C.of A.(CIV.) No.35 of 1996

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

EDWARD STUART SYKES **APPELLANT**

AND

EZEKIEL TSIETSI LETHOLE **RESPONDENT**

Held at:
MASERU

Coram:
STEYN, P
BROWDE, JA
VAN DEN HEEVER, JA

J.U.D.G.M.E.N.T

STEYN, P:

On the 4th of July, 1996, the High Court at the instance of the Respondent granted the following order:

"IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:-
EZEKIEL TSIETSI LETHOLE APPLICANT

and

M & C CONSTRUCTION INTERNATIONAL (PTY) LTD	1ST RESPONDENT
M & C HOLDINGS (PTY) LTD	ND RESPONDENT
EEC. TRAVEL (PTY) LTD	3RD RESPONDENT
ANCHOR AGENCIES (PTY) LTD	4TH RESPONDENT
KAI FRODE CHRISTENSEN	5TH RESPONDENT
EDWARD STUART SYKES	6TH RESPONDENT
RUSSEL CLARKE	7TH RESPONDENT
S.A. REDELINGHUYS	8TH RESPONDENT

ORDER OF COURT

ON 4TH JULY, 1996

BEFORE HIS LORDSHIP MR. JUSTICE M. MONAPATHI
HAVING HEARD : MR. L. PHEKO, Attorney for Applicant
and
MR. P.U. FISCHER, Counsel for Respondents
HAVING HEARD : Papers filed of record

IT IS ORDERED THAT:

1(a) Applicant is hereby declared and recognized as a director of First, Second, Third and Fourth Respondents;

(b) The question whether Applicant is the majority shareholder of First, Second, Third and Fourth Respondent is referred to oral evidence on a date to be determined by the Registrar;

(c) The mediation and arbitration agreement between Applicant, Fifth and Eighth Respondents dated 7th February, 1996 is hereby declared to be of no force and effect;

(d) Fifth, Sixth and Seventh Respondents are hereby interdicted forthwith from transferring funds, files and monies of First Respondent except in the course of business of First Respondent;

(e) Fifth Respondent is hereby directed to desist from transferring the funds, files and monies of Second Respondent except in the course of business of Second Respondent;

(f) Third and Fourth Respondents are hereby directed to desist from transferring the funds, files and monies of Third and Fourth Respondents except in the course of business of Third and Fourth

Respondents;

(g) First, Second, Third and Fourth Respondents are hereby directed to account fully to Applicant as to how much money they have received and expended with effect from January, 1993 to-date and to submit to Applicant audited statements of accounts to fully support such accounting;

(h) Fifth, Sixth and Seventh Respondents are hereby directed to allow Applicant free access to all records, files and statements of First, Third and Fourth Respondents;

(I) Fifth Respondent is hereby directed to allow Applicant free access to all records, files and statements of Second Respondent.

2. The questions of costs shall stand over to the end of this matter."

The only aspect of the Order that concerns this Court is paragraph (h). As can be seen from its terms, it enjoins "Fifth, Sixth and Seventh Respondents ..... to allow Applicant free access to all records files and statements" of first, third and fourth Respondents".

On the 13th of August, 1996, the Applicant in the Court below - Respondent in this appeal - and henceforth referred to as such - launched an application by way of notice of motion against Sixth Respondent (Appellant) for an order committing him to prison for contempt of the Order cited above. (Seventh Respondent - Russel Clarke was also cited but no relief was granted against him)

It was Respondent's criterion in the Court below that Appellant had committed certain acts which constituted a contempt of the orders of Court.

On the 25th of November, the High Court per Monapathi J granted the following orde

> "It is ordered that:-
>
> 1. The Sixth Respondent, Mr. Edward Stuart Sykes found guilty of contempt of Court for failure to allow the Applicant free access to the office and files of the 1st and 2nd Respondents in the main Application under the abovementioned case no.
> 2. The Sixth Respondent is fined in the sum of M3,000.00, or 3 months imprisonment.
> 3. My reasons to follow."

