CIV/APN/198/91

IN THE HIGH COURT OF LESOTHO

In the Application of :

SWISSBOURGH DIAMOND MINES(PTY)LTD — 1ST Applicant
RAMPAI DIAMONDS (PTY)LTD — 2ND APPLICANT

vs

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY — Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 26th day of July, 1991

In response to an urgent application moved in chambers before this Court by the applicants on 18th July 1991 the respondent filed a counter application on 25th July.

The Notice of Motion in the main application appears to have emanated from the offices of Messrs Mohaleroe Sello & Co. However Mr. Edeling appeared in Chambers to move that application accompanied by Mr. Redelinghuys of the firm of Israel and Sackstein.

On perusal of the papers tabled before me on 25th July I noticed that the firm of Mohaleroe Sello & Company filed a Notice of Withdrawal as attorneys of record in this matter on 23rd July. Notice of this withdrawal was addressed to and served on Messrs Webber, Newdigate & Company for the respondent.

The applicants prayed that a rule nisi be issued calling upon the respondent and any other interested parties to appear before Court to show cause if any, why an order in

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the following terms should not be granted : (the terms are set out in the notice of motion and cover at least three pages of typed script. I should not therefore reproduce them word for word.)

While on this point I think it is profitable to point out that the Court expressed to Mr. Edeling its anxiety about the rather incomprehensible form in which the order prayed as reflected in the notice of motion was framed.

In terms of the rule nisi the respondent was to be interdicted (by itself or through any agent/s and or sub-contractor/s) from performing any works and/or from destroying, using up, disturbing, mixing up and/or covering up any gravel deposits or other minerals in or upon the lease area described in the Deeds Registry on 26 October 1988.

It was further sought to be ordered that the said interdict shall endure until any one of the events set out in the order have occurred.

The events envisaged are in brief summary as follows :

(a) A declaratory order granted by this Court and served on applicants indicating that all preliminary matters and formalities which might possibly in future enable the respondent to acquire the right to interfere with the applicants' rights have been complied with and that the respondent has paid full compensation to the applicants;

(b) the respondent undertakes in writing to pay and actually pays to the applicants such compensation as may be calculated by one or more of the experts referred to in the papers;

(c) a certificate be obtained issued by the experts referred to and be countersigned by a duly authorised director of each of the applicants, to the effect that the respondent, has, at its own cost, conducted sufficient sampling of the minerals in the lease area ..... to the satisfaction of the said experts. In such event, the interdict shall only be uplifted in respect of such future intended interferences in portions of the lease area in respect of which sampling has been so done and certified.

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The prayer that paragraph A(i) in the order should operate as an interim order with immediate effect was granted.

In CIV/APN/206/91 featuring the same parties represented by the same respective counsel before me today the applicants on allegation of the fact that the respondent disobeyed the order granted in the main application in CIV/APN/198/91 moved this Court to commit the respondent for contempt and not to entertain or hear the respondent's counter-application until it has purged its contempt. Both these applications are opposed.

In a brief statement made by Mr. Viljoen for the respondent it was indicated that averments have been made attributing contempt to the respondent's conduct and the applicants' attitude is that the respondent should not be allowed the opportunity to contest these allegations by the applicants. He expressed his bewilderment at such an attitude and submitted that the Court is free to hear Counsel. He submitted that on behalf of the respondent he wished to furnish the Court with the answer that he has and wished to be given an opportunity to present argument to Court.

He submitted that in granting the interim order the Court had been misled and would not have granted that order but for the fact that it was so misled. He prayed that this order should be set aside as it had been "snatched" so to speak.

In answer Mr. Edeling submitted that in CIV/APN/206/91 the applicants allege in paragraph 6 that the respondent has committed contempt and that CIV/APN/198/91 should therefore not be heard till the contempt has been purged and CIV/APN/206/91 disposed of.

