

SOUTH AFRICA / JUDGMENT

Commission for Conciliation, Mediation and Arbitration and Another (J930/24), Ex parte [2025] ZALCJHB 12 (9 January 2025)

[2025] ZALCJHB 12

COURT

Labour Court Johannesburg

BEFORE

Ramji

CASE / FILE NUMBER

J930/24

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

No: J930/24

In

the ex parte application
of:COMMISSION
FOR CONCILIATION,
MEDIATION &
ARBITRATION
First Applicant
NTJATJA
KLASS APHANE
Second Applicant

In re:

COMMISSION FOR
CONCILIATION,
and
DISCOVERY CONNECT
DISTRIBUTION
SERVICES
First Respondent
TEBOGO
GOODMAN
Second Respondent
APHELELE
TAPILE
Third Respondent

Heard: 7 November 2024

Delivered: 9 January 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 9 January 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

RAMJI, AJ

Introduction

- [1] The first applicant is the Commission for Conciliation, Mediation and Arbitration (CCMA). The second applicant is Commissioner Aphane, of the CCMA. On 27 September 2024, the applicants referred a contempt ruling made by Commissioner Aphane to this Court in terms of section 142(9)(b) of the Labour Relations Act[1] (LRA). The section 142(9)(b) referral will be called the “CCMA contempt referral”.
- [2] Commissioner Aphane’s contempt ruling relates to a ruling made by another commissioner in dispute in which the first respondent (the company) is appearing in its capacity as the former employer of Seelan Pillay (Mr Pillay). Mr Pillay alleges constructive dismissal.
- [3] Although this application concerns only Commissioner Aphane’s contempt ruling, some background is necessary.

Background

- [4] On 13 June 2024, Commissioner Havenga who is presiding in the constructive dismissal case issued a “disclosure ruling”

in terms of rule 29 of the CCMA rules. Rule 29(3) of the CCMA rules allows a commissioner to “make an order as to the disclosure of relevant documents or material relevant to the dispute”. The disclosure ruling was sent to the parties on 14 June 2024.
- [5] The disclosure ruling required that the company: (a) provide Mr Pillay with certain recordings of MS Teams meetings; (b) “provide [Mr Pillay] and submit as part of its bundle of documents transcripts of the audio recordings for purposes of record”; and (c) to “disclose and provide to” Mr Pillay the individual KPI’s of other specified employees with their personal information redacted. These documents were to be provided within 14 days of the date of the ruling.
- [6] The company only complied in providing the former employee with one of the listed recordings of an MS Teams meetings, and so its compliance with this aspect of the disclosure ruling was markedly limited. The second respondent (the IR Manager) wrote to

the former employee and said, “The Company does not believe that it bears the responsibility of transcribing the recordings”. This marked a shift from the position of the third respondent (the IR Consultant) who represented the company in the rule 29 application:

Commissioner Havenga’s ruling records, “The [company] would be willing to transcribe the audio recordings for purposes of the record”. From the record before this Court, it appeared that the IR Manager offered no explanation for other aspects of its non-compliance with the disclosure ruling.

[7] Mr Pillay applied for the company to be held in contempt of the disclosure ruling. In the CCMA contempt proceedings, Commissioner

Aphane recorded that the company did not oppose the application “and submitted that it will await the contempt ruling and act accordingly”. The IR Manager represented the company at the contempt hearing.

[8] On 24 July 2024, Commissioner Aphane issued a contempt ruling. Commissioner Aphane found the company to be in contempt of the CCMA in terms of section 142(9)(a) of the LRA and exercised his discretions to make this CCMA contempt referral. In making the contempt ruling, the Commissioner considered that the company did not comply with the disclosure ruling, did not refer the disclosure ruling to the Labour Court for review or otherwise challenge it, that the company gave no reasons for not providing all the recordings to the applicant, and that the company’s only objection to the disclosure ruling related to its responsibility to transcribe the recordings.