At the date of the hearing of the appeal no reasons had been delivered. In view of the fact that no objection was raised, we proceeded to hear the appeal without the benefit of the presiding Judge's reasons.

At the outset, I should record that there are numerous disputes of fact on the papers before us. Indeed Mr. *Pheko*, who appeared on behalf of the Respondents, assured us that he pointed this out to the Judge *a quo* and suggested, he says, on several occasions, that the matter should be referred for oral evidence. I mention this aspect of the matter before setting out the facts, because it would seem clear that in view of the fact that the matter was decided on affidavits, both the Court below and this Court are obliged to determine any issues arising from such disputes in accordance with the well-

known dictum of Corbett J in *Plascon Evans Paints v. Van Riebeeck Paints* 1984(3) S.A. 623(A) at 634-635. The approach to be adopted is articulated by the Court as follows:

> "Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (c) at 235-G, to be:
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> > "..,where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order...Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."
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> This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1982 (1) SA 398 (A) at 430-1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) Sa 893 (A) at 923G-924D). It seems to me, however that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972(3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g)of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the

> correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration board and Another* 1983 (4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A)."

When it was put to Mr. *Pheko* that this was the approach we were considering applying in this appeal, he contended that this would not be appropriate. The fact that he had urged that the matter should be referred to trial in the Court *a quo* - so he submitted - rendered the application of this approach inapposite.

I must confess that I fail to see any logic in such a proposition. Certainly, had Counsel abandoned the Respondent's claim for relief on the papers in the Court below and had confined himself to seeking an order that the matter should be referred for the hearing of oral evidence and if the Court had so ordered, the case would then have been determined with the added advantage of the opportunity for the trial Court to assess the credibility and the reliability of those witnesses who testified.

However, Mr. *Pheko* did not do that. Despite his statement from the bar that he urged a reference to evidence, this must clearly have been in the

alternative. There is no record of his having abandoned his claim for relief on the motion papers, neither did he suggest to us that he did so. Moreover he persisted in seeking before this Court a dismissal of the appeal with the necessary implication that he supported the decision of the Court below and that the Respondent had succeeded on the papers filed in proving that Appellant was in contempt of the Court's order.

We are clearly therefore obliged, as the Court below was, to adjudicate this appeal in accordance with the approach enunciated by Corbett JA in the *Plascon Evans* case cited above.

Before referring briefly to the evidence, there are two preliminary points which arise. The first is that the Court *a quo* was clearly wrong in finding Appellant guilty of a failure to allow Respondent access to the "office" and files of either of the Respondents cited. The Court Order confined the relief granted to free access to "all records, files and statements". The Court also erred inasmuch as it sought to hold Appellant in contempt in that he failed to allow Respondent access to the files of Second Respondent in the Court below. As is apparent from the terms of para.(h) of the Court order allegedly flouted, it was only the fifth Respondent - i.e. Russel Clarke - and not the Sixth Respondent that was obliged to allow access to the files of the Second Respondent.

The second matter concerns the form of the Court order sought and granted in the Court below. The terms of the order was such as to invite ongoing disputes between the parties who were in any event at daggers drawn. Its vague and ambiguous terms created uncertainty. The lack of specificity could only have encouraged litigious contestants to claim or deny access to documentation on either spurious or genuine grounds, without certainty as to which claim was spurious and which was reasonable.

This is of course for the account of the Respondent in this Court. He sought and obtained an order in this form in the Court below and sought to enforce it both by way of implementation and ultimately by way of contempt proceedings. The form of the order on which he relied rendered it ill-advised for him to have done so.

It is not necessary to detail the business relationship between the parties and the acrimonious disputes that gave rise to litigation culminating in the Court order referred to above. It is only necessary to examine what Appellant's conduct was pursuant to Respondent seeking to implement the Court order obliging the former to afford the latter "free access to all records files and statements" of the companies cited as First, Third and Fourth Respondents.

