

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0057/2022

In the matter between:

PLATINUM CREDIT LIMITED

APPLICANT

AND

ANTON NICOLAISEN N.O
STANDARD LESOTHO BANK LTD
PLATCORP HOLDINGS LTD
O/C MASERU CENTRAL
COMMISSIONER OF POLICE
ATTORNEY GENERAL
MOLEFI LEQHAOE N.O
LESOTHO POSTBANK LTD

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT

Neutral Citation: Platinum Credit Limited v Anton Nicolaisen N.O & Others
[2023] 24 Comm. (16TH FEBRUARY 2023)

CORAM: MOKHESI J

HEARD: 28TH DECEMBER 2022

DELIVERED: 16TH FEBRUARY 2023

SUMMARY

CIVIL PRACTICE- *Application for contempt of court- The requisites of the remedy re-stated and applied.*

ANNOTATIONS:

Cases:

Beinash v Wixley 1997 (3) SA 721 (SCA)

Commander, LDF, and Another v Matela LAC (1995 – 1999) 799

Commissioner SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA)

Fakie N.O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

Harvey v Niland and Others 2016 (2) SA 436 (ECG)

LNDC V LNDC Employees and Allied Workers Union LAC (2000 – 2004) 315

Luna Meubel Vervaardigers v Makin and Another 1977 (4) SA (W.L.D)

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture; Corruption and Fraud in the Public Sector Including Organs of State v Zuma and Others 2021 (5) SA 327 (CC)

Vice Chancellor of NUL and Another v Putsoa LAC(2000-2004) 458

Victoria Park Ratepayers' Association v Greyvenouw (511/01) [2003] ZAECHC 19 (11 April 2003)

JUDGMENT

[1] **Introduction**

The legal battle between the applicant and the 3rd respondent (hereinafter ‘Platcorp or 3rd respondent’) is well documented. Suffice for present purposes to state that this latest instalment of this legal wrangle concerns an application for committal for contempt of the order of the President of the Court of Appeal, of the executive heads of the financial institutions at which the applicant has banking accounts. This application was lodged on an urgent basis on the 15 December 2022 after having been lodged before the Court of Appeal on the 8 December 2022, only to shortly thereafter to be withdrawn.

[2] **Background**

As already stated above, the factual background to the fight between the applicant and the third respondent is well documented in the matters already decided by this court. There is therefore no need to rehash them in this matter. Suffice to state that following non-compliance with the orders of this court in CCA/0057/2022, this court committed the board and the executives of the applicant to prison without an option of payment of a fine.

[3] Following their committal, they lodged an urgent appeal before the Court of Appeal. The appeal which was enrolled for hearing on the 21 October 2022. That appeal was struck off the roll for two reasons: appeal record not having been properly prepared and, secondly, there was no application for leave to appeal the order of this court refusing to stay execution of the orders in CCA/0057/2022, pending appeal.

[4] After hearing arguments in the urgent appeal alluded to above, the President of the Court of Appeal, sitting alone, made the following orders:

“3. (a) The appeal in C of A (CIV) No. 51 of 2022 is reinstated.

(b) The execution of the High Court judgment in CCA/APN/0057 is hereby stayed pending final determination of the appeal in C of A (CIV) No. 51 of 2022.

(c) The appeal in C of A (CIV) No. 51 of 2022 is expedited to a date to be fixed with the Registrar of this court.

(d) The costs of this application will be costs in the cause.

(e) The full reasons for this decision will be handed down on the 15 December 2022 at 2.30 p.m.”

[5] It is apposite to state that in existence and fully operative, and not mentioned in the above order are orders of this court in CCA/0063/2022 and CCA/0066/2022 which imposed obligations on the applicant towards compliance with the orders in CCA/0057/2022 and which further obliged the 2nd respondent to protect the funds remaining in the applicant’s account held with it against dissipation pending finalization of the dispute between the parties. It is important to re-emphasise that the orders of the Court of Appeal did not stay execution of these orders.

[6] **The Parties' Cases**

The Applicant

The applicant's case is that the current matter is urgent. In his Certificate of Urgency, Adv. Tšenase states that following the President of the Court of Appeal's order suspending execution of the orders in CCA/0057/2022 pending finalization of the appeal in C of A (CIV) 51/2022, the 2nd and 8th respondents have not complied with the order with the following consequences befalling the applicant:

- (i) The applicant has not been able to pay its creditors for the month of December 2022;
- (ii) The applicant has a "huge pending backlog of refunds that are owed to the Applicant's clients since June 2022, which if not paid out to clients, Applicant might lose its licence for want operations or inability to pay its debts."
- (iii) The Central Bank, as the regulator, has since written to the applicant requesting a report as to why there has not been operations since July 2022 and or report regarding operations in terms of the Regulations.