[9] This is a case of alleged contempt in terms of section 142(8)(e), and section 142(8)(f) read with section 142(1)(b). The relevant aspects of section 142(8) provide:

‘A person commits contempt of the Commission –

...

- (e) if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a commissioner;
- (f) if the person wilfully hinders a commissioner in performing any function conferred by or in terms of the Act.’

[10] Section 142(1)(b) provides:

‘A commissioner who has been appointed to attempt to resolve a dispute may –

- (b) subpoena 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.’

[11] From the applicants' papers, it appears that the company and at least the IR Manager are aware of the contempt ruling and that the company has no intention of complying fully with the disclosure ruling. They have: (a) gone back on their position at the disclosure hearing, where they stated that they were amenable to providing transcripts of the recordings; (b) not provided Mr Pillay with the documents listed in the disclosure ruling which are already in existence; and (c) effectively made out no case at the contempt hearing, and instead stated that they will await the outcome of the full contempt procedure envisioned in section 142 of the LRA. This has forced the applicants (overburdened as they are) to make a referral to this Court and to appear again on a later date. It also delays the conclusion of Mr Pillay's dispute.

Procedure and relief in section 142(9)(b) referrals

[12] The applicants made the referral to this Court ex parte. I requested written submissions on whether the general contempt rules set out in clause 13 of the Practice Manual[2], and now in rule 58 of the current Labour Court Rules[3] (the New Rules) applied to CCMA contempt referrals.

[13] The applicants' first prayer is that this Court subpoena the company, and as alternatives, the IR manager and/or the IR consultant to appear in court to show cause why Commissioner Aphane's contempt ruling should not be confirmed by this Court. I also requested written submissions on why, based on the record, it would be appropriate to subpoena these individuals.

[14] The applicants provided written submissions on both questions on 14 November 2024.

The ex parte procedure

[15] The applicants argued that in the absence of a specific procedure for CCMA contempt referrals, clause 13 of the Practice Manual for contempt applications must be applicable. They referred to clause 13.1 of the Practice Manual which states that –

‘an application for contempt of Court must be launched on an ex parte basis on a Friday in Motion Court, where the applicant must seek an order that the respondent be ordered to appear at the Labour Court to show cause why it should not be held to be in contempt.’

[16] The applicants referred me to Commission for Conciliation, Mediation and Arbitration and Another v Dyasi and Another (Dyasi),[4] which shows that this Court per Lallie J effectively accepted the ex parte procedure contained in clause 13(2) of the Practice Manual as applicable to CCMA contempt referrals, and issued an order according

which substantively followed the relief prescribed in clause 13(2). Dyasi itself related to the return date and the respondent in that matter was ultimately found to be in contempt of court, with among other things, a criminal sanction being imposed, but suspended on condition that the relevant respondents appeared before the CCMA for questioning as the CCMA originally ordered. I accept that the contempt procedures in clause 13 of the Practice Manual were followed in that case.

[17] The applicants further submitted that –

‘clause 13 of the Practice Manual of the Labour Court of South Africa prescribes how contempt of court applications are launched and subsequently dealt with before this Court.’

[18] That said, clause 13(2) specifically states that its provisions apply to an “application which seeks for the court to make a finding that a party is in contempt of an order of the Labour Court”. A CCMA contempt ruling is not an order of the Labour Court.

[19] I remain concerned with the use of the ex parte procedure for the following reasons:

19.1. The previous Labour Court Rules (the Old Rules) specifically stated that “a referral of a contempt of the Commission in terms of section 142(9)” must be brought on notice in terms of rule 7.[5]

19.2. In *Colyer v Essack NO & others (Colyer)*,[6] Basson J held:

‘In terms of the amended Rules of the Labour Court (in the footnote to rule 7) [a section 142(9)(b)] such referral takes place by way of application proceedings. The CCMA is thus in the position of applicant complainant and sets out the facts relied on to bring the alleged conduct of contempt within the parameters of the conduct described in s 142(8) of the Act. The person concerned who stands accused of being in contempt of the CCMA (also where such alleged contempt was not committed in front of a commissioner) now has an opportunity to answer in terms of rule 7, giving him or her the full benefits of both the audi alteram partem rule...’[7]