It is common cause that on the 10th of July, 1996, armed with the order issued on the 9th of July, and without prior notice, Respondent presented himself at the premises of the 1st Respondent.

What occurred during this visit is a matter of very considerable dispute. However, as indicated above for present purposes both the Court below and this Court are obliged to decide the matter on the version deposed to by the Appellant where this is in conflict with that of Respondent and not clearly incredible.

This version is set out in para.3 of his opposing affidavit and reads as follows:

> "Turning now to the Applicant's averments, we admit that on the 10th day of July 1996, the Applicant presented himself at the premises of M & C Construction International (Pty) Limited in the Industrial Area. We set out the correct sequence of events and statements that were made by the 1st Respondent, in the presence of the nd Respondent.
>
> We deemed it appropriate to call a meeting for purposes of transparency and frankness in order to explain to senior staff the

circumstances surrounding the appearance of the Applicant at the business premises on that day. We explained to the staff:-

(a) That the Applicant had brought proceedings and had obtained a Court Order against various parties including M & C Construction International (Pty) Limited to obtain access to certain documentation and to restrain certain parties from conducting certain activities which were contained in the Court Order which was present in the office at the time.

(b) Entirely for purposes of clarity and in an attempt to facilitate the easy access of the Applicant to books of record etc., we informed senior staff of the company that the Applicant was not an employee and consequently his presence at the premises was of a restricted nature, pursuant to the rights that he had acquired in terms of the Court Order.

(c) The staff were furthermore informed that any and all documentation required by the Applicant would be provided to him, through the 1st Respondent.

(d) The Applicant seemed perfectly happy with these arrangements and apparently was happy with the welcome he had received at the offices by the 1st and 2nd Respondents. At no time did he raise any objections as to the arrangements then made for his access to the documents which he required. We therefore reject the allegations as set out in the paragraph as being thoroughly dishonest and devoid of the truth."

Appellant asserts further that on the 10th of July he had informed Respondent "that we required a schedule of documentation from him that he needed and we would thereafter extract the information for him and make it available by appointment, at the M & C Construction offices". Appellant then directed the Court's attention to a letter addressed by his Attorney, Mr. Harley, to the Applicant's Attorney, Mr. Pheko, on the 16th of July 1996 in this regard, setting up a meeting for the 19th of July 1996.

This letter from Appellant's attorneys was, according to Mr. Tip for the Appellant, the best evidence that at no time was his client in contempt of Court, but that he was fully determined to comply with the letter and spirit of the Court Order. It was written in reply to a letter from Respondent's attorney dated 15th of July which reads as follows:

"Sir,

re: TSIETSI LETHOLE vs m & c CONSTRUCTION INTERNATIONAL (PTY) LTD & SEVEN OTHERS: CIV../APN/127/96

We refer to this matter.

We are informed by client that he has been to the premises of First Respondent demanding to have a look at certain files of First Respondent from Sixth Respondent, Mr. Sykes, since 10th July, 1996 to-date but every time Mr. Sykes denies him access to such files on the pretext that it should be him personally giving client the files and that client must peruse the files in his presence. Mr. Sykes gives client further excuse that he has not time to give client the files as he is busy.

There is no doubt in our minds that your client is in contempt of the order of court which was duly served upon him. Unless you advise your client to comply with the order of court as we have advised client to approach him again, we shall have no alternative but to institute contempt proceedings.

Yours faithfully,

.....
L. PHEKO & CO.'

On the next day Appellant responded to the allegations levelled by Respondent in the following terms:

"Dear Sir,

RE: E T LETHOLE vs m & c CONSTRUCTION INTERNATIONAL(PTY) LIMITED

We acknowledge receipt of your letter dated 15th July 1996 and note the contents thereof.