He accordingly referred the Court to page 370 of The Civil Practice of the Magistrates Courts in South Africa by Jones & Buckle 8th Ed. saying :

/"Contempt

> "Contempt of Court is a serious matter, not only because a conviction carries with it the consequence that a litigant who is in Contempt of Court will not be heard until he has purged himself of his contempt, unless there are circumstances present which would persuade the Court to hear him despite the contempt". See Jeanes vs Jeanes 1977(2) SA 703 at 704 also Kotze vs Kotze 1953(2) SA 184.
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> The learned authors went on to say -
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> "..... Where the order concerns a child the Court should be adamant upon the observance thereof".

Of significance is the fact that the learned authors have not by implication or otherwise confined application of the principle exclusively to circumstances where a child is involved.

I was referred to The Civil Practice of the Superior Courts of South Africa by Herbstein & Van Winsen at p.651 where the learned authors said -

> "In S. vs Beyers 1968(3) SA 70 (AD) at 77 the Appellate Division has now held not only that a criminal prosecution in respect of a civil contempt could have been instituted at common law, but that it can be done in contemporary law. It is clear, therefore, that a contempt could be both criminal and civil in character".

Mr. Edeling buttressed his submission by pointing out that it is the seriousness of the offence of contempt of Court and public policy considerations which make it necessary that contempt proceedings be heard first. He referred this Court to Cape Times Ltd vs Union Trades Directories Pty 1956(1) SA 105 NPD. Referring to "heads" relied on in that authority he submitted that all persons irrespective of whether they are parties or not are guilty of contempt if they act in disobedience of an order. This would include attorneys who advise clients to act in such disobedience. There is no question indeed that persons with

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knowledge of a Court Order would be liable if they disobeyed it. Hence the point is rightly made that the Court will not tolerate anybody assisting or participating in disobedience of a Court Order as such conduct amounts to wilful impeding of the course of justice or bringing into contempt the administration of justice.

Mr. Edeling submitted disobedience of a Court Order is another form of interference with the course of justice. He further submitted that the court should infer that the offender must have intended to commit contempt. He referred the Court to principles applicable in this regard as outlined in Kotze above at p.187 paras A to B summed up as follows :-

> "It is the plain and unqualified obligation of every person in respect of whom an order is made by a Court of competent jurisdiction to obey it, unless and until that order is discharged".

Two consequences flowing from this are that

(1) "anyone who disobeys an order of Court is in contempt and may be punished by committal or attachment or otherwise.

(2) No application to Court by such person will be entertained unless he has purged himself of his contempt".

Mr. Edeling submitted that these are well established principles which are followed widely and should therefore be observed by our Courts in Lesotho. He reiterated therefore that the contempt application be heard first.

Reacting to these submissions Mr. Viljoen submitted that learned counsel for the applicants was wrong in law because it is not true that in all circumstances a court cannot hear a party who is in contempt. He cautioned that the Court should not precipitately take the view that it has before it a party who is in contempt for there is not such a party before it as a matter of fact.

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He stated that if there was such party then the papers before Court provide compelling reasons for hearing the counter application first.

Mr. Viljoen further submitted that it is not correct to say the rule is that the Court should adopt the attitude that the respondent is in contempt therefore the Court cannot hear him. He stressed that circumstances compel and allow the Court to hear the counter application.

Relying on the passage in para 5 of Jones & Buckle at 370 he sought to take advantage of the phrase showing that indeed the Court will not hear a man who has committed contempt of Court until he has purged himself of his contempt,

> "unless there are circumstances present which would persuade the Court to hear him despite his contempt".

He therefore submitted that there are compelling reasons to hear the counter application even if the respondent were said to be in contempt.

The Court was referred to Herbstein et al at p.658 where in the 3rd paragraph it is said:

> "The court will usually refuse to hear a person who has disobeyed an order of Court until he has purged his contempt. The Court will, however, follow this course only in the absence of urgency".

Mr. Viljoen, in an attempt to show how urgent the respondent's matter is referred to Jeanes above and stated that in that case it was accepted that the respondent was in contempt. Generally he cannot obtain relief. But in case of urgency or if what is sought is variation of the order disobeyed he can be heard.

