CCA/0109/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

THE GOVERNMENT OF KINGDOM OF LESOTHO APPLICANT

AND

NIKUV INTERNATIONAL PROJECTS LIMITED RESPONDENT

RULING ON POINT IN LIMINE

Coram : L.A. Molete J
Date of Hearing : 21st August, 2014
Date of Judgment : 26th September, 2014

SUMMARY

Practice and Procedure – Failure to comply with court order – The need to purge contempt before being heard – Rule not absolute – Court may hear Respondent in exceptional cases – Ambiguity in court order and irreparable harm constitute exceptions – Point in limine dismissed.

ANNOTATIONS

CITED CASES

Di Bona v Di Bona and Another 1993(3) SA 682

Hadkinson v Hadkinson 1952 A11 ER 567

Clement v Clement 1961(3) SA 861

Hoffman la Rocheche and Co Ag and Others v Secretary of State for Trade 1975(1) AC 295 (HC) B

Associated Newspapers of Zimbabwe v Minister of Information and Publicity in the President's Office and Others 2004(2) SA 602 25

M.T. Hamntenya v D.B. Hamutenya 2005 NR 76 HC

ABEL Sibandze v Stanlib Swaziland; Liberty Life Insurance Swaziland (Pty) Ltd and Others Civil Case No. 3444/09

SwissBourgh Diamond Mine (Pty) Ltd and Another v Lesotho Highlands Development Authority CIV/APN/195/91

STATUTES
High Court Rules 1980

BOOKS

Civil Practice of the Supreme Court of South Africa (4th Edition) L.D. Van Winsen, A.C. Cilliers and Co Loots (Juta & Co Ltd 1997).

[1] The Applicant obtained an order on an urgent and *ex parte* basis against the Respondent on the 8th August 2014.

[2] The *rule nisi* which was issued by this Court on the same date and made returnable on the 9th September 2014 called upon the Respondent to show cause why certain specified orders should not be made.

[3] At this stage I need not concern myself with the detailed terms of the order sought, except to state that it contained the interdict that

3.1 The Respondent is interdicted from causing or allowing

"3.1.1 Any disruption or termination of the services in connection with the systems;

3.1.2 Any person, without the prior written consent of the Applicant, to gain access to any computer or server being part of the systems or to make any change to any data or program or permission or software or settling or configuration on any computer software or server.

3.2 The Respondent is ordered to deliver all systems control information to the Applicant's representative namely the Principal Secretary in the Ministry of Home Affairs at his office in Maseru, in both paper and digital form."

[4] The orders in 3.1 and 3.2 as set out above were to operate with immediate effect upon service, or as soon as it came to the knowledge of the Respondent or any of its representatives whether by e-mail, service or otherwise; and to remain in force pending any further or later order of the court.

[5] It is common cause that the Respondent complied with 3.1 and 3.1.2, but did not comply with 3.2.

[6] On the 18th August 2014 the Respondent filed a notice in terms of rule 8(18) of the High Court rules to anticipate the return date and sought to

discharge the interim relief granted in the paragraphs 3.1, 3.1.2 and 3.2 of the order.

[7] The application to anticipate was opposed. The opposition was at that stage heard only on the point *in limine* which was that since the granting of the interim order, the Respondent had refused to comply and therefore should not be heard by the court before and until it purges its contempt.

[8] Counsel for the parties, **Mr C.S. Edeling** and **Mr M. Mathe** for the Applicant and **Mr M.G. Roberts S.C.** for the Respondent were directed by the court to argue the contempt point *in limine* first because that would be the determining factor of whether or not the parties proceed on the merits. This ruling concerns itself with that aspect only. I should mention also that there was no application for committal of the Respondents or any of their representatives for the contempt, only the point *in limine*.

[9] At the conclusion of the hearing, the court suggested that the parties, with the assistance of their attorneys should meet with a view to an amicable resolution of the matter. It was obvious that very serious consequences would result from their dispute. Their apparent antagonistic and seemingly irreconcilable positions would negatively impact upon the nation in the delivery of identity cards and passports. Sadly; this did not succeed and counsel informed me that no agreement was reached.

[10] It was apparent to me that the parties lacked the mutual trust and bona fides that should be the foundation of any contract, and therefore none was willing to compromise for the benefit of continuation of the contract to finality to fulfil its intended purpose.

[11] The law and principles applicable to the case before me is set out in the **"Civil Practice of the Supreme Court of South Africa" (usually referred to as Herbstein and Van Winsen)** where the learned authors state in relation to purging of contempt that;

> "The court will usually refuse to hear a person who has disobeyed an order of court until he has purged his contempt. The fact that a party to a cause has disobeyed an order of court is not of itself a bar to his being heard, but if his disobedience is such that, for as long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce its orders, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.[1]"

(1) Di Bona v Di Bona and another[2]

(2) Hadkinson v Hadkinson[3]

(3) Clement v Clement[4]

[12] The rule is that a litigant is not allowed to come to court with "dirty hands." And the English Law doctrine of" purge first and argue latter" also applies in our law. It is therefore irrelevant that the litigant may consider the order to be wrong or unconstitutional, until such time that it has been set aside it must be complied with.

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[1] Herbstein & Van Winsen at Page 827
[2] 1993(3) SA 682
[3] 1952 All ER 567
[4] 1961(3) SA 861

[13] In the case of **F. Hoffman la Rocheche and Co Ag and others v Secretary of State for Trade**[5]**.** Lord Denning MR stated the same principle as follows;

> "They argue that the law is invalid; but unless and until the courts declare it to be so, they must obey it. They cannot stipulate for an undertaking as the price for their obedience. They must obey and argue afterwards."

