

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/338/2012

In the matter between:-

PRIVATE THEKO LEROTHOLI

APPLICANT

AND

LIEUTENANT COLONEL TAU

1ST RESPONDENT

MAJOR GENERAL MOTŠOMOTŠO

2ND RESPONDENT

COMMANDER OF LESOTHO DEFENCE FORCE

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

RULING

Coram : Hon. Mahase J.
Date of hearing : 5TH October 2012
Date of Ruling : 12th December 2012

Summary

Civil Procedure – Motion proceedings – Interim interdict – Order of court disregarded – Contempt of Court proceedings

ANNOTATIONS

CITED CASES:

- **Frazers Lesotho v. Hata-butle (PTY) LTD 1999 – 2000 LLR – LB 65 per Gautlett J.A**
- **Room Hire Co (PTY) LTD. v. Jeppe Street Mensions (PTY) LTD. 1949 (3) S.A. 1155 (T)**
- **Plascon – Evans v. Van Riebeeck Paints 1984 (3) SA. 623**

- **Da Mata v. Otto No 1972 (3) S.A. 858 (A)**
- **Turubull v. Van Zyl No. 1974 (1) S.A. 440 (c) 444**
- **Metropolitan Life Ltd. v, Masuphe LAC (1995 – 1999) 681 at 680**
- **Tsoeu v. Cerfontein and Other C. of A (CIV) No 18/2011**
- **Consolidated Fish (PTY) v. Zive and Others 1968 (2) S.A. 517 at 522**

STATUTES

- **Constitution of Lesotho**

BOOKS

- **Herbsted and Van Winsen :- The Civil Practice of Supreme Court of South Africa 4^{ed.} (1997) at p238**

- [1] The facts of this case are briefly that on the 7th September 2012, the applicant approached this Court on urgent ex parte basis. He was seeking orders which are stated in his notice of motion dated the 7th September instant. Same are incorporated herein.
- [2] The reason in support of this application and the explanation why he approached this Court as he did are clearly spelled out in his founding affidavit and same have been incorporated in the certificate of urgency filed of record. Said reasons appear in paragraphs 7 up to 9 of his founding affidavit.
- [3] The applicant is a member of the Lesotho Defence Force holding the rank of private.

[4] He is aged 40 years and has been on that rank for a period of over fifteen years and 13 currently under the overall command of the 2nd respondent and has been deployed at 11 Infantry Battallion.

[5] This Court granted the prayers sort by the applicant on the 7th September 2012. Prayers 1, and 2 (a), (b) and (c) were to operate with immediate effect as an interim interdict.

Subsequently, that interim order of court together with the founding papers/notice of motion were served upon the respondents. Refer to copies of returns of service dated the 10/09 and 17/10 instant.

[6] In a nutshell, and this is a matter of common cause, the respondents refused to accept the applicant's sick leave.

[7] The reason for such refusal to obey with an order of court being that according to the contents of the LDF sick parade SOPs (whatever that is) dated the 18th September 2012 and signed by the 2nd respondent, applicant should have sort medical treatment from the Makoanyane Military Hospital and nowhere else.

[8] The said L.D.F. sick SOP had come into operation on Tuesday the 18th September 2012. That would be some eleven (11) days after the interim order in question had been served upon the respondents and it had been issued by a Court of law and of competent jurisdiction.

- [9] I pause to observe that none of the respondents have denied having been served with and bearing not been aware of the existence of the orders of court because same was served upon them personally especially the 1st and 2nd respondents while the 3rd respondent was served through his legal office.
- [10] The above is buttressed by the fact that the 3rd respondent has filed an answering affidavit in an attempt to protect the conduct of the 1st respondent on the unfounded and unsupported grounds that the first respondent was not on duty the 1st October 2012, as first respondent was on leave.
- [11] This Court notes to its greatest dismay that in that answering affidavit, the third respondent, without any legal authority is speaking on behalf of the first respondent. He has not filed a supporting affidavit in which he supports the first respondent. This is not only an inadmissible hearsay evidence but it is also a novel procedure where a deponent to an answering affidavit speaks as if he is or on behalf of another deponent.
- [12] Besides this, and as the applicant has correctly pointed out, there is no documentary proof of that unnamed leave which has been annexed or attached to this answering affidavit. One does not even know the duration of it as such has not been disclosed by 3rd respondent.
- [13] Be that as it may, one thing is certain. It is that the first, third respondents became aware of the said order of court, subject-matter herein, hence why they sort to circumvent its existence and contents by having issued the said L.D.F. sick parade SOPS, some eleven days after the interim order of court was issued by this Court.

- [14] It is noted that in their determination to persist to disobey and disregard an order of court, the 1st respondent and one captain Sekhonyana adopted a peculiar and an unheard affidavit in which none of them indicate who they are actually and really supporting.
- [15] In furtherance of the above attitude, the first respondent has likewise filed what he calls a supporting affidavit without having filed an opposing affidavit even though the allegation that he is in actual fact in contempt of an order of this court is directed at him.
- [16] The undenied fact that the respondents one up to three has issued the so-called LDF sick parade SOPs some eleven days after the existence and their knowledge of the interim volumes about their intentional, determined and total disregard of the said order of court.
- [17] They have, all willfully and intentionally and with a clear knowledge of the existence of that order of court, which was duly, properly and formally served upon them and their relevant offices, to with the legal office, ignored disregarded and refused with impunity to obey same, thereby undermining violating the authority of this court.
- [18] The respondents made an attempt to oppose this application even though they also admit that they have indeed been served with this interim order and that it was received by them, including the first respondent. Refer to their written submission at paragraph 2 – sub-paragraphs 2.1 and 2.2.

