



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JA124/2018

In the matter between:

**SASOL SOUTH AFRICA (PTY) LTD**

**Appellant**

and

**GODFREY JABULANI NKOSI**

**First Respondent**

**NATIONAL BARGAINING COUNCIL**

**FOR THE CHEMICAL INDUSTRY**

**Second Respondent**

**Heard:** 7 May 2020

**Delivered:** 15 July 2020

**Coram:** Waglay JP, Jappie JA and Savage AJA

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**JUDGMENT**

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## SAVAGE AJA

- [1] This appeal, with the leave of this Court granted on petition, is against the refusal of the Labour Court (Sedile AJ) on 24 August 2018 to set aside a subpoena *duces tecum* issued by the National Bargaining Council for the Chemical Industry ('NBCCI'). The subpoena, issued at the instance of the first respondent, Mr Godfrey Jabulani Nkosi ('the employee'), directed two employees of the human resources department of the appellant, Sasol South Africa (Pty) Ltd, to attend at arbitration proceedings held under the auspices of the NBCCI and produce documentation relating to bonuses and increases received by three other of the appellant's employees in 2015.
- [2] The employee lodged an unfair labour practice against the appellant relating to his performance bonus and salary increase. Before the dispute could be arbitrated, he caused the subpoena to be issued. On 6 June 2016, the appellant brought an application in the Labour Court to set aside the subpoena on the basis that it was invalid and an abuse of process. The Labour Court dismissed the application finding that the appellant should have raised its objections to the subpoena with the arbitrator before approaching the Court and that the subpoena ought not to be set aside. The matter was referred back to the NBCCI for the arbitration to proceed.
- [3] On appeal, the appellant contends that the Labour Court erred in finding that an objection to the subpoena should have been raised at arbitration since the NBCCI lacks statutory authority to set aside a subpoena issued by it, nor enjoys the inherent jurisdiction to do so. In addition, the information sought relating to performance ratings and bonuses paid to other employees is confidential, alternatively should have been sought by the issue of a subpoena against the individual employees directly. The appellant submits further that the issue of the subpoena constituted an abuse of process in that performance ratings and salaries are individual in nature; the information could have been obtained using discovery procedures under rule 29(1) of the Rules of the NBCCI; and the subpoena *duces tecum* should only be issued against third parties. Moreover, no witness fees were paid by the employee as required by s 142(7)(b) of the Labour Relations Act 66 of 1995 (LRA) read

with rules 37 and 38 of the NBCCI Rules and the issue of a subpoena was inappropriate since the employee failed to exhaust internal remedies available to him.

### Discussion

- [4] The power to issue a subpoena is derived from the LRA. It provides, in s 142(1)(b), for *inter alia* the issue of a subpoena *duces tecum* against ‘any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object’. This Court in *Mogwele Waste (Pty) Ltd v Brynard (Mogwele)*<sup>1</sup> made it clear that:

‘...a litigant is 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.’

- [5] A subpoena *duces tecum* must, however, have a legitimate purpose and may be set aside by the Labour Court *inter alia* where the issue of the subpoena constituted an abuse of process having regard to the circumstances of the case.<sup>2</sup> Such an abuse may include where the subpoena is intended to be used for an extraneous purpose.<sup>3</sup>
- [6] In his application for the issue of the subpoena, the employee detailed the documents which he sought to have produced and which, on the face of it, have some relation to his unfair labour practice claim. He made clear that his intention in seeking the documents which are the subject of the subpoena is not to know the salaries of the three employees in respect of whom documentation is sought and that the arbitrator could ‘view the documents [in]

<sup>1</sup> (2016) 37 ILJ 2051 (LAC) at para 17.

<sup>2</sup> *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 738H–739B.

<sup>3</sup> *Ibid.*

*my absence to ensure confidentiality of their salaries*'. He also acknowledged his liability to pay witness fees, if required.

- [7] Rule 29 of the NBCCI Rules, allows a panelist to order the disclosure of relevant documents. It does not oblige a party to make use of the rule before applying for the issue of a subpoena under rule 37. In addition, rule 37 does not require rule 29 to have been relied upon before a subpoena is issued. It also does not restrict the issue of a subpoena against only third parties who are not a party to the dispute being determined at arbitration.
  
- [8] The resolution of labour disputes at arbitration is intended to be an expedited process, efficient and cost-effective. Rules and procedures are aimed at avoiding cost and delay, so as to achieve a fair and equitable resolution of a dispute, rather than creating barriers and delay in the dispute resolution process. The rules governing the arbitration process are distinct from those which govern trials in the Labour Court. At arbitration, there is no formal discovery process and there is no bar on obtaining the issue of a subpoena *duces tecum* rather than awaiting the decision of the arbitrator at arbitration to order documents be disclosed with the inevitable delays that this may cause. The implication of the election to obtain a subpoena is one of cost in that witness fees, unless waived, are to be paid by the party obtaining the subpoena. The fact that a subpoena *duces tecum* has been issued does not make the documents produced either admissible or relevant. The other party retains its rights to object to the disclosure, relevance and admissibility of such documents, in which event the arbitrator is required to make a ruling on such objections raised.
  
- [9] This Court in *Mogwele Waste (Pty) Ltd v Brynard (Mogwele)*<sup>4</sup> found, in the failure to compel discovery and cause rather that a *subpoena* be issued, that the respondent had denied the appellant the right to object to the discovery of the financial documents in a pre-trial process. The current matter is distinguishable from *Mogwele* in that the same pre-trial processes designed to provide a mechanism to resolve documentary disputes between parties at the pre-trial stage of the proceedings did not apply at arbitration. The employee

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<sup>4</sup> (2016) 37 ILJ 2051 (LAC) at para 16.

cannot be said to have acted prematurely in electing to seek the issue of a subpoena, nor is there support for the appellant's contention that the subpoena was obtained for a purpose intended to cause prejudice to the appellant<sup>5</sup> or that its issue amounted to an abuse of process. In such circumstances, there is no reason why the subpoena should be set aside and in arriving at this conclusion, albeit for different reasons, the Labour Court did not err.

[10] For these reasons, the appeal falls to be dismissed. With the matter unopposed, no order as to costs is made.

### Order

[11] The following order is made:

1. The appeal is dismissed.

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Savage AJA

Waglay JP and Jappie JA agree.

Matter determined under Covid-19 directions:

APPEARANCES:

FOR THE APPELLANT: Fluxmans Inc.

FOR THE FIRST RESPONDENT: No opposition

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<sup>5</sup> See *Standard Credit Corporation Ltd v Bester and Others*, 1987 (1) SA 812 (W) at 820A-B.