DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. X
(2) OF INTEREST TO OTHER JUDGES: YES/NO. X
(3) REVISED.

11/9/2020 [redacted]
DATE SIGNATURE

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

CASE NO: J 929/20

In the matter between:

COBUS LOOTS	First Applicant
ANDRE VAN DEN BERGH	Second Applicant
JAN THIRION	Third Applicant
TUMELO NKISI	Fourth Applicant
BARBERTON MINES (PTY) LTD	Fifth Applicant

and

ELIZE CHANTELLE JACOBS	First Respondent
THE DIRECTOR OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Third Respondent
XOLANI NDUNA *N.O.*	Fourth Respondent

Heard: 11 September 2020.

Delivered: 14 September 2020 at 13h00.

JUDGMENT

VAN NIEKERK J

[1] The applicants seek to review and set aside subpoenas issued by the fourth respondent (the commissioner) in respect of the first to fourth applicants on 7 September 2020.

[2] The material facts are not in dispute. The first respondent (the employee) was employed as the Group Procurement Manager by the fifth applicant (the mine). The employee was disciplined for committing misconduct, with the consequence of three pending disputes in the CCMA against the mine. The first is an unfair labour practice dispute relating to a final written warning; the second an unfair labour practice dispute relating to suspension; and the third an unfair dismissal dispute. The first, second and third applicants have been subpoenaed for the unfair dismissal dispute. The fourth applicant has been subpoenaed for the unfair labour practice dispute relating to suspension.

[3] The unfair suspension dispute has been enrolled for an arbitration hearing in Mbombela at 09h00 am on 15 September 2020. The unfair dismissal dispute has been enrolled for hearing on the same date, at 13h00 pm. In the absence of consent to a hearing conducted on a virtual platform, the hearings will proceed by way of a physical hearing at the CCMA's premises in Mbombela.

[4] The applicants submit that the commissioner's decision to issue the subpoenas is reviewable on the basis that the commissioner committed reviewable irregularities when he issued them and that his decision falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In particular, the applicant contends that in respect of the first to third applicants, the subpoenas were issued without any motivation and that in

respect of the fourth applicant, the subpoenas were issued in part or in whole based on a motivation that contained a material misrepresentation. The applicants contend that there was no such agreement, as was represented, that the arbitration proceedings would be conducted by way of a virtual platform. Insofar as the first and second applicants are concerned, both contend that they have no relevant or necessary evidence that they could give the arbitration. They aver that they are employees of the mine's holding company, with no direct knowledge of the facts relating to the employee's dismissal.

[5] The issue of motivation was canvassed in the answering affidavit when the employee attached copies of the motivations in respect of each of the first to fourth applicants. This was the first occasion on which the applicants had had sight of the motivations. In the case of the first applicant, who is described as the CEO of Barberton Mines, it is alleged that he is 'responsible for Mr. Deon Louw, who failed to ensure substantive and procedural fairness in the internal process' and who has 'maintained that continued structural violence which has manifested itself in grossly unfair and unwarranted dismissals, including that of the applicant'. In the case of the second applicant, the motivation which is equally brief, and asserts that the second applicant failed to conduct himself in line with policies and procedures related to the alleged 'incompatibility' case, and that the second applicant was a material witness 'directly affected in the unfair process and responsible for the unfair dismissal of the Applicant' (sic). In respect of the third applicant, the motivation records that he was the chairperson of the 'ill-fated compatibility hearing', that he was 'biased, unethical and unprofessional in his role as chairperson of the hearing and that he is a material witness in the 'continued structural violence which has manifested itself in the grossly unfair and unwarranted dismissal of the Applicant'. Finally, in respect of the fourth applicant, the motivation asserts that the fourth applicant failed to conduct himself in a fair, professional and constructive manner, that he is responsible and liable for the substantive unfairness of the dismissal related to incompatibility and similarly, that he is a material witness to the continued structural violence which manifested itself in the grossly unfair and unwarranted dismissal of the Applicant.'

[6] Section 142 of the LRA regulates the powers regarding the issuing of and compliance with subpoenas. Of some significance is subsection (8), which provides that a person having been subpoenaed in failing to appear before the commissioner without good cause, or failing to remain in attendance until excused by the commissioner, commits contempt of the commission. In other words, the failure to comply with a subpoena can have serious consequences; the issuing of a subpoena is thus not an exercise that is to be undertaken lightly.

