



EMPLOYMENT

Are CCMA and Bargaining Council Subpoenas Meeting Legal Standards? A Closer Look at Substantive Compliance

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and Rekgopetše Pula, Candidate Attorney

Since inception, the issuance of subpoenas by the Commission for Conciliation, Mediation and Arbitration and Bargaining Councils has been wanting for substantive compliance with the requirement of necessity as set out in Rule 37(1) of the rules of the CCMA. These subpoenas have been there for the taking for some time despite the clear provision in Rule 37(1) and (4)(a) that before a commissioner can issue a subpoena, the applicant, in their motivation, must demonstrate that the evidence of the witness they intend to subpoena is not only relevant but necessary.

Both the CCMA and Bargaining Councils have routinely issued subpoenas in instances where applicants have failed to make out a case for necessity in their motivation. This misalignment and confusion largely stems from the provisions of Rule 37(3)(1) and 37(5)(a), which respectively determine that an application for a subpoena must be filed with the Commission at least 14 days before the arbitration, and served on the subpoenaed witness at least seven days prior to the hearing. The procedural requirements of subsections (3)(1) and (5)(a) create a fundamental inconsistency with section 142 of the Labour Relations Act 66 of 1965, as they compel intending parties to apply for subpoenas before they would have had the opportunity to assess the necessity of a witness's evidence—something that can only be properly determined after hearing the opposing party's case.

Once a subpoena is issued, the subpoenaed witness is legally bound to comply unless they formally challenge its validity, either before the Labour Court or within the arbitration proceedings themselves, on the basis that the subpoena constitutes an abuse of process. Failure to comply, even with a substantively defective subpoena, could unfortunately still amount to contempt of the Commission, carrying severe legal consequences for the defaulting witness. This remains the case even where the subpoena does not meet the necessity threshold established in *Loots v Jacobs*.

Following the *Loots v Jacobs* judgment, one would have expected the Commission and Bargaining Councils to adopt a more cautious and considered approach when adjudicating subpoena applications. However, the practice of issuing subpoenas that fail to comply with the requirement of necessity persists.

Beyond its findings, the *Loots* judgment raises critical questions regarding the timing of subpoena applications. The court clarified that section 142 of the Labour Relations Act 66 of 1995 ("**LRA**") empowers commissioners to issue subpoenas at any point during arbitration proceedings. Van Niekerk J (as he then was) emphasized that it is inconceivable that a commissioner or an employee could determine which witness' testimony would be necessary before hearing an employer's evidence. As a result, subpoenas issued before the commencement of arbitration proceedings are, by default, premature and speculative.

In light of these ongoing challenges, it is imperative that Rule 37(3) and Rule 37(5)(a) be harmonized with section 142 of the LRA and the *Loots* judgment. Without such alignment, the practice of issuing subpoenas without properly establishing necessity will continue, leading to unnecessary litigation and procedural inefficiencies.

By ensuring that subpoenas are granted only when genuinely warranted, the CCMA and Bargaining Councils can uphold the integrity of arbitration proceedings and prevent the misuse of legal processes to harass or burden employers and their representatives.



Sandile July

Head of Employment

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