he is responsible for any of the alleged losses suffered by the appellant.

[6] The parties attended a pre-trial conference in July 2014 and signed a pre-trial minute in November 2014. During December 2014, they were notified that the trial had been set down for 9 February 2015. On 16 January 2015, the respondent's attorney addressed a letter to the appellant's attorney requesting confirmation that certain witnesses would be available failing which a *subpoena* would be issued. It also requested the appellant to make available the signed financial statements for the years 2010-2013 and the monthly management reports in respect of 2011-2014. The respondent contends that these documents are relevant principally to the issues arising under the

counterclaim. The letter noted that should the documents not be made available the respondent would issue a *subpoena* to obtain them at the trial.

[7] During January 2015, the parties engaged in correspondence regarding the postponement of the trial, logistics and the provision of documents. On 9 February 2015, the Labour Court postponed the trial *sine die* by agreement between the parties. It also made an order that "further documents requested by the parties will be exchanged and delivered by no later than Monday 20 April 2015." On 10 April 2015, the respondent's attorneys sent a reminder requesting that the documents be delivered by the date in the court order. The appellant's attorneys replied on 15 April 2015 advising that the appellant was of the view that its financial statements and monthly management reports were confidential and would not take the matter further. The appellant's attorneys stated:

> 'Our client is of the view that its financial statements and monthly management accounts is (sic) of a confidential nature and will in any event not take this matter any further (unless if (sic) your client can convince us otherwise).'

Instead of replying to this letter and accepting the invitation to motivate why he believed the documents were not confidential and relevant, or seeking to compel discovery under rule 6(9) of the Labour Court Rules (which is set out below), the respondent elected to use rule 32 and on 23 April 2015 caused a *subpoena duces tecum* to be issued against the appellant, despite it being a party to the litigation. He did so with full knowledge of the fact that the appellant regarded the financial documents as confidential and irrelevant to the issues to be determined between the parties and accordingly had refused to discover the documents. The *subpoena* was issued five weeks prior to the date on which the matter was set down for trial on 1 June 2015. The limited time left before the trial was due to commence may have prompted the respondent to issue a *subpoena* in respect of the financial documents because an opposed interlocutory application regarding the discovery of the financial documents would most likely have delayed the trial.

[8] On 20 April 2015, the appellant delivered a 600 page bundle of documents to the respondent's attorneys, which did not include the requested financial statements and reports.

[9] In the period between 20 April 2015 and 24 May 2015, attempts to obtain the documents did not prove successful. As mentioned, the *subpoena* was issued on 23 April 2015. On 1 June 2015, the appellant obtained a further postponement of the trial with a punitive costs award against it. The court directed that the *subpoena* should be complied with. However, on 24 June 2015, the appellant brought the urgent application to have the *subpoena* set aside. Steenkamp J refused to set aside the *subpoena* and dismissed the application with costs. He held that the documents sought are relevant to both a claim for dismissal based on operational requirements and the counterclaims. He did not accept that the appellant had proved an ulterior purpose to extract a higher settlement on the part of the respondent or that the documents should be privileged on grounds of confidentiality. The learned judge also dismissed the contention that the *subpoena* was not validly issued and defective in form. This then is the appeal against the refusal to set the *subpoena* aside.

[10] The appellant has raised on appeal, as its main ground of appeal, an additional ground for setting aside the *subpoena* which was not broached in the urgent court before Steenkamp J. As noted earlier, it argued that the respondent followed an irregular process by resorting to a *subpoena* without first attempting discovery and that such constituted an abuse of process.

[11] Parties to litigation proceedings have the right to lawfully secure the production of documentation relevant to the issues arising from the dispute between them. The appellant maintained in argument before us that this must be done in terms of rule 6(9) of the Labour Court Rules governing discovery and not in terms of rule 32, which permits a party to litigation to *subpoena* a witness (as opposed to a party) to give evidence and to produce in evidence any document or thing in his or her possession. The objective of rule 6(9) is to enable a litigant to discover documentation in the possession or under the control of the other party to the proceedings, whereas the primary objective of

rule 32 is to secure the production of documentation from persons or entities who are not necessarily parties to the litigation proceedings.

[12] Two rules govern the process of discovery in the Labour Court. Rule 6(4)(b)(vi) provides that at a pre-trial conference the parties must attempt to reach consensus on the discovery and exchange of documents and the preparation of a paginated bundle of documentation in chronological order. The other rule is rule 6(9) which reads as follows:

> '**Discovery of documents**
>
> (a) A document or tape recording not disclosed may not, except with the leave of the court granted on whatever terms the court deems fit, be used for any purpose at the hearing by the person who was obliged to disclose it, except that the document or tape recording may be used by a person other than the person who was obliged to disclose it.
>
> (b) If the parties cannot reach an agreement regarding the discovery of documents and tape recordings, either party may apply to the court for an appropriate order, including an order as to costs.'