We have consulted with our client, Mr Sykes, on behalf of the various Respondents and we are directed to respond to you as follows:-

1. Our clients are ready, willing and able to comply with the Order of Court.

2. Our clients do not intend to place themselves in contempt of the Court Order

under any circumstances.

3. Our clients are prepared to make Friday the 19th day of July 1996 available for your client to have access to the books that he has specified in a letter to our clients dated 10th July 1996, a copy of which we have in our possession.

You will understand that your client is not the Managing Director of the various Respondents and his "shareholding" is hotly contested. We would also remind you that there is nothing to prevent our clients from removing your client as a Director of the various Respondents, despite the Court Order dated 4th July 1996. Entirely without prejudice to our client's rights, which are reserved, our clients however, will not at this stage remove him as a Director pending the finalisation of the proceedings before Court provided, however, that your client does not conduct himself in such a way that he disrupts the business activities of our client. We have also been requested to advise you that Mr Sykes is extremely busy and cannot simply make himself available at any time to accommodate your client, due to pressure of work. Our client, however, is prepared to spend a day with your client on Friday the 19th day of July 1996 as stated in order to assist your client as much as possible.

Yours faithfully
HARLEY & MORRIS ASSOCIATES"

However it is necessary to return to some of the events that preceded this correspondence. In his opposing affidavit, Appellant proceeds to make the point that he could not on the 10th of July "produce documentation on demand by Applicant (Respondent) without notice".

It is clear that on the 11th of July Respondent once again attended at the premises of 1st Respondent and presented a hand-drawn list. The reason why the presentation of this list did not instantly generate the documentation requested, is explained by Appellant in the following terms:

"Your Lordships will appreciate that original documentation belongs to the Respondent companies and consequently, we were not inclined to allow the Applicant to remove original documentation consisting of books of prime entry and other accounting information from the premises. Your lordships will appreciate that the company cannot allow original confidential documentation to be removed from the premises, in any event. The circumstances developed, as your Lordships are by now aware, to a situation flowing from the exchange of correspondence between the respective Attorneys where a proper meeting was held on the 19th July 1996 and the Applicant satisfied in regard to his queries. The events which the Applicant is at pains to describe in the paragraphs above, led in fact to a concrete arrangement being put in place which the Applicant and all the parties concerned. We question why the Applicant wishes to belabour the Record and introduce matters of a historic nature which in any event culminated with the meeting referred to which took place on the 19th."

I return to deal with what the outcome was of the exchange of correspondence between the parties' attorneys referred to above.

As can be seen from Appellant's reply to Respondents' letter, Friday the 19th of July was made available for Respondent to have access to documents specified in his list drawn on the 10th of July, and Appellant undertook to spend the day of the 19th of July with Respondent to assist him "as much as possible".

The meeting as proposed took place. According to Appellant, "everything that Applicant (Respondent) required was in fact perused by him and he has signed an acquittance in favour of the company...."

The acquittance referred to is annexure "ETL4" and reads as follows:

"July 19, 1996

RECORDS OF ACCESS TO THE BOOKS OF ACCOUNTS OF M&C CONSTRUCTION INTERNATIONAL (PTY) LTD

Mr. E.T. Lethole was given access on 19 July 1996, to the following Books of Accounts of M&C Construction International. for inspection purposes.

1. The Audited Accounts for the year ending 30 June 1993
2. The Audited Accounts for the year ending 30 June 1994
3. The Management accounts for the year ending 30 June 1995

   The Audited Accounts for the year ending 30 June 1995, are currently under Audit and should be ready for inspection on 16 August 1996.
4. For the year ending 30 June 1996, the following Management Accounts were provided:

a. The cash book together with bank reconciliations
b. The valuations and certificates relating to the following contracts:

