



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

Not Reportable  
Case No: J 1304/2021

In the matter between:

**KATLHOLO ELIAS WABILE**

**Applicant**

and

**THE COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

**First Respondent**

**CHARLES DELL, N.O.**

**Second Respondent**

**Heard: 28 February 2023**

**Delivered: 14 March 2023**

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**JUDGMENT**

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**VOYI, AJ**

## Introduction

- [1] This matter commenced as an application for declaratory and ancillary relief.
- [2] When the case was argued before me, the applicant capitulated and stated that he was withdrawing the application.
- [3] With the matter having been withdrawn, what now remains for determination is whether the applicant should be ordered to pay the first respondent's legal costs.

## Overview

- [4] The applicant (Wabile) is a former employee of the first respondent. He was employed by the first respondent (the Commission) as a commissioner. The Commission, as the employer, dismissed Wabile on 13 August 2019 following a disciplinary enquiry in which he was found guilty of gross misconduct.
- [5] After his dismissal, Wabile lodged an unfair dismissal claim with the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), now in its capacity as the dispute resolution body whose primary function is to conciliate and arbitrate disputes referred to it in terms of the Labour Relations Act<sup>1</sup> (LRA) and other labour statutes.
- [6] The unfair dismissal dispute ultimately proceeded to arbitration. The second respondent (Commissioner Dell) was appointed as the commissioner to arbitrate the dispute.
- [7] During the course of the arbitration proceedings, Wabile caused a subpoena *decus tecum* (the subpoena) to be issued in terms of section 142 (1)(b) of the LRA. The subpoena called for the production of documents by the Commission, namely (a) EXCO summary reports for departmental activities and (b) arbitration and post-hearing monthly reports.

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<sup>1</sup> No. 66 of 1995.

- [8] The relevant period for which the documents were being sought was stated in an email attached to the subpoena. It was contended by Wabile that the required documents are crucial to his defence in the arbitration proceedings.
- [9] It appears that the Commission only produced redacted copies of the EXCO summary reports for departmental activities for October 2017, December 2017 and January 2018. The report for the month of November 2017 was, according to Wabile, not provided by the Commission. It also appears that the arbitration and post-hearing monthly reports that were not produced.
- [10] As a result of what he regarded as partial compliance, Wabile took the view that the Commission was in contempt in failing to produce all of the requested documents. On 16 April 2021, he brought an application before Commissioner Dell, seeking to hold the Commission in contempt of the CCMA for failing to produce all of the subpoenaed documents.
- [11] On 10 May 2021, Commissioner Dell issued a Ruling on the application for contempt of the CCMA. In his Ruling, he directed as follows:
- ‘3.1 The Respondent must furnish to the Applicant, and within 7 (seven) days from the date hereof, the following documents requested in the subpoena and in the Applicant’s Notice of Motion, namely:
    - 3.1.1 The Arbitration and Post-hearing monthly reports for the periods of October, November and December 2017, as well as for January 2018.
    - 3.1.2 The EXCO Summary report for the period November 2017.
  - 3.2 Should the Respondent not provide the Applicant with the aforementioned documents within the prescribed period of time, the matter may be referred to the Labour Court for the necessary relief.’
- [12] On 29 October 2021, Wabile instituted an application before this Court seeking *inter alia* a declaratory order to the effect that Commissioner Dell’s

Ruling falls short of the statutory standard and that he be ordered to issue a Ruling that meets the statutory standard.

- [13] The application launched by Wabile was in two parts, they being styled Part A and Part B. The declaratory order was sought under Part A. Under Part B, Wabile sought *inter alia* an order substituting Commissioner Dell's Ruling with a ruling to the effect that the Commission, as the employer, is in contempt of the CCMA.
- [14] Commissioner Dell did not oppose the matter. He delivered a notice to the effect that he will abide by the decision of this Court. The Commission, however, opposed the application.
- [15] The approach adopted by the Commission, in its answering affidavit, was to '*... address legal questions premised on the common cause facts.*' In particular, the Commission took the position that there is a dispute of fact as to whether there was compliance with the subpoena.
- [16] The deponent to the Commission's answering affidavit stated therein that he will not enter the domain of why the employer claims that it has complied with the subpoena. In his replying affidavit, Wabile insists that the Commission has not complied with the subpoena. He says that if there was compliance, Commissioner Dell would have found that the Commission was not in contempt.
- [17] The withdrawal of the matter immediately followed after Wabile was given an elucidation of paragraph 3.2 of Commissioner Dell's Ruling. Having had the benefit of what is meant by the words used in the said paragraph, Wabile conceded that the application was misguided. He, in his own words, described the application as '*dead in the water*'.
- [18] With the application being withdrawn, the Commission persisted with its prayer for costs. I afforded both parties an opportunity to address me on costs. Counsel for the Commission briefly addressed the Court on this issue and also referred to the heads of argument delivered. Wabile also advanced

his argument as to why an adverse costs order should not be made against him.

### Analysis

- [19] According to section 162 of the LRA, this Court may make an order for the payment of costs according to the requirements of the law and fairness. The awarding of costs is a matter within my discretion, which I am enjoined to exercise judicially.<sup>2</sup>
- [20] In as much as the application was, by Wabile's own admission, misguided, I do not have the benefit of the Commission's version on whether or not there has been compliance with the subpoena. The Commission elected not to enter the domain of why it claims there was compliance with the subpoena.
- [21] What I have before me is a dismissed employee who contends that the subpoena issued has not been fully complied with. In one of his prayers in the notice of motion, Wabile sought an order to the effect that the Commission is in contempt of the CCMA in failing to comply with the subpoena issued.
- [22] If the Commission had demonstrated that it complied with the subpoena and on the face of that compliance, Wabile nonetheless proceeded to launched his application, I would not have hesitated in granting an order for costs against him.
- [23] It is my finding that if there was compliance with Commissioner Dell's Ruling by the Commission, the evidence of which I do not have, Wabile's conduct of proceeding with the matter before this Court would have been frivolous and vexatious, thus warranting an adverse costs order. As matters stand, I do not have the necessary evidence upon which to base such a conclusion.

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<sup>2</sup> *National Union of Mineworkers obo Masha and Others v SAMANCOR Limited (Eastern Chromes Mines) and Others* (2021) 42 ILJ 1881 (CC) at para 32

[24] All things considered therefore, my decision is that there should be no order as to costs in this matter.

[25] In the premise, I make the following order:

Order

1. There is no order as to costs.

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N P Voyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : In person

For the First Respondent : Adv S Bismilla

Instructed by : Dyason Incorporated

LABOUR COURT