IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Delete whichever is not applicable:

Reportable : yes / no
Of interest to other Judges: yes / no
Revised

30 April 1999

Signature

Case

No: J2258/98
In the matter between :

NATIONAL BARGAINING COUNCIL FOR
Y Applicant

and

First Respondent

Second Respondent

Third Respondent

JUDGMENT

REVELAS J :

[1] The applicant applied to this court for an order in terms of section 142(9) read with section 33 (3) of the Labour Relations Act, 66 of 1995 ("the Act"), declaring that the first, second and third respondent, had committed contempt of the applicant, the Bargaining Council for the Road and Freight Industry, in that the first, second and third respondent were subpoenaed to appear before the applicant but, failed to attend at the time and place stated in the subpoena..

[2] The applicant seeks an order directing the respondents to comply with the subpoena and to direct the respondents to pay a fine or undergo imprisonment on terms determined by this court.

[3] During argument the applicant's legal representative, conceded that this is not a matter were a prison sentence would be suitable, should I find that there was contempt on the respondents part. I agree fully.

[4] The three respondents are members of a close corporation, which, on the version of the first respondent, is currently dormant. However, despite its dormant status, the close corporation, known as M A J Roets Vervoer CC, joined the Allied, Small and Medium Business Organisation ("ASAMBO") and continues to be a member.

[5] According to the founding affidavit of the first respondent, one of the first matters in which the close corporation was involved, which was referred to the applicant, was a referral which the Transport and General Workers Union (TGWU) made to the applicant, concerning an alleged dispute with the close corporation about "victimisation of all the workers [of respondent] who had joined the union [TGWU] and threat of dismissal, as well as bribery, to resign from the union".

[6] This dispute was served on the close corporation on 6 November 1997.

[7] The first respondent alleges that on behalf of the close corporation, he requested that an official of ASAMBO represent the close corporation at the conciliation process.

[8] By reason of the applicant's "well known approach" to the conciliation process, according to the first respondent, the conciliator refused that an official of ASAMBO represent the close corporation. The conciliation meeting was then scheduled for 13 January 1998. Following the applicant's refusal that an official of ASAMBO represented the close corporation, the first respondent was advised by ASAMBO not to attend this scheduled conciliation meeting. The applicant then, issued a certificate of outcome in which it was stated that the dispute remains

unresolved and made an endorsement in the certificate to the effect that, the respondents "failed to attend the dispute hearing". On this occasion none of the respondents were subpoenaed.

[9] A further notice of a referral was served on the close corporation. This dispute allegedly concerned the terminating of the services of an employee without a fair reason and certain other allegations relating to alleged nepotism.

[10] According to the first respondent, the official from ASAMBO was not permitted to represent the close corporation at the conciliation proceedings pertaining to the latter dispute either. Subpoenas were issued against the three respondents with which they did not comply.

[11] The first respondent avers that he was subsequently advised, by one of the ASAMBO officials that the three respondents should not attend the conciliation proceedings and they did not do so.

[12] It was the case for the respondents that the subpoenas had not been lawfully served and are in any event invalid since no payment of witness fees accompanied the subpoena or was even tendered in the subpoenas as required by section 142 (7) of the Act. The provisions of section 142 and section 33 of the Act apply to both Bargaining Councils and the Commission for Conciliation, Mediation and Arbitration.

[13] Furthermore, the respondent's case is that they acted in accordance with the advice of experts, namely, the employers' organisation which they had joined. They contend that they have been led to believe that their behaviour was lawful.

[14] According to the applicant, it sent to parties who had a dispute before it, a certain standard letter, in which employer parties are warned that **" it is the policy of the Council that an official of the company, who can give material information concerning the events leading up to the dispute, and who is fully mandated to represent the company in negotiations to settle the dispute, must attend, failing which a certificate of outcome will automatically be issued to the applicant - mandated consultants/lawyers attending a loan will not be acceptable. The alternative would be to serve a subpoena in terms of section 2(1)**

(A)(ii) of Schedule 7 of the Labour Relations Act 66 of 1995 compelling attendance, which we would prefer to avoid.

Should you fail to attend the hearing without prior notification and good cause, would so automatically result in the issue of a certificate of outcome to the applicant(s)".

[15] The respondents attached an example of the aforesaid standard letter "JR11" to the founding papers and a letter containing the same information, which was addressed to Interland Distributors, Cape Province. However, the respondents , significantly, did not annex a copy of a similar letter addressed to themselves by the applicant.

[16] According to the replying affidavit of the applicant, the three subpoenas which were issued, were not intended for the close corporation, but for the individuals concerned (the three respondents), so that the conciliation process could be meaningful and could have the best chance of succeeding. The applicant contends that it is its experience of conciliation and I accept this, both under the present Labour Relations Act and its predecessor, that conciliation is impossible where the parties who are involved in the dispute, who are able to give information are not present and are not involved in the conciliation process.

[17] I agree with the contention of the applicant, that it was disingenuous of the respondents to accuse the applicant of **refusing to permit an official** of their chosen employers' organisation to represent them. The standard letter, referred to above, specifically makes the point that such an official cannot attend the proceedings **alone**. According to the applicant, that was also the point of issuing and serving the subpoena in the first place.

[18] Furthermore, common sense dictates that an official of an employers organisation, when appearing alone and without the actual employers or managers of the employer present, would be unable to give any meaningful input into the conciliation process. Since such a person does not work for an employer in question, he or she would not have intrinsic and personal knowledge of matters surrounding the dispute or of other aspects and facts, which directly impact on the dispute which is to be conciliated.