[13] In trial proceedings, a party thus has a clearly defined right to call upon the other party to the proceedings to provide documents by way of discovery. All the financial documents, insofar as they are relevant to the issues to be determined and are required for advancing the respondent's case or defending against the counterclaims, could have been sought and obtained through the discovery process. If the parties were unable to reach an agreement regarding the discovery of documents, either could have applied to the court in terms of rule 6(9)(b) for an appropriate order. It is common cause that the respondent did not make use of rule 6(9)(b) to apply for an order to require the appellant to discover the financial documents. Instead, it issued a *subpoena*.

[14] The function of discovery is to provide the parties with the relevant documentary material before the trial begins so as to assist them appraise the merits of the suit and to provide an opportunity for a fair and orderly disposal of the case before or at the hearing. Part of the purpose is to avoid trial by

ambush. Discovery aims to eliminate surprise through disclosure. But also ensures that the progress of the trial is not impeded by skirmishes about relevance, confidentiality and privilege when such matters could have been better dealt with in pre-trial interlocutory proceedings.

[15] Where a party fails to give discovery, the application to compel contemplated in rule 6(9)(b) serves three valuable purposes: it permits the court by pre-trial motion to: i) assess the relevance of the disputed documentation by deciding whether the documents relate to any matter in question in the action;[1] ii) determine any objection to the production of the document on legally recognised grounds of privilege or prejudice;[2] and iii) set a timetable for discovery and put the parties to terms of compliance, failing which to dismiss the claim or strike out the defence.[3] An application to compel discovery can be made during a trial in unusual circumstances, but the norm is that it should be brought before the trial as this has obvious advantages for preparation, orderly conduct and the curtailing of the proceedings.

[16] Had the respondent followed the discovery procedure, the appellant would have had an opportunity to object to the discovery of the financial documents by opposing the application to compel discovery. By failing to bring an application to compel and electing rather to cause a *subpoena* to be issued in respect of the financial documents, the respondent denied the appellant the right to object to the discovery of the financial documents in a pre-trial process. The appellant submitted that a *bona fide* litigant would not employ and enforce a *subpoena* (which holds severe penalties such as a fine and/or imprisonment in the event of non-compliance)[4] to obtain the financial

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[1] See rule 35(1) of the High Court Rules.

[2] In *Mlamla v Marine and Trade Insurance Co* 1978 (1) SA 401 (E) the court recognised four main grounds upon which discovery may be resisted: the document is incriminatory or penal; legal professional or other privilege; disclosure of the party's evidence; and disclosure injurious to the public interest.

[3] See rule 35(7) of the High Court Rules which authorises the court to make an order dismissing the claim or striking out the defence. Rule 6(9) is not that specific, it merely authorises the court to make an appropriate order. It must be read with rules 11(3) and 11(4) of the Labour Court rules which provide that if a situation arises for which the rules do not provide, the court may adopt a procedure it deems appropriate and may act in a manner that it considers expedient to achieve the objects of the Act. The Labour Court may thus make an order such as that contemplated in rule 35(7) of the High Court Rules.

[4] Section 35(2) of the Superior Courts Act 10 of 2013 provides the requisite sanction in the form of a fine or imprisonment, if the witness disregards a *subpoena*, and in any event a failure to obey a

documents without first availing itself of the discovery process and consequently it urged us to hold that the respondent's conduct constituted an abuse of process. In *Standard Credit Corporation Ltd v Bester and Others,*[5] the Court stated:

> 'In general terms, however, an abuse of the process of the court can be said to take place when its procedure is used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings.'

[17] A court may set aside a *subpoena* if it is satisfied that its issue constituted an abuse of the process of the court.[6] The *onus* of proving abuse of process rests on a party alleging the abuse.[7] In *Beinash v Wixley,*[8] the Supreme Court of Appeal described an abuse of process in relation to the issue of a *subpoena* in the following terms:

> 'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective....
>
> Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of the truth, unless the disclosure of the document is protected by law. The process of a *subpoena* is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded. For this reason the Court must be cautious in exercising its power to set aside a *subpoena* on the grounds that it constitutes an abuse of process. It is a power which will be exercised in rare cases, but once it is clear that the *subpoena* in issue in any particular matter constitutes an abuse of the process, the Court will not hesitate to say so and

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subpoena and/or attend court or produce documents is at common law a contempt of court committed *ex facie curiae.*

[5] 1987 (1) SA 812 (W). at 820A - B.

[6] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 738H–739B.

[7] *SA Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* and *Others* 2007 (6) SA 629 (D).