[7] In her founding affidavit. Ms Lishea who is the Applicant's Managing Director repeats what is stated by Adv. Tšenase as the basis of urgency. She avers, on the merits, that the 1st and 7th respondents, despite being served with the orders of the Court of Appeal, refuses to comply. The case against the 7th and 8th respondents centre around disclosure by these respondents, to the 3rd respondent's employee, of daily account transactions related to the

applicant's bank account held with 8th respondent. In this judgement the Standard Lesotho Bank (2nd respondent) and the Lesotho Post Bank (8th respondent) will be referred to using these descriptions interchangeably. What seemed to have agitated the applicant towards lodging this application is the 2nd applicant's response to applicant's compliant regarding the latter's compliance with the Court of Appeal orders. In the letter which was authored by the 2nd respondent's Heads of Legal and Business and Commercial Clients, it was stated that: (in relevant parts):

“The Bank has noted contents of your letter and the instructions per your letter dated as mentioned above. In view thereof, the Bank responds as follows to your instructions;

- The Bank has had time to study and understands the effect of the order mentioned herein. The Court of Appeal is abundantly clear that the relief sought and granted in this order is interlocutory. This means an interim relief was granted pending finalization of the issue appealed against.*
- With the above exposition in line with the Bank understanding, the Court of Appeal only meant that which was supposed to be done in CCA/0057/2022 is held off until such time that the Court of Appeal has determined the appeal before it. Therefore, your understanding that the order suggests the officers of Platcorp Holding Ltd should not have access into the Platinum Credit Ltd account and the latter should run the affairs of the latter to the exclusion of the former, is not in defiance of what the Court of Appeal ordered but seeks to grant the order that was not given.*

- *If you challenged the relief sought in CCA/0057/2022, you are legally bound to await the outcome of appeal decision, otherwise your interpretation of the current order seeks to make an interim order permanent.*
- *The Bank is prepared to comply with the Court of Appeal as it relates to the exaction (sic) of CCA/0057/2022 pending the appeal hearing. Anything outside what the Court of Appeal has ordered undermines its powers, something the Bank is not prepared to do.*
- *Given the nature of this order as it relates to the Bank; and in terms of CCA/0057/2022, the Bank would stop the execution thereof. That is, the Bank would freeze the account such that no signatory would transact in this account until the Appeal has been disposed of.*
- *Please note further that there are Orders that the Commercial Court has granted which have not been challenged. Based on this, the Bank would continue to observe and comply with the relief granted in those orders.”*

[8] **The 1st and 2nd respondent’s case**

These respondents raised a point in *limine* that the matter is not urgent as similar allegations as founding urgency were advanced on the 05 December 2022 before the Court of Appeal, the matter which was later withdrawn and re-instituted before this court on 13 December 2022 without providing explanation for urgency. They contend that urgency is self-created for these reasons.

[9] On the merits, the 1st respondent contends he was not served with the order of the Court of Appeal as the same was not served by the deputy sheriff. He states that when the order was brought to his attention, he doubted its veracity given that it was not served by the deputy sheriff. He denied that he is in contempt of court by interpreting the said order to mean what is contained in the letter alluded to in paragraph [7].

[10] **7th and 8th Respondents' case**

The 7th respondent who is the Chief Executive Officer of the 8th respondent denies that he is in contempt of order of the Court of Appeal. He argues, quite correctly, that the 8th respondent was not party to CCA/0057/2022 and was therefore not aware of it. He contends that the 8th respondent has complied fully with orders of court and that the 8th respondent's actions of disclosing the applicant's transactions was in complying with this court's orders in CCA/0066/2022.

[11] **3rd Respondent's case**

The 3rd respondent raised an issue of lack of urgency, the contention being that the reasons advanced by the applicant for urgency, namely; that it does not have access to its banking accounts and that it was unable to pay its creditors for the period of December 2022, are untruthful, disingenuous and *mala fide*.

[12] The 3rd respondent avers the applicant has been trading from the Lesotho Post Bank banking account as evidenced by the statements submitted to the 3rd respondent per the orders of this court. It avers that since July 2022 this account received an estimated Ten Million Maloti as credits per the

statements submitted to it by the 8th respondent. The said statements were annexed to the answering affidavit as Annexure “D1”. These statements show that on 8 December 2022 an amount of M150,000.00 was withdrawn from the same Post Bank account, and that, this evidence shows that it is untrue that the applicant has been inoperable and needed funds to pay its creditors. Based on these, the 3rd respondent contends that lodging this application on an urgent basis is an abuse of this court’s processes. It avers that it was served with this application on 15 December 2022 at 13hrs00 and was required to answer on the 16 December 2022, on less than one day’s notice during festive season when counsel’s chambers were already closed for holidays.