   I. The Trade and Industry Contract
   ii. The Vocational Rehabilitation Centre Contract
   iii The three LHDA Contracts
   iv. The Resource Centre Contracts
c. The Lesotho Bank Deposit books for the period
d. The Stanbic Bank Deposit book for the period
e. The Lesotho Bank Cheque book Counter Foils
f. The Stanbic Bank cheque book Counter Foils

Signature of Director Performing the Inspection — Date 19/7/96

Signature of Witness to inspection — Date 19/7/96"

Respondent contended in his supporting affidavit that he could not within the time allowed make a meaningful inspection of all the records. He added the somewhat quaint statement that: " I signed this letter to confirm once more that First Respondent meant it that he could not allow me free access but limited access as determined by him".

Appellant's response to this averment is that at no time at or after the meeting of the 19th of July did Respondent request a further meeting or query the quality of the access afforded him. The record kept by applicant reflects that Respondent arrived at approximately 9.15 hours, was given a desk

together with all the documentation requested by him for perusal. Save for a short absence between 12.00 and 12.40 hours and between 13.05 and 14.05, Respondent stayed on the premises inspecting the documentation requested until he left at 15.30.

Subsequently photocopies of documentation was requested by Respondent. This request was declined by Appellant.

It has not been argued before us that the refusal to produce photo-copies of the requested documentation was conduct constituting a contempt of Court. Indeed it would be difficult to advance such a contention in the light of the terms of the order which obliged Appellant to afford Respondent "free access" to the documents concerned. The request was - according to Respondent - "to give me (Respondent) photocopies of the audited accounts I was said to have inspected". Whilst it may have been reasonable as an act of grace to have done so, the Court order did not in my view place such an obligation on Appellant. Even on Respondents' own version this request was only conveyed to appellant on the 22nd July 1996, after Respondent had signed the document E.T.L.4 set out above.

It is difficult to understand how on these facts the Court *a quo* held Appellant to be in contempt of the Court order. Contempt is an act with

crimino-legal consequences. If someone deliberately refuses to comply with a directive of the Court a criminal prosecution can result. See *S v. Beyers* 1968(3) 70 (A). A person found to be in contempt may be ordered to undergo imprisonment. It must therefore as a first requirement at least be clear that the Appellant's conduct amounted to a contravention of the Court order.

It is my view that Respondent clearly failed to prove the *actus reus*; i.e. that "the Court's ..... authority was [intentionally and unlawfully] violated" I say this because:

1. The Court's order was so imprecisely phrased as to permit of a variety of reasonable interpretations.

2. The conduct of the Respondent on the 10th of July in seeking compliance with the Court order, without notice and without specifying his requirements, was itself unreasonable and Appellant's response in the circumstances not reprehensible. His conduct, even if viewed in isolation, did not constitute a violation of the Court order.

3. Whatever may have transpired between the 10th and the 15th of July (and this is in serious dispute) it is common cause that after

the exchange of correspondence, Respondent prepared a written list of his requirements and was given "free access" to all the documents he wished to see.

4. He subsequently acknowledged this fact by affixing his unqualified signature to the document in question. Respondent's subsequent conduct was inconsistent with the acknowledgement implicit in this "acquittance".

5. Accordingly, whatever may have occurred prior to 19th of July, on that date there had been compliance with the Court's order. Respondent failed to establish that Appellant had violated the Court order by failing or refusing to give him free access to the documents specified.

I would add that there is no room for a finding that Appellant's conduct, subsequent to 19th July, amounted to contempt.

In these circumstances, the appeal succeeds. The order granted by the Court *a quo* holding appellant in contempt and imposing the punishment on him reflected in the said order is set aside. Appellant is entitled to both the costs in this Court and in the Court below. It is ordered accordingly.

.....

J. H. STEYN
PRESIDENT

I agree .....

J. BROWDE
JUDGE OF APPEAL

I agree .....

L. VAN DEN HEEVER
JUDGE OF APPEAL

Delivered at MASERU this 5th day of ~~JANUARY~~ February, 1997.