[7] The mechanics of the issuing of subpoenas in the CCMA is dealt with by Rule 37 of the CCMA Rules. Rule 37 (4) provides that the CCMA may refuse to issue a subpoena, amongst other reasons, if the party does not establish why the evidence of the person is necessary. In his book *CCMA: A Commentary on the Rules*, Adv. Peter Kantor draws attention to the potential for the issuing of subpoenas to harass witnesses or embarrass parties and which would not assist in the resolution of a dispute. The objective of a subpoena, he suggests, must be to pursue the truth of relevant facts. In particular, it is an abuse of the process to subpoena persons to answer questions about the matter over which they have no personal knowledge (at page 227). The authorities to which he refers suggest that an abuse of process takes place where the procedures permitted by the Rules to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.

[8] There are a number of observations that can be made in consequence of this caution. The first relates to a case such as the present, where subpoenas are sought and granted prior to the commencement of arbitration proceedings. It should be recalled that in terms of section 192 of the LRA, the employer has the onus to establish the substantive and procedural fairness of any dismissal. It follows that the employer would ordinarily commence leading evidence at any arbitration hearing, and that it would lead the evidence of those witnesses it considers necessary in order to discharge the statutory onus that it bears. It is difficult in these circumstances to appreciate how a commissioner can issue subpoenas in respect of members of the employer's management prior to the commencement of the hearing – the witnesses that the applicant party intends

to be subpoenaed may well be those that the employer party intends to call. Put another way, it is not for a referring party to anticipate which witnesses an employer may or may not call to give evidence, and seek to have them subpoenaed prior to the commencement of any hearing. Section 142 clearly contemplates that at any time during the proceedings the presiding commissioner in any arbitration hearing may be requested to issue a subpoena; indeed, the commissioner on his or her own initiative may subpoena for questioning any person who may be able to give information or his presence at the proceedings may help resolve the dispute. To the extent that it becomes evident during the course of arbitration proceedings that one or another witness's evidence may contribute to a determination of the dispute, it always remains open to the presiding commissioner to ensure that witness's attendance, by means of subpoena, if necessary. Secondly, the requirement in rule 37 (4) that a party seeking to have a subpoena issued must establish that the evidence of the person concerned is necessary, imposes a high threshold. The threshold is not one of relevance, as the employee's motivations appear to suggest. Rule 37 (4) requires that the evidence of the person who is the subject of the application to issue a subpoena must be essential. Again, I fail to appreciate how, in most cases, this can be determined prior to an arbitration hearing in the absence of any knowledge of the issues in dispute. In the present instance, for example, the parties have not yet signed and filed a pre-arbitration minute. The issues in dispute for the purposes of the arbitration hearing will only be properly determined at that stage, and it is only then that there is any basis on which to begin to explore whether any particular witness' evidence will be essential to a determination of the dispute. Frankly, the threshold of necessity is one that ought to have the effect that very few subpoenas are issued prior to the commencement of an arbitration hearing. Put another way, it would seem to me that most subpoenas sought at this point in the resolution of any dispute are more likely than not an abuse of the dispute resolution process. As Adv. Kantor points out, not only must the information required be relevant to the dispute and on the personal knowledge of the person subpoenaed, the test of necessity means that 'without the witness, the party will not be able to prove the essential facts of their case'. Given the application of the onus of proof in dismissal disputes, in the vast majority of cases it is for the employer to prove

the essential facts that establish substantive and procedural fairness. The employer's witnesses are, of course, subject to cross-examination and their evidence stands to be scrutinised on that basis. Again, without more, and at the stage between the set down and the commencement of the arbitration hearing, it is difficult to appreciate how an employee can anticipate which witnesses are necessary to establish essential facts of the employee's case. Of course, it may well be that the employee wishes to raise a defence to the employer's case of substantive and procedural fairness, and that certain witnesses who will not attend the proceedings of their own volition must necessarily be subpoenaed to attest to essential facts in support of the employee's case. But what rule 37 clearly does not anticipate is a 'shotgun' approach where witnesses are sought to be subpoenaed without any reference to the manner in which their evidence is likely to establish essential facts of the applicant's case.

[9] Turning to the facts of the present case, in each instance, the substantive motivations for the subpoena comprise no more than three brief sentences in which bald assertions are made, without any detail canvassing the evidence that the witness might give, its relevance, or why it is necessary. In the case of the first applicant, whom it transpires is not an employee of the company and has no personal knowledge of the circumstances surrounding the applicant's dismissal, the applicant bluntly asserts that he is responsible for an employee who failed to ensure procedural fairness, that he is responsible for the substantive unfairness of the applicant's dismissal and that he maintained 'continued structural violence'. These are no more than unsubstantiated assertions; by no stretch of the imagination can they be referred to as 'motivations', nor do they provide any rational basis for the issuing of a subpoena where the threshold is one of the necessity of the evidence of the witness concerned. The same applies to the second applicant. In that case it is asserted that he is a material witness directly affected in the unfair process and dismissal of the applicant. This is patently untrue, given that the second applicant is employed by the holding company and has no day-to-day dealings with the exercise of workplace discipline at the mine.