- [13] To show that the application is *mala fide*, the 3rd respondent averred that on 01 November 2022 in the application for lodged by the applicant under the same case number, the applicant’s Managing Director, Ms Lishea told the court that she had complained to the Financial Intelligence Unit (FIU) about what she considered to be suspicion of money laundering pertaining to the applicant’s Standard Lesotho Bank account and argued before this court that this account should remain frozen until FIU has finalized its investigation into the complaint. The 3rd respondent argues that because millions of Maloti were transferred from the applicant’s closed First National Bank account into Standard Lesotho Bank account (an amount of M79 Million) the Managing Director has changed tac and wants the account unfrozen in order to have access to it in order to dissipate it.

[14] **Issues for determination**

- (i) Urgency

(ii) The merits

[15] **Urgency**

If there is a court procedure which suffers from constant and unabating abuse, it is urgency, irrespective of several admonitions accompanied at times by punitive cost orders. This case, from its inception was characterised by this egregious conduct on the part of the applicant's counsel. Personal costs orders against counsel involved do not seem to have any deterrent effect as this latest instalment serves as an example as will be seen in the ensuing discussion.

[16] Urgency procedure is provided for under Rule 8(22) of the High Court Rules 1980:

“(22)(a) In urgent application the court or a judge may dispense with the forms and service provided for in the rules and may dispose of such matter at such time and place in such manner in accordance with such procedure as the court or judge may deem fit.

(b) In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial (relief in an hearing in due course if the periods presented by this Rule were followed.

(c) Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and that he bona fide believes it to be a matter for urgent relief.”

[17] The requirements in terms of this Rule have been dealt with in numerous decisions of this court and the Court of Appeal (**Commander, LDF, and Another v Matela LAC (1995 – 1999) 799 at 805 A – C: LNDC V LNDC Employees and Allied Workers Union LAC (2000 – 2004) 315 at 325 B – C**). It is trite that urgency relates to deviation from strict compliance with the times and forms which the rules of this court provides. Urgency has nothing to do with the merits of the application and therefore court cannot be the basis for dismissal of the application (**Commissioner SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at para.9**). Where however, the court is of the view that its processes are being abused, it is fully entitled to protect itself by invoking its inherent power to nip such abuses in the bud, and may in the exercise of its discretion dismiss such application on the basis of abuse of urgency procedure (**Vice Chancellor of NUL v Putsoa LAC (2000- 2004) 458 at 462 F – I: Beinash v Wixley 1997 (3) SA 721 (SCA) 734 – G**).

[18] Contempt of Court is urgent by its nature for its tendency to erode to confidence of the public has in the court of law to uphold the rule of law. Urgency of contempt becomes especially heightened where it is continuing. This principle was stated in **Victoria Park Ratepayers’ Association v Greyvenouw (511/01) [2003] ZAECHC 19 (11 April 2003) at paras. 26 – 27**, where the court said the following:

“It is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution render the ongoing failure or refusal to obey an order a

*matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow.” (This decision was followed in **Secretary of the Judicial Commission of Inquiry into Allegations of State Capture; Corruption and Fraud in the Public Sector Including Organs of State v Zuma and Others 2021 (5) SA 327 (CC) at para. 33).***

- [19] Contempt of court, therefore, should be approached from a legal perspective as well as factual perspective. The legal perspective relates to the above principles on the nature of the proceedings. On the factual aspect, the extent to which the abridgment of the times and forms required by the Rules should be commensurate with the exigencies of the matter, as acting with haste in an undeserving case may amount to abuse of the procedure. This point was made in the off-quoted decision of **Luna Meubel Vervaardigers v Makin and Another 1977 (4) SA (W.L.D) 135 at 137 E – G:**

*“Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court if required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12)(b) [Rule 8(22)] will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of departure from the norm, which is involved in the time and day for with the matter be set down.” (See also: **Harvey v Niland and Others 2016 (2) SA 436 (ECG) at para. 19)***

