IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

CASE NUMBER: C415/2014

DATE: 24 JUNE 2015

In the matter between:

GERHARD MATTHYS BRYNARD Applicant

and

MOGWELE WASTE (PTY) LIMITED Respondent

J U D G M E N T

STEENKAMP, J:

This is an *ex tempore* judgment in an interlocutory application brought by the respondent, Mogwele Waste (Pty) Ltd, this morning to have a subpoena set aside. The subpoena was issued on 23 April of this year at the behest of the applicant, Mr Gerhard Brynard. It called upon the respondent's director, Mr Kishor Chhita, to bring to court the respondent's annual financial statements for the financial years 2010 to 2014 and also the management statements for the financial years 2010 to 2014.

The background is that the applicant, Mr Brynard, referred an unfair dismissal dispute to this court. It appears from his statement of claim that he alleges that he was dismissed for operational requirements and that that dismissal was unfair. The employee says in his statement of case:

> "The applicant was verbally advised by the respondent's duly appointed general manager, Mr Dirkie van der Merwe, on 17 March 2014, that the applicant is being retrenched with immediate effect."

And further down:

> "On 18 March 2014, the applicant was instructed by Mr Dirkie van der Merwe to pack up his belongings and leave the respondent's premises at the end of the day and that he is retrenched with immediate effect."

The applicant then alleges that the respondent did not comply with any of the provisions contained in Section 189 of the Labour Relations Act, Act 66 of 1995, dealing with dismissals for operational requirements. He further says that he was not informed of the reason for his retrenchment and that he is not aware of any operational requirements necessitating any retrenchments. He then formulates the first of his two claims as follows:

> "Unfair dismissal for operational requirements/ retrenchment:
>
> (i) The applicant's retrenchment was procedurally unfair. The respondent blatantly disregarded the provisions of Section 189 of the LRA.
>
> (ii) The applicant's retrenchment was substantively unfair, as the respondent failed to disclose any reason for the applicant's retrenchment, no operational requirements existed necessitating or justifying the applicant's retrenchment and the respondent failed to follow the procedure as set out in Section 189 of the LRA."

The respondent, that is the company, Mogwele Waste (Pty) Ltd, avers that the applicant's employment was, in fact, terminated by agreement. However, the Court must have regard to the claim as formulated by the applicant at this stage, together with the fact that the respondent applied for a tax directive from the South African Revenue Services, stating that the applicant had been retrenched, and on the basis of which SARS issued a tax directive that no deduction should be made from the severance pay paid to the applicant.

I shall return to the relevance of the applicant's claim insofar as he says that the financial statements are relevant to the reason for his dismissal.

The further history of the matter is that since January of this year, in circumstances where the matter was initially set down for trial to commence on 9 February, the applicant asked the respondent for certain documents. More specifically, on 16 January, the applicant's attorneys asked the respondent's attorneys, both of whom have been on record throughout, for the company's financial statements for the years 2010 to 2013 and the management reports for the years 2011 to 2014. Further correspondence ensued between the attorneys. In short, the respondent's attorneys questioned the relevance of the financial statements required and asked the applicant's attorneys for reasons why they wanted it. The respondent also said that the documents were, in its view, confidential.

Eventually, on 23 April, the applicant had the subpoena issued out of this court and it was served on the respondent on 30 April. On 15 May, the parties had a further pre-trial conference, and in a pre-trial minute filed on 19 May they recorded, under the heading "Subpoena":

> "Respondent will revert on whether it is prepared to provide these documents or whether this point will be argued."

The respondent was not prepared to provide the documents and when the matter was set down for trial again to commence on 1 June, it had still not done so. Neither had the respondent applied for the subpoena to be set aside. On that day, 1 June 2015, the matter was set down for trial before Walele, AJ. The respondent applied for a postponement, because its main witness, Mr Chhita, was ill. It did not apply to have the subpoena set aside at that stage and Walele, AJ made an order in the following terms:

> "The subpoena for documents to be furnished to the applicant shall be complied with."