19.3. In *Bargaining Council for the Clothing Manufacturing Industry & another v Prinsloo*[8] (Prinsloo), Nel AJ held:

‘In the light of the apparent uncertainty relating to the manner in which a commissioner may refer his finding of contempt to this court, I believe it is necessary to remind parties that in terms of the footnote to rule 7 of the rules of this court, rule 7 applies to referrals of a contempt of the commission in terms of s 142(9) of the LRA. It follows that the notice of application must inter alia indicate the relief sought, give notice to the other party of its rights and obligations if he intends opposing the matter, and the referral must be supported by affidavit.’[9]

19.4. Although both judgments were handed down before the Practice Manual was published in 2013 (and *Colyer*, before the 2002 amendments to the LRA)[10] the Old Rules were never amended.

19.5. Finally, section 142(11) of the LRA provides that, before this Court makes any decision to “confirm, vary or set aside the finding of a commissioner”[11], it –

‘may make any order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the person’s right to represent a party in the Commission and the Labour Court be suspended.’

19.6. The discretion afforded to this Court in terms of section 142(11) of the LRA suggests that an ex parte application may be unfair on the alleged contemnor, depending on the nature of an order made in terms of the subsection.

[20] The applicants' submissions were based solely on the Practice Manual. This application was, however, brought after 17 July 2024, and so the Practice Manual is inapplicable. I have therefore considered the New Rules:

20.1. The new rules on motion proceedings, unlike the old rules, do not specify where the ordinary motion procedure (on notice) is applicable.[12] Significantly, the New Rules do not prescribe that CCMA contempt referrals must be brought on notice. I find that this change from the Old Rules reflects the intention of the Rules Board to not bind the CCMA to bring an application on notice when making a contempt referral.

20.2. The contempt provisions in rule 58 remain substantively unchanged from the provisions of the Practice Manual. I find that rule 58(1) is applicable to CCMA contempt referrals and entitles it to make a contempt referral ex parte. I also find that the CCMA is not confined to following the exact prescripts of rule 58(2), though it may be prudent to do so to ensure that any relief sought would not violate audi principles. This Court per Daniels J clarified that ex parte contempt orders are not unfair or unjust on respondents. Although this judgment related to non-compliance with a certified arbitration award, the same logic applies to this case:

'The ex parte order holds no consequence for the respondents unless they fail or refuse to comply with the order. The respondents can only be found in contempt if they fail to appear in court as directed by this court, or if they fail to provide an explanation (satisfactory to this court) under oath for their failure to comply with the certified arbitration award. By failing to comply with an order of this court a respondent would violate the dignity, repute, or authority of the court.'[13]

20.3. Even if rule 58 is not applicable to CCMA contempt referrals, rule 41 deals with interlocutory applications and procedures not specifically provided for in other rules. Rule 41(1) requires that these "other" applications be brought on notice. At the same time, rule 41(3) provides:

'In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.'

[21] The applicants have essentially sought the relief prescribed in rule 58(2). They have not sought any relief that may potentially be granted in terms of section 142(10)(c) of the LRA. Had they done so, an ex parte process would have been inappropriate in terms of audi principles.

[22] Even if I am wrong and rule 58 is not applicable to CCMA contempt referrals, in the absence of the New Rules specifying the procedure applicable for such referrals, I find that rule 41 will then apply and this Court may exercise its discretion to decide the application on an ex parte basis for the following reason: Given the nature of the procedure adopted by applicants and the relief that they seek, it is expedient to consider this application ex parte to achieve effective resolution of Mr Pillay's dismissal dispute. An application on notice would be a less speedy and efficient option. The respondents will have an opportunity to file affidavits and appear in court to explain their stance.

The relief

[23] In terms of section 142(10)(a) of the LRA, the Court "must subpoena any person found in contempt to appear before it on a date to be determined by the Court". The company was found in contempt by Commissioner Aphane, and I must therefore subpoena it.