[20] The incontrovertible evidence is that on the 27 October 2022 Ms Lishea who is the applicant's Managing Director, requested the Standard Lesotho Bank to freeze its bank accounts pending investigation by the Financial Intelligence Unit, on account of what she considered to be money laundering activities perpetuated through the said accounts by the bank and Platcorp. However, in a surprising about – turn hardly two months later and on an urgent basis seeks to imprison the bank's CEO for what she considers to be non-compliance with the order of the Court of Appeal. This application was lodged on the 15 December 2022 and served upon the 3rd respondent on the same day. The 1st and 8th respondents suffered from the same treatment, requiring that their opposing affidavits be filed on or before the 16th December 2022. Given that Ms Lishea had sought the freezing of the applicant's bank account held with the Standard Lesotho Bank on the 27 October 2022, it is unfathomable how, a month later the issue of the same bank accounts should be dealt with urgently, within such unfairly and unreasonably compressed timeframes. This can only be attributable to egregious abuse of this procedure. This must also be seen in the light of untruthful allegation by Ms Lishea that the applicant does not have money to pay its creditors while it does not have access to its Standard Lesotho Bank accounts, an allegation which flies in the face of the undeniable documentary proof originating from the Postbank showing that the applicant has money which it was able to expend in substantial amounts in ways it deems fit. On account of this abuse, this application ought to be dismissed with costs on a punitive scale.

[21] **The Merits**

Assuming, without conceding, that the application should not be dismissed on account of abuse of urgency procedure, the court is of the opinion that even on the merits, it lacks any substance. The requisites of contempt are trite: the order; service of the court order or notice; non-compliance with the order; wilfulness and *mala fides* which must be proved by the applicant beyond a reasonable doubt. Once the applicant has proved these requisites, the respondent bears the evidential burden of showing that his/her non-compliance is not *mala fides*. Should the respondent fail to adduce evidence showing the existence of reasonable doubt that his non-compliance was neither wilful or *mala fides*, contempt will have been proved beyond a reasonable doubt (**Fakie N.O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at para. 42.**

[22] The test for civil contempt was stated in the **Fakie case (ibid)** at para.9) as follows:

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fides.’ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”

[23] At this point it is germane to revisit the applicant’s allegations against the 1st, 2nd, 7th and 8th respondents in order to determine whether contempt has been established. Against the 1st and 2nd respondents it is alleged that:

“5.8 This fact, the first and second Respondents have deliberately, blatantly and/or flagrantly refused and/or neglected to comply with, in total deviance and contempt of the order Court of Appeal. The third (sic) Respondent replied to our covering letter advising them of compliance on the 7th December 2022 at 1637 hrs and the copy of the said letter is herein attached and marked PCL 4.

5.9 What is most striking about the said letter is that the authors thereof, Head legal and Heal Business and Commercial clients, both understand that the Appeal Court has stayed the order in CCA/0057/2022. They however, interpret the Order to mean that stay means that Platcorp still has to have access and signatory rights whereas it is trite that an order of stay means the effect of the Order (stayed order) has been suspended (signatory and access rights to our banking accounts). The authors further go on to state that instead of complying with the Order they would rather freeze the Account so that no one has access to Account, including Platinum Credit who clearly needs the Account to resume operations to rescue the company from losing its licence, in the best interest of the Applicant...

6.0 The authors in total intentional contradiction and deviance of the Order of Court of Appeal, go on to state that the order does not direct that the officers of the fifth Respondent should not have access to our bank accounts pending the final”

[24] As regards the 7th and 8th Respondents, the applicant avers that:

“7.1 The ninth Respondent was served with an Order of Stay of the Appeal Court via a covering letter herein attached and marked annexure PCL 6 on the 1st of December 2022. The Ninth Respondent

found it difficult to interpret the order and we accordingly reconciled all the orders obtaining between the Applicant and the Third Respondent in terms of annexure PCL 7 herein attached and same was also forwarded to Third Respondent's counsel for transparency.

7.2 The Ninth Respondent thereafter partially complied with the Order of stay of the Appeal Court, in that they have, commendably so, removed the officers of the Third as signatories to Applicant's bank accounts.

7.3 The Ninth Respondent has however failed to remove one Phillipus Fourie, the officer of the Third Respondent as one of the persons who receives daily account statements. Same was done only in accordance of the initial order of this Honourable granting the Third Respondent status quo ante.

7.4 There is no order by this Honourable Court directing the Ninth Respondent to be a recipient of the said daily account statement, more so when same has been stayed by the Appeal Court..."