I was referred to Byliefedt vs Redpath 1982(1) 702 (AD) at 714 F, where Trengove J.A. cited the words of Lord Denning MR in Hadkinson vs Hadkinson 1952(2) All ER 567 at 575 B - C as follows :-

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> "I am of opinion that the fact that A party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impeded the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its own discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".

I take it that by discretion here is meant knowing and doing what is right in accordance with justice. It was submitted that the law and facts are not as outlined by the applicants' counsel. Counsel for the respondent pointed out that what the Court has before it are papers served before lunch alleging that certain contractors continued doing work despite the Court Order, yet no relationship between them and the respondent was established with a view to seeing if the respondent had control over them. Mr. Viljoen thus demurred at the fact that none of the others alleged to have been working on the site was joined in the first place. A rhetorical question was asked whether in fact the order obtained was meant to apply even to men painting lines along the tarred road in the area.

Regarding the question of joinder I wish to refer to our Court of Appeal's remarks in C. of A. (CIV) No. 12 of 1983 David Masupha vs. Paseka 'Mota (unreported) at p.2 where Wentzel in a judgment concurred in by Schutz P. (as he then was) and Mahomed J.A. now President of that Court said :-

> "This case illustrates the need to consider and identify those who can be affected by the result of proceedings and to ensure that they are party to the proceedings..... In the absence of that joinder which the respondent neglected in his application, the proceedings are defective and the order, accordingly..... must be set aside".

Mr. Viljoen craved leave of Court to grant the respondent time to answer averments of contempt levelled

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against it by the applicants. He contended that as things are presently the respondent doesn't know if in fact it is in contempt or that allegations of contempt are not only the applicants' say-so.

He accordingly invited the Court in considering the allegations of contempt against the respondent to also take cognizance of Van Zyl the only deponent of some substance on the applicants' side.

He further invited the Court to take cognizance of the circumstances in which it is alleged the respondent was served with papers just before lunch in respect of an application moved hardly three hours thereafter.

He contended that if the respondent on receiving papers served on its receptionist Mrs. Mopeli one of the deponents for the respondent, came straight to Court asking that the respondent be allowed time to answer it is inconceivable that the Court could have refused the respondent that indulgence. Thus he contended that if the receptionist's attention had been brought to the urgency of the contents of a sealed envelope she received from a young man things would have been different for the respondent's legal section would have reacted with due promptitude. He thus craved leave of Court to have the circumstances restored to the position obtaining before the order was granted on papers which do not appear to have been properly served as required by the rules of this Court. I will come back to this question of service later.

Mr. Viljoen went further to invite the Court to look at the facts and determine if there aren't factors justifying that the counter application be heard before the application for contempt. He sought to show the enormity of harm that the respondent is made to suffer as long as the interim order forbidding work to be done remains in place and not lifted despite that the Court granted it unaware of the full

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facts relating to it. Indeed in CIV/APN/402/86 Khoboko vs Khoboko (unreported) at p.9 this Court had occasion to refer to Republic Motors vs Lytton Road Service Station 1971(2) at 518 where Beck succinctly drove the point home as follows :-

> "The procedure of approaching the Court ex-parte for relief that affects the rights of other persons is one which ..... is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of audi alteram partem. It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of a respondent who if informed beforehand that resort will be had to the assistance of the Court, that the course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained".

It may be wondered what the reference to ex-parte has to do with this proceeding but I will attempt to show that later.

Mr. Viljoen reiterated that the respondent did not know of the existence of the original application for it was handed over to the receptionist who on her part outlined in an affidavit the circumstances under which she received the papers, and her state of mind towards them. See pages 135 and 136 of the record in CIV/APN/198/91.

The learned Counsel for the respondent contended that the applicants are suffering no damage while the respondent stands to suffer M3,000,000 loss per day. He further indicated that the applicants are at large to go to the area in question and make their samplings of 90% of the soil there. He reiterated that the respondent wishes to be put back where it would have been but for

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what is imputed to its conduct as improper behaviour. He contended that it would be absurd that the interim order should remain in place till the alleged contempt has been purged.