- [19] The above is a matter of common cause. The stated facts referred to and admitted by the respondents as being of common cause are directly inconsistent with the contents of the answering affidavit of the third respondent where in the point of law in which he denies urgency of the matter he states categorically and in clear terms that the interim order in issue was served and received by respondents herein, including first respondent.
- [20] Indeed, the contents of that answering affidavit deposed to by the third respondent are mutually distractive to the facts accepted and admitted as being of common cause to the parties herein.
- [21] The only reason for such inconsistency is because it is not true that the first respondent was never served with the said interim order of court as the deponent to the answering affidavit, LT. General Kennedy Tlali Kamoli wants this court to believe.
- [22] It is indeed a fundamental principle of the law that parties must stand or fall by their pleadings. As a result the respondents mutually distractive and inconsistent averments have done a great blow on their case.
- [23] This Court is left in no doubt that the only probable inference to be drawn from such facts and averments is that the respondents numbers up to three were duly served and received the interim order of court.

- [24] The averments of the applicant to the effect that the respondents one up to three have disobeyed an order of this Court dated the 7th September 2012, remain unchallenged.
- [25] This Court has already dealt with a deliberate attempt by the said respondents to circumvent the contents of its order by relying on the L.D.F sick Parade SOPs which came into operation some eleven days after the order of this Court was issued and served upon the respondents in question in the manner alluded to above.
- [26] It has also not been denied by the respondents in question that when the 2nd respondent endorsed the said L.D.F sick Parade SOPs, he was not aware of the interim order in question. Indeed all of the first up to the third respondents were aware of the existence of that interim order of Court hence why none of them has challenged the contents of the return of service dated the 2nd October 2012.
- [27] The reasons explaining and or justifying the urgency of this application, particularly at paragraph 2 (b) have not at all been challenged by the respondents, as such they remain admitted. In fact the urgency of this application was brought about the fact that as a result of their refusal to accept the applicant's sick leave, annexure "PTLI", applicant could not stay at home as recommended by the medical doctor, and so he could not properly take his medication as he was on duty. The urgency therefore, has nothing to do with the absence from duty of the first respondent.

- [28] The averments of the third respondent in his answering affidavit (when are inadmissible hearsay evidence) are therefore misplaced.
- [29] There can be no acceptable legal defence justifying the total disregard of the interim order of this Court.
- [30] the most salient question one can ask is is it by a strange coincidence that the said L.D.F sick Parade SOPs are written and endorsed for operation after the respondents have violated and disobeyed an order of this Court? The answer is in the negative.
- [31] The respondents are seeking to hide behind this document so as to justify their contemptuous behaviour of an order of this Court. They should not be allowed to get away with that.
- [32] The allegation or submission that the second respondent was out of the country when the said L.D.F. parade SOPs was issued and or signed is not supported by anything. He too has not filed a supporting affidavit.
- [33] The allegation is therefore a bare denied, which should not be accepted at least in a court of law. I am not sure if it would probably be acceptable in the L.D.F.
- [34] While this Court does not want to question the way the military runs that institution, one cannot overlook the fact that the commander and those who are assisting him in the command of the L.D.F., it to the junior officers

to empower such officers to be able to understand the purport of the relevant military laws so as they too make their job easier.

[35] The above is in response of the contents of the third respondent at paragraph 7 (seven) of this answering affidavit. This is to emphasis the view of this Court that respondents should not and cannot be allowed to hind behind the said L.D.F. Sops, which have deliberately been issued some eleven days after the order of court, subject-matter herein was issued.

[36] This Court has noted the contents of paragraphs 7, 9, 10, 11 and 12 which are irrelevant to the present application. The deponent to this affidavit seems to be venting out his anger and possibly frustrations at this Court. The language he has used there in describing the kind of person he thinks the applicant is, is a clear assassination of one's character. Courts of law do not countenance and overlook such behaviour.

I fail to understand why counsel who drafted these paragraphs had the audacity to allow the use of such language in papers meant to be used in court.

[37] As for the "supporting affidavits" of the first respondent and that of captain Sekhonyana, they are defective in the way in which the applicant has pointed out in his written submissions. To that extend they are no affidavits.

[38] In the premises, it is the considered view of this Court, that clearly as per the returns of service herein filed of record and also regard being hand to their unsupported, or to their unsubstantiated allegations, which are also mutually

destructive and in consistent and contradictory the respondents one up to three have been aware of the existence of the interim order in question but they have done all they could to pretend not to have been aware of same and their contents. That is why they had issued and made operational with immediate effect after they had been aware of the existence of the said order of court.

[39] As I have indicated above, the third respondent has very consciously and deliberately sort to protect but in doing so he assisted the first and second respondents to disobey an order of court thereby circumventing the order of court by having issued the said L.D.F. sick leave parade SOPs. They are therefore in contempt of an order of this Court. They are accordingly so found guilty of contempt of court. In short only prayer 2 (b) is granted. Prayer 2 (a) is academic as it has been overtaken by events. Prayer 2 (c) not granted.

[40] Indeed they are at large to issue any L.D.F. sick leave parade SOPs but not after an order of court has been issued before they did that and think that they can hide behind such notices.

[41] Their story would be otherwise had they not issued the said L.D.F. sick leave parade SOPs some eleven days after the order of court in question was issued and served upon them. Their contempt is therefore willful and intentional.

[42] I note that none of the first up to the third respondents are before court for reasons I do not know.

[43] In the premises counsel are ordered to submit written submission outlined or explaining to this Court why and why not the said respondents shall not be committed to prison for being in contempt of court.

[44] The rule herein is extended to 5th February 2012,

M. Mahase

Judge

For Applicant: Adv. M. Kumalo

For Respondents: Adv. F. Mohapi