

IN THE HIGH COURT OF LESOTHO

CIV/APN/253/2010

In the matter between:

ZHAI FENG FU

Applicant

And

LU BEN HUI

1st Respondent

WANG BIN

2nd Respondent

ZHUANG XIAOHUOA

3rd Respondent

LONG YAN WANG

4th Respondent

LONG YAN XIN

5th Respondent

GONG XIN GUAN

6th Respondent

FAN JIAN MING

7th Respondent

LESOTHO STONE ENTERPRISES (PTY) LTD

8th Respondent

JUDGMENT

Delivered by the Honourable Mr Justice T. Nomngongo

On the 15th December, 2010

On the 8th September 2010, the court gave Judgment in the matter and made orders in the following terms:

1. Interdicting and restraining the 1st, 2nd and 3rd respondents to conduct the business of the respondent in exclusion of applicant; and
2. Directing the 1st, 2nd and 3rd respondents to allow the applicant and any of his duly appointed agents undisturbed and free access into the business management and financial affairs of the 8th respondent including free and undisturbed access into a financial records, bank accounts, Computer records and data of the 8th respondent; and
3. Granting leave to the applicant to have free and undisturbed access into the financial records and books of account of the 8th respondent and to make copies thereof especially in regard to the trading activities of the 1st, 2nd and 3rd respondents while in possession and control of the business of the 8th respondent; and
4. Directing the 1st, 2nd and 3rd respondents to allow the applicant and any of his duly authorized agents free and undisturbed access to the offices, manufacturing factories and quarry of the 8th respondent; and
5. Interdicting and restraining the 1st, 2nd and 3rd respondent to withdraw any funds from the bank accounts or from the business of the 8th respondent, except in the normal cause of business and without the consent of the applicant including an interdict restraining the 1st, 2nd and 3rd respondents from

transferring any funds from the kingdom of Lesotho whatever unless authorized by the applicant and/or by order of this Honourable court; and

6. Setting aside any management agreement in regard to the business of the 8th respondent awarded to the 1st, 2nd and 3rd respondent or any other entity under their control or authority and setting aside such agreement as unlawful and null and void.
7. Setting aside any appointments of directors of the 8th respondents made by the 4th, 5th, 6th and 7th respondents and cancelling the appointment of the 1st, 2nd and 3rd respondents as directors of the Company in so far as they may claim to be directors of the 8th respondent.
8. Directing that the respondents pay the costs of this application in the event of any one of them unsuccessfully opposing this application, jointly and severally the one to pay the others to be absolved.

Following that, the applicant moved court in the following terms:

1. Dispensing with the rules of court regulating the service of process and time limits and directing that the application be heard as an urgent application.

2. Directing that the respondents appear before this Honourable Court at a time and on a date to be determined by this Honourable Court to show cause why they should not be held in contempt of a final order of the above-mentioned Honourable Court dated the 8th of September 2010, the contents of which the 1st, 2nd and 3rd respondents are fully aware of and came to their notice.
3. Directing that in the event of the 1st, 2nd and 3rd respondents failing to show adequate and proper cause why they should not be held in contempt of court or in the event of these respondents not appearing at all that they be dealt with in the discretion of the abovementioned Honourable Court.
4. Directing that the 1st, 2nd and 3rd respondents pay the costs of this application on the attorney and own client scale.
5. Granting such further and/or alternative relief as this Honourable Court may deem necessary in the circumstances.

The contempt application was opposed.

In his founding affidavit Zhai Feng Fu alleges that the order of court was served by the deputy sheriff, one Mr 'Musi on the 1st, 2nd and 3rd respondents during 9th and 10th September 2010 and he attached a copy of the return of service. He says the order was served on them

and one Mr. Wu who acted as interpreter for them and therefore they became fully aware of the contents of the order and its implications. They subsequently gave applicant undisturbed and free access to the quarry and manufacturing facility of the 8th respondent at T.Y. They however refused access to the 8th respondent's offices at the BNP centre. When they did so they were in contact with their legal advisor Advocate Mosito K.C. telephonically.