[10] Indeed, the employee has not denied that the first and second applicants have no direct evidence to give in relation to her dismissal. Not only does the employee not deny this, she goes further and states the following in her answering affidavit:

> 19.3 To the extent that Applicants have no idea what they will be called upon testify about, it is common cause that that the issues in dispute pertain to my dismissal. There is no justification for the First to Fourth Applicants not to familiarizing themselves or at least attempting to do so with the facts and circumstances of my dismissal. Instead they have sought refuge in these proceedings by raising rather tortured contentions. In any event, my legal representative, will not be permitted to go on a so called "fishing expedition" given the very nature of dismissal arbitration proceedings at the CCMA. (Emphasis added.)

[11] This is in itself a clear indication that the first and second applicants have no direct knowledge of the facts leading to the employee's dismissal and that they cannot give any direct evidence on the two charges of misconduct on which the employee was found guilty and dismissed. As I have indicated, the employee's motivation that served before the commissioner does not begin to address the threshold of necessity.

[12] In the case of the third and fourth applicants, at least there is a more direct link with the mine's operation given that they are part of the mine management team, but as in the case of the first and second applicants, the motivation submitted in support of the issuing of the subpoenas are not motivations at all. The relevant documents comprise no more than three substantive sentences, all of which all comprise no more than bald assertions. Neither of these motivations begin to meet the threshold of necessity. I fail to appreciate how any reasonable decision-maker could have decided to issue a subpoena on the basis of the motivations that were proffered by the employee.

[13] Further, the commissioner ought to have appreciated the motivations for the issuing of a subpoena in the context in which they were sought. This is the context in which the applicant has clearly attempted unjustifiably to inflate the

importance of her case. In her referral, the applicant requests the appointment of a senior commissioner based outside of the Mpumalanga province. She also seeks to assert that her case is somehow complex, as it is based on what she claims 'incompatibility'. There is no inherent complexity attached to that term, and in any event, it is abundantly clear that the applicant was in fact dismissed for misconduct. The fact that the applicant sought to have subpoenas issued in respect of a group chief executive officer and chief operating officer was in itself a red flag. Commissioners faced with applications to have subpoenas issued in these circumstances need to exercise particular caution – it is rare that executive management, particularly in the case of a holding company, will have direct personal knowledge of a dismissal dispute at operational level. Targeting executive management is almost inevitably an indicator of a strategy of harassment and embarrassment. This is not to say that this is always the case, but as I have indicated, it is a circumstance in which commissioners ought to be on their guard. In the present instance, I have little doubt that the applications to have subpoenas issued is a continuation of a campaign of pressure if not harassment, conducted by the employee and her advisers, both in respect of the CCMA's management and the applicants.

[14] For the above reasons, in my view, the commissioner failed to apply the test of necessity established by rule 37 and in doing so, committed a reviewable irregularity. The commissioner's failure had the consequence that the decision to which he came was a decision that no reasonable decision-maker could make having regard to the material that served before him. The subpoenas issued by the commissioner thus stand to be reviewed and set aside.

[15] Insofar as costs are concerned, the court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. I had initially planned to order that the first respondent pay the costs of these proceedings, on the basis that the subpoenas were sought on the basis that comprise no more and no less than harassment of the applicants, a strategy that is to be discouraged in the strongest terms. I will accept however that the subpoenas were issued on the basis that the first

respondent anticipated a hearing on a virtual platform, and that she did not intend deliberately to require the applicants to physically present themselves in Mbombela (the first and second applicants being based in Johannesburg). I will also accept that the applicant no doubt acted on the advice, misguided as it was, of her representatives when seeking to have the subpoenas issued and that ultimately, it was the commissioner who ought properly to have refused to issue any subpoenas in the present circumstances. I will accord the applicant the benefit of the doubt and intend therefore to make no order as to costs.

I make the following order:

1. The subpoenas issued by the fourth respondent on 2 September 2020 in respect of the first, second, third and fourth applicants, are reviewed and set aside.

[redacted]

André van Niekerk

Judge of the Labour Court of South Africa

REPRESENTATION

For the applicants: Adv VM Mndebele, instructed by Wilken Inc.

For the first respondent: Adv N Williams, instructed by MacDonald Attorneys