He invited the Court to look at the two opposing parties involved here. On the one hand are two mining companies of which Van Zyl is the only deponent of some substance. On the other hand is the Lesotho Highlands and Development Authority in whose hands are tied billions of Maluti. It was proposed on this basis that the Court should be chary in its discretion of burdening the LHDA thus with the interim order. The learned Counsel quickly if deftly betook himself from the charge levelled at him that in referring to paragraph 4 page 173 of Mr. Molyneaux's affidavit and the annexures he was indulging in unfair character assassination of Mr. Van Zyl. He however formulated the case before Court as being whether in the event that on 18 July 1991 at 4 p.m. respondent had been able to come before Court and had placed the above documents before it the Court would have said it was going to give Mr. Van Zyl an opportunity to reply.

In response Mr. Edeling submitted that it might be a mistake that the receptionist did not deliver the documents to the legal secretary in time. But that places an onus in terms of the legislation on the respondent for Section 19(2) says in "carrying out the scheme under this section the Authority shall (b) conform to the highest standards of managerial, financial and technical competence, expertise and practice".

He charged that the respondent has been selective in deciding what facts to place before Court. He intimated that because this application was not ex-parte rule 8(18) does not apply. Thus the respondent cannot try to avail itself of the option to anticipate the return date. I may in passing say this to me seems to be the crux of the matter.

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He further charged that the respondent is trying cleverly to go round the Rules. I was referred to Rule 8(22) which provides that a party may approach Court on short notice. He contended that the respondent is attempting to adopt a procedure not known to our Rules. He submitted that if indeed the receptionist had made a mistake the respondent should have been in Court the next day or so and not a week later. He invited the Court to share in his bewilderment at the submission that he relied on wrong facts when he had addressed the Court on no facts.

He charged that it could not hold to say there is no contempt despite Mr. Sole's statements at pages 127, 128 and 138 the thrust of which is either that the disturbance (on which the contempt proceeding is based) is minimal or that the total extent of the works being carried out is within the Rampai mining lease area. He denied that the respondent's papers provide any compelling reasons to hear the counter-application. Thus he looked upon this plea as a mere strategy for the so called facts relied on by the respondent are not correct. The learned Counsel expressed his puzzlement at the contention that the applicants acted improperly when approaching Court.

He suggested that nothing prevented the respondent asking someone to come to Court and ask that the matter be stood down.

Mr. Edeling contended that the respondent is engaged in a strategy to raise false disputes of facts; suggesting that if Court knew of such facts it would not have granted the interim order. He thus contented that disputes in this proceeding are spurious. He submitted that the small opportunity craved by the respondent is in fact a big indulgence that is not warranted. He stated that what the respondent in effect says is that it is not bound by the Development Order nor by orders of this Court for it carried on with the works destroying the evidence

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in the process despite these orders.

The learned Counsel urged on this Court to appreciate that appeal to public interest cannot justify a departure from the rule of law. In this regard I was referred to Dicey's works unfortunately I was not able to lay my hands on the text book in point; but nonetheless the submission sought to be buttressed by the quotation from the learned author's works was well paid regard to by this Court.

The Court was also referred to the Feasibility Study that preceded the framing and coming into effect of the LHDA Order; the purport of which is that the LHDA is not above the law. The learned Counsel appealed to this Court to consider that it cannot lie in the mouth of the respondent to make pretences that public interest is of any consequence for the respondent's attitude seems to be that nothing can be done to it as it deems itself too important to be brought within the purviews of the law. In response to submissions made earlier that there are cases where notwithstanding contempt the respondents have been heard, the learned Counsel said such cases are cases involving children where special rules apply; for then a new crisis would have arisen after the Court had given an order.

He charged that the respondent has impeded the course of justice and therefore must be punished. With regard to the question that the contractors were not joined he referred me to Section 21(3) of the legislation i.e. the LHDA Order of 1986 saying

> "Reference in this Order to the doing of any work or thing by the Authority shall be construed as including the doing of such work or thing by a contractor employed and authorised in that behalf by the Authority under this Section".

