REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **21298/2016**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

QUITS AVIATION SERVICES LIMITED Applicant

And

EMPIRIC ENGINEERING (PTY) LTD First Respondent
MELUSI MASWABI GREGORY MOFOKENG Second Respondent
ANTHONIE JOHANNES WILLEMSE Third Respondent

JUDGMENT

Van der Linde, J:

Introduction

[1] This is an application for contempt of court. It comes on the urgent court roll. All three respondents are alleged to be in contempt of a court order of 1 August 2016 by my brother Mokgoathleng, J who on that day reconsidered and set aside an order granted on urgent

application ex parte by Carstensen, AJ in favour of the 1st respondent, authorising the attachment of assets of the applicant to found jurisdiction.

[2] Under rule 6(12)(c) such orders may be set down for reconsideration, which is what the applicant did; this led to the order by Mokgoathleng, J. His Lordship also ordered that the assets that had since been attached, pursuant to the order of Carstensen, AJ, be released and be delivered to Phenix Construction (Pty) Ltd. The case for contempt against the 2nd and 3rd respondents is that in law they control the 1st respondent, and so the failure of the 1st respondent to comply with the court order is directly attributable to the wilfulness and mala fides of the 2nd and 3rd respondents.

[3] The 1st respondent had given notice of application for leave to appeal against the order of Mokgoathleng, J and the respondent now argue that that notice has the effect, under s.18(1) of the Superior Courts Act 10 of 2013, to have suspended the operation of that order. The further effect, according to the submission, is that the earlier order of Carstensen, AJ was resuscitated, and so the attachment of the assets stands.

[4] If this argument stands, the application fails. If the argument falls, the question still remains whether the applicant has shown the respondents' contempt of court. The respondents certainly have knowledge of the order, and they are deliberately not obeying it, ostensibly believing that they are entitled to ignore it because it has been suspended pending the appeal. If the respondents are to avoid the inference of wilfulness and mala fides, they have to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide.[1]

[5] It seems therefore that the correct approach in this matter is first to consider whether the operation and execution of the order has been suspended, and then to consider whether a case for contempt of court has been made out.

[1] Fakie NO v CCII Systems (Pty) Ltd, 2006 (4) SA 326 (SCA) at [42].

Has the order been suspended?

[6] In this division Goldblatt, J held in Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another,[2] that an application for leave to appeal such a reconsideration of an attachment order, which had set aside the original order granting the attachment to found jurisdiction, does not have the effect of reviving the attachment. That judgment was given when the now repealed[3] rule 49(11) still applied; but s.18(1) and (2) have substantially re-enacted those provisions and so the reasoning applies with equal force.

[7] Goldblatt, J referred with approval to a judgment in the Western Cape Division in The MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd[4] by Selikowitz, J which came to the same conclusion for the same reasons. Snow Delta was since upheld on appeal to the Supreme Court of Appeal.[5] Further, the reasoning in those judgments has recently been followed in an unreported judgment in the Western Cape Division by Van Rooyen, AJ in The MV Asturcon and Others v Afriline Denizcilik Veg Emi Kiralama Ltd.[6] The learned Acting Judge applied both s.18(1) and rule 49(11), his attention not having been drawn to the fact of the repeal of the latter, but nonetheless in this sense bridging the rule which applied when Goldblatt, J gave his judgment, to the present-day legal position.

[8] Assuming that strictly speaking the judgment of Goldblatt, J is not binding on me because it was decided on a different rule than the section that now applies, its reasoning appeals, with respect, to me. An application brought ex parte is subject, according to rule 6(12)(c), to "reconsideration". Such a reconsideration may even be on the same papers. That hearing is not an appeal; it is what as word says, a "reconsideration". The reason why the application is

[2] 2000(2) SA 188 (W).
[3] 17 April 2015.
[4] 1996 (4) SA 1234 (C).
[5] MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd, 2000(4) SA 746 (SCA).
[6] Case no AC11/2015, 2 September 2015

permitted to be reconsidered, is because the absent respondent was not present in the first place when the matter was argued and an order was granted.

[9] If the application is then reconsidered, and it is dismissed, it is akin to an application on notice which is dismissed. Any party may give application for leave to appeal, and of the order is capable otherwise of being put into operation and execution, such operation will be suspended under s.18. But if it cannot be put into operation and execution, there is nothing that can be suspended.

[10] Take the costs order usually granted when an application is dismissed with costs. The giving of a notice by the unsuccessful applicant of an application for leave to appeal will suspend the costs order, because that is an order which is capable of being put into operation and execution; and the successful respondent will not be able to recover its costs from the applicant. But the dismissal of the substantive part of the relief claimed is usually incapable of being put into operation and execution, because usually no order to pay money or do something will have been made.