[19] In my opinion, the three respondents are not in a position to argue that they were acting "lawfully" by not complying with the subpoenas. If they acted on the advice of ASAMBO, ASAMBO advised them wrongly and the respondents

should face the consequences thereof. It is their close corporation which is a member of ASAMBO and they initiated its membership thereof.

[20] The respondents' have objected to the method of issuing and service of the subpoena's on various, very technical, grounds. Some of these objections were mostly disingenuous and I do not wish to go into them, in any great detail.

[21] Since the respondents refused to accept receipt of the subpoena's, and that is the case on the papers before me, the applicant is in my view not in material breach of any rule which would render the subpoena's a nullity.

[22] It may be advisable that the deputy sheriff, in my view, rather than an employee of the applicant should serve such subpoena's. However the fact that Mr Du Plessis, an employee of the applicant served the subpoena's, in my view, does not amount to an irregularity.

[23] As insofar as the question was raised by the three respondents, that the witnesses' fees weren't paid as required by the Act, the respondents also state at the same time that they did not see the subpoenas. I also regard this objection as somewhat disingenuous.

[24] The standard letter "JR11" is a warning and explanation of a failure of the consequences to attend conciliations at the applicant. This is a further reason why the three respondents should not be excused from not attending the conciliation proceedings. They deliberately flouted the subpoenas, which they received, on the facts before me.

[25] I, subsequent to argument by the parties, raised the question whether this court should grant contempt orders where subpoenas have not been complied with, when in civil matters in the High Court and Magistrates Court, a defaulting defendant does not face contempt of court charges for failing to appear in court. I wanted to know why an employer party should be treated differently when failing to appear at a conciliation meeting. Further, supplementary heads of argument were served by both the applicant and the respondents.

[26] On behalf of the applicant it was contended that in civil matters the consequences of a defendant not appearing at court on the designated trial date, is that default judgment will be granted against such a defendant. This is also the case of course, in the Labour Court. Arbitration awards are made orders of court and are executed if the respondent remains in default.

[27] Section 142(8) (a) of the Act provides that **" a person commits contempt if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend at the time and place stated in the subpoena."** This also applies to officials of Bargaining Councils in terms of item 21 A (2) of Schedule 7 of the Act.

[28] Neither rule 39(1) of the rules of the High Court nor rule 32(2) of the rules of the Magistrates Court, have similar provisions. Both the aforesaid rules provide that, when a defendant does not appear at a trial of an action, judgment may be

given against such a defaulting defendant.

[29] It was emphasised that in this matter, not the employer, but the three respondents were served with subpoenas. Their position seems to be the same as that of a witness, since they were the appropriate parties with the personal knowledge, necessary to give meaning to the conciliation process. It was pointed out to me that in the present matter I am not dealing with a trial, but rather with an appearance, under power of subpoena, before a bargaining council.

[30] The point was also made that both section 32 of the Supreme Court Act and section 51(2) of the Magistrates Court Act, deal with the method of procuring the attendance of persons in civil proceedings as well as the penalties of non attendance. Similarly, the Labour Relations Act, it was argued, pertains to the method of securing attendance of individuals in section 142 (1)(a) of the Act as read with item 21(A)2 of Schedule 7 to the Act, and formulates the consequences for not complying with a subpoena, in section 142 (8)(a) of the Act.

[31] In the supplementary heads of argument in regard to the aforesaid, the respondents' attorney made the following remark **"1. The respondents have read the supplementary heads of argument submitted on behalf of the applicant and wish to state that they associate themselves with the views expressed therein"**

[32] It is quite apparent, and I agree with the applicant in this regard, that there is clearly an intention on the part of all three of the Acts in question, to censure the disobedience of a subpoena. Of further importance, in considering this question, is the fact that the conciliation process intended to take place, is imposed by statute on the parties, and is aimed at ending the dispute between the parties. This consideration renders the issuing of subpoenas, in these circumstances, lawful and appropriate in my opinion. The standard letter issued, merely echoed the provisions of the Act and is not an attempt to lay down a new procedure.

[33] In terms of the Act, the applicant was entitled to issue a subpoena to obtain the presence of the three respondents at the conciliation hearing. The Act makes provision therefore. The standard letter issued, reminded the respondents of its provisions. The respondents wilfully did not comply with the subpoenas. They are therefore in contempt of the applicant and should pay a fine.

[34] There are no guidelines to follow, as to what an appropriate amount would be but I intend to impose a fine which I believe is appropriate in the circumstances.

[35] Consequently, I make the following order:

(1) The first, second and third respondents have committed contempt of the applicant in that:

(1.1) The first, second and third respondents, failed to appear before the applicant, having been subpoenaed to appear.

(1.2) The first, second and third respondents failed, without good cause, to attend at the time and place stated in the subpoena.

(2) The respondents are directed to comply with the above mentioned subpoena.

(3) The respondents are to pay a fine in the amount of R 500-00 each for contempt of the Bargaining Council, such fine to be payable to the Bargaining Council within 14 days of the date of this Judgment.

(4) The respondents are directed to pay the applicant's costs in this matter.

E REVELAS

For the applicant : Mr Truebody

BOWMAN GILFILLAN HAYMAN GODFREY

For the respondent: Mr E Louw

ERIC H LOUW