THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J1726/19

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION(SOC) LIMITED **First Applicant**

MADODA MXAKWE **Second Applicant**

MANUEL DE OLIVIERA **Third Applicant**

SANDILE JULY **Fourth Applicant**

YOLANDE VAN BILJON **Fifth Applicant**

and

AYANDA MKHIZE **First Respondent**

Labour Court

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

Heard: 15 August 2019

Judgment delivered: 16 August 2019

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JUDGMENT

VAN NIEKERK J

[1] On 17 October 2018, the first respondent was dismissed by the first applicant on the grounds of misconduct. She has disputed the fairness of her dismissal and an arbitration hearing in the CCMA has been set down for 21 August 2019. On 5 August 2019, the senior convening commissioner issued subpoenas in terms of s 142 of the Labour Relations Act (LRA) requiring the second, third, fourth and fifth applicants to attend at the arbitration hearing before questioning and to produce any book, document visual footage or object. In this application, the applicants seek to have the subpoenas set aside

[2] The issuing of the subpoenas was preceded by the filing of written motivations in terms of the rule 37 of the rules of conduct of proceedings before the CCMA. For present purposes, it is not necessary for me to traverse the content or merits of the written motivations save to record that the senior convening commissioner

was obviously persuaded that he should exercise his discretion in favour of issuing the subpoenas sought.

[3] The applicant avers that the subpoenas are an abuse of process and therefore irregular and invalid. In essence, in each instance, the applicants submit that there would be no purpose in questioning them at the arbitration proceedings. They further submit that the second and fifth applicants occupy very senior positions within the first applicant's managerial structure and that it would be highly prejudicial to these applicants for them to spend two days at the CCMA under subpoena.

[4] When the application was called, I enquired of the applicant's counsel as to the basis on which the application was brought, since this was not apparent from the papers. My attention was drawn to the provisions of s 158 of the LRA which, amongst other things, empowers this court to make various appropriate orders, including declaratory orders and orders directing the performance of any particular act. Section 158 (with the possible exception of s 158 (1)(h)) confers powers on this court; it does not confer jurisdiction. Jurisdiction remains regulated by s157, which provides in subsection (1), in broad terms, that this court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law, are to be determined by this court. In other words, in any proceeding before this court which in terms of s 151 has inherent powers only in relation to matters under its jurisdiction, it is necessary for an applicant to identify a provision of the LRA (or any other law) that confers jurisdiction of the court to entertain the proceeding.

[5] There is no provision in the LRA (or in any other law) that confers a general jurisdiction on this court to supervise the manner in which the CCMA and exercises its statutory powers. The scope of this court's intervention is both defined and limited by the LRA and entitles this court to intervene, for example, by way of review under s 145 and s 158 (1) (g).

[6] Section 142, which regulates the powers of commissioners when attempting to resolve disputes and which provide for the power of subpoena, contains a

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number of requirements that attach to the issuing of a subpoena. For example, a subpoena must be signed by the director or his or her nominee, and particular constraints apply to any authorisation to enter and inspect premises on which any book, document or object relevant to the resolution of a dispute is to be found. Rule 37 of the rules for the conduct of proceedings before the CCMA establishes the procedure by which a subpoena must be issued and served and, amongst other things, prescribes the times within which an application to have a subpoena issued must be made, and the form of that application. The rule further establishes grounds on which the CCMA is entitled to refuse to issue a subpoena.

[7] In the present proceedings, it is not in dispute that all of the procedural requirements of both the LRA and CCMA rule 37 have been met. The only basis on which the issuing of the subpoenas has been attacked is that they are an abuse of process.