It is only then that the respondent brought the current application and it did so on 5 June. The employee filed an answering affidavit and the company replied. I was, therefore, presented with a full set of pleadings when the matter came before Court this morning.

The first question to be considered is that of urgency. Ms *Erasmus*, for the company, argued that the matter remains urgent, despite the fact that the subpoena was issued two months ago, because in the interim the company had tried to establish why the documents were sought and whether it should make them available. That may be so for the first month, however, since 30 April when the subpoena was served on the respondent, even though further correspondence ensued, the respondent took no steps either to supply the documents provided or to have the subpoena set aside. It was only galvanised into action on 1 June when the matter was meant to proceed to trial, but when it brought an application for a postponement.

In my view the application to have the subpoena set aside should be struck from the roll for lack of urgency alone. However, that would not be in the interest of either party, as it will only lead to further delays in circumstances where this matter has already been postponed twice and where the trial could and should have been finalised by now. I will, therefore, deal with the merits of the application.

The company sets out four reasons why it says the subpoena should be set aside. Firstly, it says it was issued for an ulterior purpose, i.e. to extract "a higher settlement". Secondly, it says the documents subpoenaed have no bearing on the pleaded issues. Thirdly, it says they may fall into the hands of a competitor, and along with that, that the documents are confidential. Fourthly, it argues that the employee is simply embarking on a fishing expedition.

The principles relating to applications of this sort are well known. Perhaps the most convenient summary is that found in the judgment of Mahomed, CJ in Beinash v Wixley 1997 (3) SA 721 (SCA), and specifically at 734 where he says the following:

> "There can be no doubt that every court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse, it is quite entitled to set it aside. As was said by De Villiers JA in Hudson v Hudson & Another 1927 AD 259 at 268:
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> > "When ... the court finds an attempt made to use for ulterior purposes, machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse."
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> 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. ... A subpoena *duces tecum* must have a legitimate purpose. ... 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 to protect both the court and the parties thereby from such abuse." [Citations omitted].

Both parties also referred me to a judgment of this court in Cachalia v Vinning 2012 (33) *ILJ* 611 (LC), but that judgment, to a large extent, simply reiterates the principle set out by the SCA in Beinash v Wixley.

It is against that background and those principles that I must consider whether the subpoena issued in this case constitutes an abuse of process.

Firstly, I take into account that the applicant's claim rests on a claim that he was dismissed for operational requirements. Whether that is a good or a bad claim, is neither here nor there; that is for the trial court to decide. Why it is relevant is that, if he was indeed dismissed for operational requirements, then the financial status of the company and, therefore, its financial statements and management accounts, are relevant to his dismissal.

More pertinently, though, I turn then to the company's counterclaims. Those four counterclaims comprising more than R4 000 000,00 worth in total, are: (1) that the employee manipulated management accounts; (2) that he was responsible for stock losses; (3) that he did not exercise control of pallets in the period January 2012 to March 2014; (4) that he was responsible for the overpayment of leave in excess of 44 days; and (5) that he was responsible for overpayments with regard to forklifts (and that claim goes back to mid 2012, as an aside). Although it appears that those are actually five counterclaims, two of them should be read together.

Having had regard to those counterclaims and the substance of the company's allegations, I do not think it can be said at this stage that the claims can be neatly limited to one or two aspects with regard to which the respondent can pick and choose which documents to make available. Clearly, both the management accounts forming the very subject of one of the counterclaims, and the financial statements are relevant to the counterclaims, and more specifically the employee's responses and defences to those counterclaims.

Ms *Erasmus* said that some of the contraventions were only discovered in 2015. That appears to me to be irrelevant. The question is not when they were discovered, but when they arose. In that regard both parties will have to point to the financial statements and the management accounts in order for the company to show on what it basis it counterclaims and for the employee to establish his defence, if any.