[25] **Analysis and discussion:**

1st and 2nd Respondents

These respondents' understanding of the Order of the Court of Appeal is that what "was supposed to be done in CCA/0057/2022 is held off until" the appeal is determined. It should be stated that the order of the Court of Appeal stayed execution of CCA/APN/0057/2022, which order had directed that the *status quo ante* be restored, that is, the 3rd respondent's official have access to the applicant's banking accounts held with the 2nd respondent and restoration of their signatory rights together with ancillary management powers. This understanding of the 1st and 2nd respondents was brought about

by the fact that the order of the Court of Appeal related specifically to stay of execution of orders in CCA/APN/057/2022. It should be stated that that was not the only order in place in terms of which these respondents had to comply with. There are other court orders which were left intact by the order of the Court of Appeal: In terms of CCA/APN/0063/2022 the 2nd respondent was ordered to preserve an amount of Nine Million Maloti in the bank account of the 2nd respondent and that the management of the applicant is interdicted from dissipating the funds held in those bank accounts pending finalisation of the matters between the applicant and the 3rd respondent.

- [26] In terms of CCA/APN/0066/2022 the management of the applicant is directed to do all things necessary to restore the *status quo ante*; the 2nd respondent, Lesotho Post Bank and Nedbank are ordered to report immediately to the applicant's attorney any activities of the applicant's management which may raise suspicion that the applicant's business is conducted in a manner outside the ordinary course of business; the applicant's management is interdicted from opening new bank account without the written consent of the third respondent and from transferring monies between bank accounts without prior knowledge and consent of the 3rd respondent; CDAS is directed to make payments to the applicant using its Standard Lesotho Bank accounts; The Standard Lesotho Bank is directed to desist from making further payments out of any of the applicant's bank accounts without the third respondent's prior written consent, and further, pending final determination of CCT/0397/2022 the Standard Lesotho Bank is directed to reserve the amount of Two Million Eight Hundred and Five Thousand, Four Hundred and Ninety Three Maloti, twenty Three Lisente (M2 805, 493.23).

[27] In terms of CCA/APN/0109/2022, the Standard Lesotho Bank held substantial amounts of money on account of the order of this court directing First National Bank (FNB) to transfer the applicant's funds to it following FNB's decision to terminate its relationship with the applicant. But as regards the other banks, they were ordered to provide the applicant's bank statements between the period of 01 June 2022 to 24 October 2022, to the third respondent's attorney, and secondly, to provide all documents for the third respondent's attorney to sign in order to facilitate for its officials (third respondent's) to have access, administrative, user or signatory rights.

[28] In view of the conspectus of this factual reality, the 1st and 2nd respondents' decision to refuse to deny the third respondent's officers access to the applicant's bank accounts is not deliberate and *mala fide*. The orders of this court which have been outlined above point a picture that the respondents are caught in an unenviable situation where the Court of Appeal only stayed execution of one judgement of this court leaving three orders untouched. These letters, as can be seen, place certain obligations on the 2nd respondent which cannot be ignored because they emanate from extant orders of this court. In the circumstances my considered view is that the applicant has failed to prove that the 1st respondent is in contempt of the order of the Court of Appeal.

[29] **8th and 9th Respondents**

The reporting obligations with regard to which the applicant is complaining is done in terms of the orders of this court in fulfilment of the *status quo* order in CCA/APN/0057/2022, read with CCA/APN/0066/2022 and

CIV/APN/0109/2022. Mr Fourie receives the daily transactions reports as part of *status quo* orders which runs through all the above-stated orders, three of which are still in operation. In the same vein as above while the orders in CCA/APN/0063/2022, CCA/APN/0066/2022 and CCA/APN/0109/2022 are still extant, the 8th respondent cannot be held in contempt for complying with them. Counsel for the 3rd respondent submitted before me (this issue is undisputed) that the President of the Court of Appeal was made aware of these orders, but only stayed execution of CCA/APN/0057/2022, leaving the rest of the orders unscathed. While these orders remain in place, they have legal consequences. They cannot be ignored, nor can one pretend they do not exist. They exist as a fact and have legally valid consequences from them until specifically stayed or set aside on appeal. In the circumstances, the applicant has failed to prove contempt on the part of the 7th respondent.

[30] **In the result:**

(a) The application is dismissed with costs on attorney and client scale, which costs should include costs of a Senior Counsel where so employed.

MOKHESI J

**For the Applicant: Adv. Tšenase instructed by K. M Thabane
Attorneys**

For the 1st and 2nd Respondents: Adv. T. Mpaka instructed by Du Preez Liebetrau & Co. Attorneys

For the 3rd Respondent: Adv. J. Roux SC instructed by Webber Newdigate Attorneys

For the 5th to 7th Respondents: No Appearance

For the 8th and 9th Respondents: Mr Lebakeng from Rasekoai, Lebakeng and Rampai Attorneys