[24] In terms of section 142(10)(b) of the LRA, the Court "may subpoena any other person to appear before it on a date determined by the Court". The other persons who the applicants seek to have subpoenaed are the following:

24.1 The IR Manager. The IR Manager informed the former employee that the company did not believe that it was its duty to provide transcripts of recordings, and who appeared on behalf of the company in the CCMA contempt proceedings. He therefore has insight into the company's change of heart regarding compliance and why the company sees fit to have the CCMA approach this Court in terms of section 142(9)(b) of the LRA.

24.2 The IR Consultant. The IR Consultant was present as an observer at the contempt proceedings, and was the company's representative at the disclosure proceedings, making the submissions that resulted in the terms of the disclosure

ruling.

[25] I agree with the applicants that they are both best placed to explain the company's non-compliance with the disclosure ruling and ought to be subpoenaed to assist the Court in exercising its powers under section 142(11) of the LRA.

[26] The company had a further observer present at the contempt proceedings, Zoe Hlatshwayo. The applicants do not seek to subpoena Ms Hlatshwayo, who is in any case not cited.

[27] Although this judgment was submitted on 21 November 2024, the final version was only relayed to me on 8 January 2025. The CCMA and

the applicant before the CCMA have been adversely affected by this delay, for which I apologise.

[28] In the results, the following order is made:

Order

1. The first respondent is subpoenaed to appear before this Court on 24 January 2025 at 10h00 to show cause, if any, why the second applicant's contempt ruling in respect of the first applicant, dated 24 July 2024, should not be confirmed, alternatively, whether it should be varied or set aside.
2. The second and/or third respondent are subpoenaed to appear before this Court on 24 January 2025 at 10h00 to show cause, if any, why the second applicant's contempt ruling in respect of the first applicant, dated 24 July 2024, should not be confirmed, alternatively, whether it should be varied or set aside.
3. The first, second and/or third respondents may explain the first respondent's conduct by way of an affidavit or affidavits filed by 17 January 2025, although this will not excuse them from being present in Court in terms of paragraphs 1 and 2 of this order.
4. That in the absence of providing an explanation to the satisfaction of the Court, or failing to appear in Court despite being properly served, the Court shall confirm or vary, as appropriate, the second applicant's finding of contempt in respect of the first respondent and further order that:
 - 4.1. The second and third respondents be incarcerated for such period as this Court deems appropriate; alternatively, that the first, second and/or third respondents be fined in an amount this Court deems appropriate; alternatively, that the respondents be dealt with in a manner deemed appropriate by this Court; and
 - 4.2. The first applicant shall comply with the disclosure ruling to the extent determined by this Court, on a date to be determined by the first applicant at the arbitration hearing under CCMA case number GAJB5265/24.
5. Any sanction imposed by this Court, pursuant to the confirmation or variation of the second applicant's finding of contempt, be suspended on condition that the respondents comply fully with paragraph 4(b) above.
6. The first applicant shall ensure that this order is served on the first respondent, and that this order is served personally on the second and third respondents.

B. Ramji

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Commission for Conciliation, Mediation and Arbitration

- [1] Act 66 of 1995, as amended.
- [2] Practice Manual of the Labour Court of South Africa, effective 2 April 2013, repealed with effect from July 2024.

[3] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

[4]

[2020] ZALCJHB 238.

[5] Footnote 2, point 15 of the Old Rules.

[6]

(1997) 18 ILJ 1381 (LC); [1997] 9 BLLR 1173 (LC).

[7] Colyer at 1387B – D.

[8]

(2007) 28 ILJ 1754 (LC).

[9] Prinsloo at 1758C – E.

[10] The 2002 amendments seek to address, among other things, audi concerns in contempt referrals with the additional of section 142(10) of the LRA.

[11] Section 142(11) of the LRA.

[12] See rule 35 of the New Rules.

[13] Public Servants Association of SA on behalf of Msibi v Department of Correctional Services and Another

(2024) 45 ILJ 2049 (LC); [2024] ZALCJHB 183 at para 36.

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