Thus Mr. Edeling submitted that the applicants are not

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called upon to go out seeking to find out what the names of the various contractors and subcontractors are. He indicated that the Order under (e) showed that publication should be made in a paper circulating in Maseru. Thus he submitted that there could be no substance in saying the order was disobeyed because contractors were not joined. I have already referred to Masupha vs 'Mota above on this point and would go further to say there is a legal principle in support of the view that where there are two laws purporting to secure the same result one being stringent and the other benign regard should be had to the latter.

It was submitted the Court is not required to interdict the entire scheme but only 9% of the affected area, so the respondent should not be heard to say millions of Maluti are being wasted per day when the interim order endures. It was pointed out that Mr. Sole's affidavit is dated 25 July 1991 thus suggesting the respondent cannot say there is any urgency in this matter.

Mr. Edeling submitted Mr. Redelinghuys's affidavit seeking to gainsay the receptionists affidavit. Mr. Viljoen was allowed to address the Court on it for he had not had an opportunity to refer to it as it only came to him during the course of this proceeding.

He indicated that Counsel stated that the Court endorsed short service but did not thereby imply any service. He pointed out that Mr. Redelinghuys does not deny what Mrs. Mopeli says which is that she received a sealed envelope. See p.135 of the record. Nothing on record shows that the nature and exigency of the document and service thereof were explained as required by the practice and rules of this Court. Notwithstanding that Rule 4(5)(b) requires that the person who effects service should make an affidavit, none is on hand. Mr. Viljoen

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explained that the impropriety he was referring to relates to the mode of service. The words of Schutz P (as he then was) in C. of A (CIV) No. 16 of 1984 Kutloano Building Contruction vs Matsoso and 2 Others (unreported) at 7 are worthy of great consideration, to wit :

> "I am afraid that my decision may smack of the triumph of formalism over substance. But forms are often i.. rtant and the requirements of the sub-rule are such".

In reply Mr. Edeling cautioned against the impropriety of making inferences on the basis that something is not denied.

On the day the application was moved before me in Chambers Mr. Edeling observed that in respect of the respondent's legal representative I scribbled something which he thought was Mr. Redelinghuys's name as the latter had accompanied him there. He duly advised that Mr. Redelinghuys was not appearing for the respondent. I assured the learned Counsel that what I was filling in there was the phrase Ex-parte. Nothing turned on this until the order was about to be granted when Counsel advised that he would prefer the order to be granted at 4.00 p.m. I did not know what the significance of the hour 4.00 p.m. was. Nor did I inquire. Both Counsel left and came back at 4.05 p.m. and I was shown a copy of the papers on which it seemed the respondent had been served. Thereupon I was kindly asked to cancel the phrase ex-parte and in its stead I accordingly wrote "no appearance". In my notes I indicated : "shown proof of service on respondent. Proof borne in applicants' copy of the Notice of Motion". Then the order was granted.

My difficulty as to this entire problem is whether a proceeding which was initiated and proceeded with ex-parte treated as can in the process convert into process moved on Notice. That is the first point.

The next point is whether the service that was

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effected on the receptionist was properly effected. The rules of this Court require that, if I am to take it that the process was before me on notice, the messenger should submit an affidavit showing that he explained the nature and exigency of the process to the respondent and that he exhibited to the respondent the original document while at the same time leaving the respondent with a copy. Nohow could the original have been exhibited to the respondent for it was in my possession at the time. It is not contended though that it was so exhibited. But the rule requires it should have been.

It would seem to me that even if the Court were to be persuaded that the service effected on the respondent was proper or should be condoned if in error, the balance of convenience favours that the respondent's counter-application be heard before the contempt proceedings.

The order made is therefore that -

1. The application to hear the contempt proceedings before the respondent's counter-application is dismissed with costs of two Counsel.

2. The respondent is ordered to file its opposing papers within two weeks from today.

J U D G E

26th July, 1991

P/S After the order numbered 2 styled "The interim order is lifted" Mr. Edeling stood to observe that this order would not properly follow as no argument was heard on the merits in CIV/APN/198/91. Mr. Viljoen explains context in which he had sought order in such terms.

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Court : The order as framed by the Court is deleted in terms of Rule 45 and thus the Judgment immediately corrected.