[8] In the absence of any statutory basis on which this court is entitled to intervene and determine whether the issuing of a subpoena is an abuse of process, it seems to me that the application stands to be dismissed. The point goes beyond the technical – if this court is to intervene in circumstances such as the present, the legal basis of that intervention must be clear. The director of the CCMA or his or her nominee who receives a written motivation for the issuing of a subpoena must necessarily satisfy him or herself that the necessary procedural requirements have been met, and that a proper case has been made out. This would ordinarily require a close scrutiny of the motivation and a consideration of any potential for abuse of process. (For a consideration of this issue in the context of the issuing of a subpoena *duces tecum*, see *Beinash v Wixley* 1997 (3) SA 721 (SCA).) If this court were to exercise some ill-defined and broad power of supervision over the exercise of the director's discretion, the immediate question is the basis on which the court might be entitled to intervene. For example, would the court be entitled to intervene because it would have come to a different conclusion on the same facts? That would amount to an appeal

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against a decision made by the director, a remedy that is not contemplated by the LRA. On the other hand, there could be no bar against an aggrieved party seeking to review such a decision in terms of s 158 (1) (g). The parameters of intervention in this instance are clearly demarcated – the court is empowered to intervene if the decision is not one to which a reasonable decision-maker could come on the available material, or if the director misconceived the nature of the enquiry. A so-called legality review and a common law review may also be available to any applicant in a s 158(1)(g) review but again, in each case, the scope of intervention is relatively clearly defined. Insofar as counsel submitted that the remedy of review would be overly time-consuming, there is no reason why a review could not be sought on an expedited or urgent basis. Indeed, most urgent applications filed in this court seek to dispense with the forms and service provided for in the rules of this court and there is no reason why that would not extend to the provisions of Rule 7A (8) which regulates review applications.

[9] Insofar as counsel submitted that a refusal by this court to intervene would have the consequence that dismissed employees could simply have subpoenas issued as an element of a strategy of harassment in the course of arbitration proceedings, that submission overlooks the fact that the director is required in terms of s 142 to consider the written motivation in support of any application for the issuing of a subpoena and to make a decision that is rational and reasonable having regard to the material disclosed in the motivation. Where the decision is devoid of rationality and reasonableness, as I have indicated, an aggrieved party has the remedy of review. Further, it seems to me that any abuse of s 142 is a matter that can be taken up directly with the presiding commissioner either prior to or during the commencement of any arbitration hearing in respect of which a subpoena has been issued. Any abuse of process that the applicants complain about is an abuse of the arbitration process, not process in this court. The arbitrator presides at the arbitration hearing, and must manage and control that process. It seems to me that an arbitrator's statutory powers are sufficiently broad to deal with any abuse of the arbitration process in the form of a party initiating the issuing of subpoenas either irregularly or without proper cause, or

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where it becomes clear at the commencement of or during the process that a party has abused s 142 and sought to have subpoenas issued as nothing more than a tactic or strategy to place undue pressure on the other party. In extreme cases, such abuse may even amount to contempt of the Commission and liable to be sanctioned as such. Further, it remains open to a person who has been subpoenaed to attend a hearing to seek direction from the arbitrator as to the basis on which that party should hold him or herself available. The issuing of a subpoena is an interlocutory matter, and the presiding arbitrator would be entirely within his or her rights to vary the terms on which the subpoena was issued, having regard to the exigencies of each case.

[10] Finally, counsel for the applicants urged me to have regard to the fact that similar applications have previously been granted by this court. It is not clear to me from the judgments to which I was referred that the applications concerned did not disclose some legal basis for intervention. In any event, the fact that the same or similar orders have previously been granted is not in itself a basis on which to assume jurisdiction where I am persuaded, in the present instance at least, that there is none.

[11] In short, an applicant seeking to set aside a ruling or decision made by a CCMA commissioner or other member of staff must necessarily articulate a proper legal basis to do so. There is no general supervisory authority that vests in this court that entitles the court to intervene in decision-making in the CCMA and in particular, absent a review, in relation to a decision to issue a subpoena in terms of s 142. It follows that the present application stands to be dismissed.

[12] In relation to costs, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. In the present instance, I fail to appreciate why the first respondent should be denied the costs that she has incurred in opposing the application.

I make the following order:

1. The application is dismissed, with costs.

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André van Niekerk

Judge

Appearances:

For the Applicants: Adv M Van As,instructed by Werksmans Attorneys

For the Respondent: Adv T Moretlwe,instructed by Motlatsi Seleke Attorneys

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