Once again, whether he has a good defence or not, is irrelevant at this stage. The question is only whether the subpoena amounts to an abuse of process. The merits of both his claim and the counterclaims will be traversed at trial. At this stage, though, it appears to me that he has at least laid a basis for his assertion that the documents subpoenaed may be relevant to both his claim of an unfair dismissal based on operational requirements; and his defence in the counterclaims, and why they should be provided. Once he, his legal team, and perhaps his auditors have had an opportunity to peruse those documents, it may well be that he decides not to use them at trial; but at this stage the interests of justice require that he at least be given access to them.

With regard to the claim of an ulterior purpose, the company has simply not set out any basis for that argument. And with regard to the claim that the documents are confidential and may fall into the hands of a competitor, it also has not laid any basis. It may well be inconvenient for it if the documents do fall into the hands of a competitor, but there is no reason to suspect that the employee will be so vindictive as to make the documents available to another party. As Ms *De Wet* pointed out, he is currently employed in an unrelated enterprise and there is no reason to suspect him of having that purpose in mind. In any event, if necessary, the parties could agree to an undertaking that it will not be made available to any third parties.

There is one remaining aspect and that is that Ms *Erasmus* argued that the subpoena was not validly issued. The rules of this Court, in contradistinction to the High Court rules, does not provide for two different methods of subpoena. Rule 32 deals with both a witness subpoena and a subpoena *duces tecum*. Rule 32(3), that could perhaps have been more clearly worded, says:

> "If a witness is required to produce in evidence any document or thing in the witness's possession, the subpoena must specify the document or thing to be produced."

And then (5):

> "A witness who has been required to produce any document or thing at the proceedings, must hand it over to the registrar as soon as possible after service of the subpoena, unless the witness claims that the document or thing is privileged."

The rule does not make it clear whether, after handing over the documents, the "witness" has to give evidence *viva voce*. The form to be used for issuing subpoenas does envisage that a witness is required to appear in person before the court and to remain in attendance until excused "in order to testify". It then goes further to say "and inform them that they are further required to bring with them and to produce to the court (here describe accurately the document, book or other thing to be produced)".

The subpoena issued in this case did not in terms require Mr Chhita to come and testify. However, it was issued to him, it was served on the company in the proper form and in terms of Rules 4, and it then states:

> "Inform Mr Kishor Chhita, director of the respondent of [*sic*] Mogwele Waste (Pty) Limited, situated at no 1 Louwtjie Rothman Crescent, Atlantis Industria, Atlantis, that the respondent is required to bring to court the respondent's annual financial statements for the financial years 2010, 2011, 2012, 2013, 2014 and the management statements for the financial years 2010, 2011, 2012, 2013, 2014. And inform Mr Chhita that he should at no account not comply with the subpoena as he may render himself and the respondent liable to a fine or to imprisonment."

There could have been no doubt in the mind of Mr Chhita and any of his fellow directors that he was required to make at least the documents available. And Ms *De Wet* clarified in court today, as she apparently did on 1 June before Walele AJ, that the applicant does not require Mr Chhita to be present in person, but only for the documents to be provided. He has no objection if another witness could be cross-examined on the relevance of those documents. To say that the subpoena has not been issued using the *ipsissima verba* of Form 4, is to my mind elevating substance over form. I am satisfied that the subpoena was validly issued and served.

In conclusion, I do not regard this subpoena to amount to an abuse of process. It is relevant to the issue in dispute and it must stand.

With regard to costs, I must take into account the requirements of both law and fairness. Firstly, I take into the account that the respondent was unsuccessful. Secondly, I take into account that this application, that has been brought on an urgent basis, could and should have been brought some time ago. At the very latest it could have been argued on 1 June when the parties were in court in any event to argue the application for postponement. The further costs incurred by the applicant were unnecessary.

The application to have the subpoena *duces tecum* set aside is dismissed with costs.

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STEENKAMP, J

APPEARANCES

APPLICANT: Alma de Wet

Instructed by Venter attorneys, Durbanville.

RESPONDENT: Linda Erasmus

Instructed by De Beer Minnaar attorneys, Johannesburg.