On the 9th September the applicant and the Deputy sheriff proceeded to a residential area at Hill's view occupied by the 1st, 2nd and 3rd respondents together with other employees of 8th respondent. He says at par. 8 of his founding affidavit that:

"It is well known that the 8th respondent also conducts its business from this property and that all administration was actually done from this office and most of its financial records were also kept there. Computers and laptops are kept in these premises and are used for the financial records of the 8th respondent".

When they arrived at this property they were at first not allowed in until the intervention of Mr. Mosito K.C. when only the deputy sheriff was allowed in. There ensued a fight and scuffle before the deponent could finally leave the premises.

On the 10th September the deponent and the deputy sheriff again proceeded to the office at BNP where they were apparently let in. There the deputy sheriff again tried to explain the order. They refused to abide by it until they were locked out at about 10p.m. They did not allow the applicant access to the financial records of the 8th respondent.

The answering affidavit was deposed to by Lu Ben Fu. I must say at once that the affidavit is tedious, repetitive and mostly argumentative. For instance par.4 of the founding affidavit which simply says that the 1st, 2nd and 3rd respondents were served with the order by the deputy sheriff and the return is annexed is met with an answer that goes to

detain eight pages of trying to explain in excruciating detail how that service was effected. Rule 20 (4) of the High Court Rules deprecates this kind of pleading. It specifically provides that every pleading shall contain a clear and concise statement of facts upon which the pleader relies. If a deponent rumbles on in an affidavit clarity is bound to be lost in the process.

Be that as it may the gist of the deponent's long affidavit is that the court order was not served on the respondents in the manner reflected in the return of service. He says they (respondents) received the court order from members of a security company after it had been first received by a number of people including a Mr. Wu. That order was never explained to them. He goes on to state that from their residence – we do not know at what point they had arrived there, the applicant in the company of Mr Musi, Mr Monyako (deputy sheriff) and Philip Mokhali; an employee of a rival company, proceeded to Lekokoaneng in the company of a police officer. There they entered the quarry and

started searching the offices and they took away a sum of M4, 923 as well as an invoice book, a receipt book, delivery notes and client's information books. The company then apparently afterwards preceded to the 8th respondents offices at Maseru where 'Musi informed all those present – we don't know if these include the respondents, that he was facilitating the taking over by the applicant of the office. In doing so he did not read any court order. They did so only after about two hours in the office and it was read in the English language. The deponent goes on to list a number of things that he says the applicant and the deputy sheriffs did which were not authorized by the court order such as locking the offices of the 8th respondent and the attempt by them to enter and search their residential premises.

Counsels for both parties have amply expounded the law relating to applications for committal for contempt. Mr Mosito referred me to the case of **Fakie NO V CC11 Systems (Pty) Ltd 2006 SA 326 (SCA)** where Cameron J summarized the essentials of contempt of court as follows:

(22) Once prosecution has established (i) the existence of the order (ii) its service upon the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non compliance was willful and *mala fide*, the offence will be established beyond reasonable doubts.”

And further that:

“The preconstitutional approach was that once the enforcer established that the order had been granted, and served on or brought to the alleged contemptor’s notice an inference was drawn that non-compliance was willful and *mala fide* unless the non-complier established the contrary. The alleged contemptor bore the full legal burden of showing on a balance of probabilities that failure to comply was not willful and *mala fide*”.

Monapathi J. had this to say in the case of **Mapitso Cecilia Thaki v Maputi Thaki & Two** ORS CIV/APN/195/95 at pp. 7 – 8 (unreported)

“The courts do not take lightly to the fact of intentional disobedience of their orders. The applicant must show that an order was granted against the respondent and that the respondent was either served with the order or informed of its contents and could have no reasonable grounds for disbelieving the information and further that he either disobeyed or neglected to comply with it. Once this is shown willfulness is normally inferred and the onus will be on the respondent to rebut it on a balance of probabilities.”