[8] 1997 (3) SA 721 (SCA).

to protect both the Court and the parties affected thereby from such abuse.'[9]

[18] The abuse of process doctrine derives thus from the court's inherent power to act as the guardian of its own procedures in the interests of orderly and regular litigation. The doctrine at common law is wide enough to encompass a power to set aside an irregular step in proceedings which causes prejudice. The premature resort to a *subpoena* against a party is such an irregular step. The discovery process is designed consciously to provide a mechanism to resolve disclosure between the parties at the pre-trial stage of the proceedings. The letter of the appellant's attorneys of 15 April 2015 was in effect an invitation to the respondent to resort to an application to compel in terms of rule 6(9). He declined that invitation, probably because he feared it would delay the trial. But his chosen course was bound to be fraught with difficulty and in any event would have delayed the trial with prior skirmishes at the trial regarding the relevance of and any privilege attached to the documents. Moreover, discovery is the preferred process when seeking documentary evidence from a party to litigation. A *subpoena duces tecum* is the mechanism ordinarily applied to obtain documentary evidence in possession of non-parties.

[19] The respondent's argument that the appellant is being technical and formalistic misses the point. The appellant is entitled to put up a defence to any application to compel discovery prior to the trial commencing. A pre-trial ruling on disclosure could bear significantly upon the appellant's trial strategy and preparation. Besides the denial of its basic right to be heard on the issues of relevance and privilege prior to trial, it has been deprived of the opportunity to assess the merits of the suit in light of any judicially determined obligation to disclose relevant information. Any negation of those rights will be prejudicial. Moreover, I see no basis for refusing a litigant the benefits of a contested pre-trial discovery process on the basis that labour litigation should be conducted with minimal legal formalities and speed. Avoiding pre-trial discovery is likely to have the opposite effect, as this case shows. Proper discovery normally can contribute to shortening trial proceedings.

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[9] At 734G–735A.

[20] In the premises, I am satisfied that the failure of the respondent to bring an application under rule 6(9)(b) to compel discovery and his irregular issuing of a *subpoena* against his opponent in litigation is indeed an abuse of process in the circumstances of this trial. That said, one has a measure of sympathy with the respondent arising from the fact that this issue was mentioned for the first time on appeal and was not argued before Steenkamp J in the court *a quo*. It is trite that a court of appeal is not bound by the terms of issues as defined by the pleadings or affidavits. A new legal point not involving new evidence may be argued on appeal.[10] The fact that the point was presented belatedly can be taken into consideration in determining an appropriate costs order. The appellant at no stage prior to the appeal urged the respondent to pursue pre-trial discovery procedures. Had the point been taken earlier both the application and the appeal might possibly have been avoided. This is consequently a situation where each party should bear its own costs in the application and the appeal despite the appellant having succeeded on appeal.

[21] The appellant has also addressed the issues of the relevance and confidentiality of the documents. These are matters best left for the Labour Court to determine in pre-trial discovery proceedings or at the trial. Likewise, having decided that the issue of the *subpoena* was an abuse of process, justifying it being set aside, there is no need to consider any issues regarding its alleged defective form; although the arguments raised are evidently not without merit.

[22] In the result, the appeal must be upheld and the following orders are issued:

i) The orders of the court *a quo* are set aside and substituted with the following:

> "The *subpoena* issued by the Registrar of this Court on 23 April 2015 is hereby set aside"

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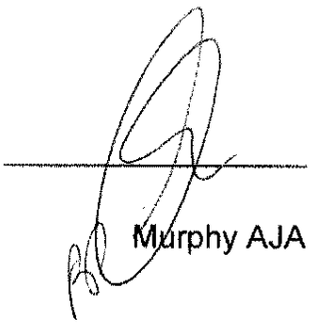
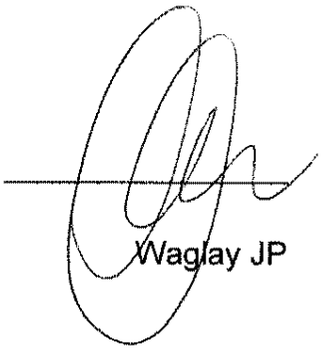
[10] *BP (SA) (Pty) Ltd v Secretary for Customs and Excise* 1985 (1) SA 725 (A).

ii) There is no order as to costs.



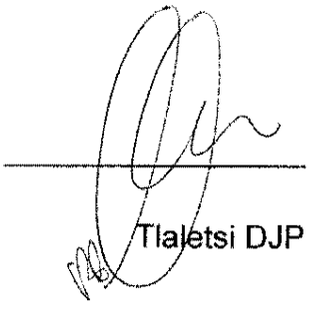
Murphy AJA

I agree



Waglay JP

I agree



Tlaletsi DJP

APPEARANCES:

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