[11] If an unsuccessful applicant considers that the dismissal of its application will cause it irreparable harm pending the appeal, it is not without remedy. It is free to apply for an appropriate interim interdict pending the appeal. If it does not succeed and the application for an interim interdict is dismissed, then it is in the same position as the unsuccessful party in the interim applications envisaged in ss.18(1) and (2).

[12] If this were not the appropriate interpretation of s.18, then an unsuccessful party would be able to obtain substantive relief against the successful party, if only in the interim, thereby placing the onus on the successful party to show the presence of “exceptional

circumstances." That involves an inroad into freedoms[7] guaranteed in the Bill of Rights, and accordingly such an interpretation is not appropriate.

[13]It follows that to my mind the order of Mokgoathleng, J was not suspended, and the 1st respondent is obliged to carry it out.

Contempt of court?

[14] The order made by Mokgoathleng, J contained a paragraph 1 which was not included in the relief claimed in the notice of motion. It was however included in a draft order that was handed up to the Learned Judge when the matter was argued, but a copy was not at that time given to the counsel representing the respondents. The first time this counsel saw the paragraph concerned was when the order of Mokgoathleng, J of 1 August 2016 was published.

[15]The paragraph concerned reads as follows: "The Order of acting Judge Carstensen, granted on 24 June 2016, is reconsidered and deleted."

[16]This is regretted. Counsel for the respondents submitted that had they known that this was the relief that would be asked, they might have conducted the case differently. Whether the respondents would have been successful had they done so, is a different matter; but that seems to me irrelevant. It has always been fundamental to the way in which litigation is conducted in these courts that parties do not place anything before a judge which is not at least at the same time placed before his or her opponent.

[17]In this matter, had draft order been given to the respondent's counsel, there may have been an objection; or a further affidavit; or further submissions. One does not know where this may have led. The court's concern with this feature is expressed in the costs order made below.

[7] Ss.21 and 24.

[18]Civil contempt of court proceedings have a criminal character. That is why the applicant must show beyond a reasonable doubt that the respondent had knowledge of the order, that the order was not executed; and that the respondent was wilful and mala fides. Once knowledge and non-compliance is shown, wilfulness and mala fides are inferred, unless the respondent establishes a reasonable doubt as to these two requirements.

[19]There is no doubt that the respondents had knowledge of the order; they concede that. It is also common cause that the assets were not released.

[20]The respondents advance essentially two arguments to excuse their non-compliance. The first is that the order was not capable of being executed, since no company known as Phenix Construction (Pty) Ltd exists; only Phenix Construction Technologies (Pty) Ltd exists. But the respondents know that Mr Bhamjee is the operating mind behind this latter company, and that the order intended to refer to this company. Accordingly, the respondents' reliance on the technicality of the correct name of the relevant Phenix company does not persuade me that they failed to comply with the order because they did not know to whom to release the assets.

[21] The second reason advanced concerns the question whether the order of Mokgoathleng, J was suspended. Here the question is whether the respondents avoid the inference of wilful conduct by contending that they believed that the order of Mokgoathleng, J was, as a matter of law, suspended by their notice of application for leave to appeal.

[22]The provisions of s.18 of the Superior Courts Act must have been known to the respondents, since they will have taken their legal advice. They must have appreciated too that the attachment to found jurisdiction is an interlocutory order, the implication of which is that ordinarily an application was required by them in terms of s.18(2) before suspension would

have followed. Since they did not so apply, they could not have thought that the order was suspended.

[23]But there is a complicating factor. I have held above that s.18 does not apply to the order of Mokgoathleng, J because it is, in substance, a negative order not capable of being put into operation or of being executed. That being so, the question is rather whether the respondents ought to have known this and thus, as a matter of inference, did know this.

[24]Moreover, if one assumes that they knew that s.18 did not apply to the order, they may conceivably have reasoned that the common law rule, that embodied in the old rule 49(11), would have applied. Of course, this rule was repealed in April 2016 but that is not known to all.[8] And, even if they had known that the rule had been repealed, that is not to say that they knew of the Goldblatt, J judgment, which in effect explains the common law position.

[25]In the result, although as a matter of law the order of Mokgoathleng, J was not suspended by s.18(2) of the Superior Courts Act, the respondents (assuming that the 2nd and 3rd respondents could be held in contempt for the failure of the 1st respondent to comply with the order) are not in contempt of court for failing to execute it. I believe it is appropriate however, in view of the conclusion to which I have come, that an appropriate declaratory order issues.

[26]In the result I make the following order:

(a) It is declared that the order of Mokgoathleng, J of 1 August 2016 in the above matter has not been suspended as a result of the delivery of the 1st respondent's notice of application for leave to appeal against that order.

(b) The 1st respondent is directed to comply with the said order, and to release deliver the assets attached to Phenix Construction Technologies (Pty) Ltd.

[8] It was not known to the court in the MV Asturcon case.

(c) No order as to costs issues.

WHG van der Linde
Judge, High Court
Johannesburg

Date of argument: 10 August 2016
Date of judgment: 17 August 2016

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