In the present case, it is not in dispute that there is an existing court order issued against 1st, 2nd and 3rd respondents and others. It has been argued rather vigorously that it was not served upon them. But on the respondents’ papers themselves it is clear that they did not only came to know of it but they knew exactly what its purport was for throughout the answering affidavit the deponent keeps saying that what the deputy sheriff in the presence of the applicant did was not what the court had ordered. That means he knew exactly what the order was. Besides, the respondents were in contact with their lawyer when the

deputy sheriff and applicant tried to enforce the order. Quiet strangely they seem to deny this. This is illustrated in par. 8 (iii) of the answering affidavit where the deponent says:

“I deny that we were in contact with Advocate K.E. Mosito K.C. The 1st, 2nd and 3rd respondents cannot speak English and Advocate K.E. Mosito K.C cannot speak Chinese. There was no way in which we could have been in contact with him, moreso when deponent does not even say that we ever spoke through an interpreter to Advocate K.E. Mosito.”

The deponent had forgotten what he had deposed to earlier and this is no doubt as a result of the longevity of his affidavit that in turn resulted in the loss of clarity. He had said at par. 6(f) of the answering affidavit.

“We then called our lawyer to say what these people were doing there and he told us that the order did not permit them to come to our residence and that if they did we should lock them in there”

The question that remains is whether the respondents complied with the order. The essence of the order that I gave was that respondents allow the applicant to have undisturbed and free access in the affairs of the 8th respondent company including its management and financial affairs. The reading of the respondent's papers reveals a confrontational affair. They were only allowed access at the quarry and manufacturing facility at Teya-Teyaneng but apparently allowed only entry at BNP offices of the 8th respondent but anything else. Their presence there was seen as harassment. At the residence at Hills View their presence was resisted vigorously and this was done with encouragement by their lawyer. The matter at Hills View should be seen in the light of what the applicant says that the eighth respondent conducts business from that property (par 8 of the founding affidavit). The respondent's only answer to this specific allegation is:

“The 8th respondent has no office at our residential house”

Yet once again he forgets what is stated at par. 6(g) of the answering affidavit that:

“In the afternoon on Friday, we wanted to take some items home for safe – keeping which had been brought to the office, Phillip could not allow us to take a bag which they had brought from our quarry and he blocked us from leaving our BNP offices with it”.

This clearly illustrates what the applicant says that business was conducted from the property at Hills View. Access to this property was fiercely resisted by the respondents, frustrating the order for access.

As if this was not enough, in a bizarre move the respondents then approached another Judge and obtained *ex parte* an order, *inter alia*:

“That 2nd to 5th respondent herein be interdicted from going to any of the business sites and/or offices of the 1st applicant pending determination of this application.”

This was clearly aimed at frustrating access and thus the order of this court. This was done surreptitiously behind the back not only of the applicant but behind this court as well. Conduct of this sort definitely brings the courts as a whole into disrepute with one court seen as giving one decision and another a conflicting one on one issue and the same parties. These cannot be more willfulness and mala fides.

Of all contempt applications that have come before courts this must rank *sue generis*. The three respondent's contempt has been compounded by trying to drag the courts along their contemptuous path. This cannot be countenanced.

The application succeeds with costs.

It remains to make an appropriate order. In **Barclays Bank (Now known as Standard Bank Lesotho Limited) v Michael Mpheta Ramphalla LLR 1999 – 2001**, Ramodibedi J. (as he then was) said:

“It is salutary to note that the administration of justice can only function effectively if those affected by court orders obey them.

No court of law can tolerate the disregard of its orders with – impunity as this case only demonstrates. It is thus the duty of this court to impose such penalty as will vindicate its honour consequent upon disregard of its orders. I have previously given the respondent/ defendant a suspended sentence in the hope that he would comply. That apparently has not worked. I have no doubt that respondent/defendant's excesses in the matter have brought the justice system in this country into disrepute."

The respondent in that case was sentenced to six month's imprisonment without the option of a fine. One of the considerations was no doubt that he had previously been sentenced to a suspended period of imprisonment.

In the present case the respondents have not previously been sentenced. However Ramodibedi J. alluded to excesses that bring the courts into disrepute. Such an excess has been demonstrated in this

case by the respondents not only flouting the order of this court but by also attempting to solicit the assistance of the courts in their conduct.

I consider therefore that thirty days imprisonment without the option against 1st, 2nd and 3rd respondents of a fine appropriate in all the circumstances of the case.

If the respondents are not in attendance warrants of apprehension must issue so that they should start to serve their sentence immediately.

T.Nomngcongo
Judge of the High Court

For Applicant: Mr Nathane

For Respondent: Mr Mosito