[14] This is the established position in our law and applies with equal force in various jurisdictions; to name a few in Southern Africa; Zimbabwe in **Associated Newspapers of Zimbabwe v Minister of Information and Publicity in the President's Office and Others**[6]**.** Namibia in **M.T. Hamntenya v P.B. Hamutenya**[7]. Swaziland in **ABEL Sibandze v Stanlib Swaziland; Liberty Life Assurance Swaziland (Pty) Ltd and Others** [8] and in Lesotho **SwissBourgh Diamond Mine (PTY) Ltd and another v Lesotho Highlands Development Authority**[9].

[15] It does not matter in these cases whether non-compliance is in respect of a statutory provision or a court order the same principle applies.

[16] Mr Edeling for the Applicant relied on the case of **S.A. Fakie, No Vs CC11 Systems (Pty) ltd (2006) SCA 54 (RSA) at para (42) d** for his submission that:

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[5] 1975(1) AC 295 (HC) B
[6] 2004 (2) SA 602 25
[7] 2005 NR 76 HC
[8] Case No. 3444/09
[9] CIV/APN/198/91

> "……..once the Applicant has proved the order, service or notice and non-compliance, the respondent bears the evidential burden in relation to wilfulness and *mala fides*; should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt."

[17] The attorneys for the parties exchanged some correspondence after the order was made, and before the hearing. It is necessary to refer to the contents of some of the letters to find out if there could be a reasonable doubt as to whether the non-compliance was wilful and *mala fide,* regard being had to the fact that the court has a discretion to exercise as to whether it should refuse to hear the Respondent until the impediment is removed "or good reason is shown why it should not be removed."

[18] The court will be inclined to exercise its discretion in favour of hearing the party where the contempt is still in issue and the litigant may be heard in his own defence in certain cases; one of them being that the court has no jurisdiction to make the order sought against him. It is also recognised that if there is a genuine mistake caused by ambiguity in the order or a possibility that compliance would cause irreparable harm to the Respondent, those instances would constitute an exception to the general rule.

[19] The correspondence between the parties will put this aspect of the case into proper prospective. TGR attorneys wrote on behalf of the Applicants on the 10th August 2014.

"I attach a copy of the court order. Please observe in particular paragraphs 3.1 and 3.2 which apply with immediate effect."

[20] On the 11th August 2014 again TGR wrote to Webber Newdigate and suggested a meeting which;

"……should also be used to discuss and agree the arrangements to implement court order number 3.2 for the delivery of the system control information. Our client cannot wait until 18 August 2014 to discuss with NIKUV implementation of the court order, which apply with immediate effect."

[21] Webber Newdigate responded as follows;

"Paragraph 3.2 of the order is extremely widely couched if regard is had to the definition thereof and the respondent is unable to comply therewith. Our client is in any event of the view that irreparable harm would be suffered by it if the system control information is parted with, if the order is later reversed and that accordingly, the *ex parte* order with respect to par. 3.2 of the order, should not have been granted. In this regard our client further contends that:

(a) The Respondent is a company which has its registered office and principal place of business in Israel. The vast majority, if not all of the software development was performed in Israel.

(b) The codes and documentation required in terms of the order are the Respondent's trade secrets and intellectual property located in Israel, which is highly sensitive and highly valuable trade secrets and intellectual property, of which the Respondent is the owner.

(c) The trade secrets and intellectual property rights in and to the software at all times remain vested in the Respondent as owner, if regard is had to Clause 15.1 of annexures "GOL2" and "GOL3" to the application papers.

(d) Courts are not entitled to grant orders which requires execution or performance outside the court's jurisdiction, therefore the order in paragraph 3.2 is ineffective and a nullity.

(e) The Respondent would suffer irreparable harm and irreversible damage if it is obliged to submit all its assets and trade secrets which is inherent in the court order.

(f) In terms of agreement the Applicant receives a licence to use the systems but not ownership of the intellectual property and source codes integrated therein."

[22] It is immediately obvious that Respondents attorneys have raised in their correspondence the two recognised exceptions being the irreparable harm their client could suffer, and the fact that the order will not be enforceable because it requires performance and execution outside the courts jurisdiction.

[23] The Applicant also adopted a very wide definition of the phrase "System Control Information," which does not appear in the Agreement itself. The Applicant sought delivery of the same in both paper and digital form.

[24] The rule is that in order to obtain the interdict, Applicant must show that there is no other remedy available and that it stands to suffer irreparable harm if the interdict is not granted. In granting the interdict and exercising the discretion the court should also be mindful of the fact that it does not cause the Respondent to suffer irreparable harm. This would amount to final determination of the matter without hearing the other party. It is not permissible.

[25] It is to be further noted that this matter involves an advanced form of technology which is very technical in nature. It is necessary for the court to have expert assistance on various aspects of the case. Therefore, the balance of convenience is in favour of hearing the Respondent to assess its version. In my view even the likelihood of irreparable harm as alleged by Respondent; if not properly investigated by the court would lead to an injustice, I am accordingly of the view that Respondent should be heard.

[26] I therefore make the following order

(a) The Applicants objection *in limine* is dismissed and the court will proceed to hear the merits of the matter.

(b) The rule nisi granted on the 8th August 2014 is extended to 4th December 2014.

(c) Each party will pay its own costs in respect of hearing of the points *in limine*.

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L.A. MOLETE
JUDGE

For Applicants : C.S. Edeling and M. Mathe (Instructed by M.T. Matsau & Co

For Respondents : M.G. Roberts S.C. (Instructed by Webber Newdigate)