

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE - PORT ELIZABETH)

CASE No. 2227/08

NOT REPORTABLE

In the matter between:-

FLOWRA TRADING CC

Applicant

INTOZANI TRADING (PTY) LTD

First Respondent

BRADFORD BOWN

Second Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In this matter the Applicant seeks, in addition to a punitive order of costs, an order -

(a) holding the Respondents to be in contempt of the order of this Court (Dambuza J) granted on 26 February 2008 under Case No. 3127/06 and be imposed an appropriate sentence;

(b) directing, notwithstanding the provisions of paragraph 2 of the aforesaid order, the First Respondent to pay forthwith to the Applicant, through its attorneys, an amount in Rand currency equivalent to US\$104 421,14 calculated at the exchange rate which applied on 21 April 2006.

[2] The relevant order reads as follows:

- “1. The second and third respondents are interdicted to release the containers bearing identification letters and numbers KNLU3354056, GLDU4015442, MSKU3345357 and PONU890506, which are currently held by the second respondent under and in terms of bills of lading numbers SG001-3421 and SG001-3422, to the applicant.
2. The applicant is ordered to pay an amount in Rand equivalent to US Dollars 104 421.14 (One Hundred and Four Thousand Four Hundred and Twenty One US Dollars and Fourteen Cents), calculated at the exchange rate which applied at 21 April 2006, alternatively, such portion of the said amount as this Honourable Court may deem fit, to Attorneys Koutsoudis Du Preez and Co, of 7 Hancock Street, North End, Port Elizabeth, to be held in trust pending the finalization of an action to be instituted against the first respondent, within thirty (30) days of the release of the said containers, for the recovery of damages arising from demurrage charges, transport charges and professional expenses incurred in respect of the said containers from 21 April 2006 to date of release of the said containers.”.

[3] The Applicant in the matter heard by Dambuza J is the First Respondent in this matter and the First Respondent in that matter is the Applicant in this matter. The Second Respondent in this matter is the sole director of the First Respondent.

[4] It is common cause that the amount referred to in paragraph 2 of the above Order has to date not yet been paid to the attorneys concerned and that the action referred to in that

paragraph has also not yet been instituted.

[5] On the relief claimed there are on the papers two issues in contention between the parties, namely -

(a) **firstly**, the interpretation of paragraph 2 of the Order, particularly, whether the 30 day period referred to in the order relates to the period within which the payment was or is to be paid or whether it relates to the period within which the envisaged action is to be instituted by the Applicant; and

(b) **secondly**, whether the order is one *ad pecuniam solvendam* so that contempt proceedings are therefore inappropriate.

Interpretation of paragraph 2 of Order granted on 26 February 2008

[6] If I understood Mr. Van Rooyen SC who appeared on behalf of the Respondents correctly, the interpretation of paragraph 2 of the Order was at the time of the hearing of this application no longer in dispute.

[7] In my opinion it is, upon a proper interpretation of that paragraph and regard being had to the background of this matter contained primarily in Case No. 3127/06, clear that in terms of that Order the First Respondent was bound to pay to its own attorneys, Messrs Koutsoudis Du Preez and Co, the amount referred to in that Order forthwith or at least within a reasonable time after the order was granted, the purpose being to be held in trust pending the finalization of an

action to be instituted by the First Respondent against the Applicant for the recovery of damages allegedly suffered by it arising from demurrage charges and the like within 30 days of the release of the containers referred to in paragraph 1 of the Order.

[8] I pause here to give a brief summary of the background of this matter as it appears from the papers filed in Case No. 3127/06.

It would appear that the Applicant in this matter on 21 June 2006 launched an application under Case No. 2438/06 in this Court against the First Respondent in this matter in which it claimed US\$200 000 admittedly paid to the First Respondent in a scrap metal transaction, the particulars of which are not relevant for present purposes. The claim is based on a contention that the agreement had because of some breach by the First Respondent been cancelled by the Applicant. Because of extensive disputes of fact between the parties the matter was ultimately referred to the hearing of oral evidence on certain specified issues. It is, however, common cause between the parties that out of the amount claimed an amount of US\$104 421,14 is owing by the First Respondent to the Applicant. The parties apparently agreed that this amount, instead of being paid over to the Applicant, it be paid to the First Respondent's attorneys to be held in trust pending an action to be instituted in effect by way of a counterclaim by the First Respondent against the Applicant for damages.

The matter launched under Case No. 2438/06 is, so I have been informed from the Bar, still pending between the parties in relation to the outstanding balance of the claim of US\$200 000.

[8] It would appear that the containers had indeed been released, but are now being held in terms of a summons in an admiralty action *in rem* by a certain company, BLG Leads Logistics BLL of South Africa (Pty) Ltd, for reasons which are unrelated to this matter.

[9] Against this background there seems to be no longer any dispute between the parties on the interpretation of paragraph 2 of the Order in question.

[10] This brings me to the second issue relevant to the order in respect of the Respondents' alleged contempt of the Order concerned.

Is the Order an order *ad pecuniam solvendam* or and order *ad factum praestandum*?

[11] It is the Applicant's contention that the Order is an order *ad factum praestandum* whilst on the other hand it is contended on behalf of the Respondents that the Order is an order *ad pecuniam solvendam*.

[12] An order *ad pecuniam solvendam* is one in terms of which a plaintiff is ordered to pay the defendant a sum sounding in money. It is trite that contempt proceedings are inappropriate where there has been non compliance with an order *ad pecuniam solvendam* (**Jayiya v MEC for Welfare Eastern Cape and Another 20042) SA 611 (SCA); Hofmeyr v Fourie; BGBS Contractors (Pty) Ltd v Lategan 1975(2) SA 590 (C)**). The rationale for that rule is clear and well-recognized, namely, the plaintiff has in the case of such an order other remedies available to him, like, execution and attachment of the defendant's assets or to obtain an order for the sequestration or liquidation of the defendant. This is not the case in respect of orders *ad factum*

praestandum which are orders requiring the performance of an act where there is no other remedy where a defendant fails to perform such act other than contempt proceedings

[13] The Order in question requires, on either version, the First Respondent to pay its own attorney the sum concerned to be held on its own behalf. It accordingly does not oblige the First Respondent to pay the amount to the Applicant and, therefore, does not vest in the Applicant any right in the money.

The Applicant finds itself in this matter unable to rely on any of the remedies available to a party in the case of an order *ad pecuniam solvendam*. It is unable to pursue a warrant of execution or to seek First Respondent's liquidation simply because there is no order sounding in money in favour of the Applicant. In fact the First Respondent is in effect required to perform some act, namely, to deliver to its attorney a sum of money to be held on its behalf by such attorney.

[14] The order is accordingly in my opinion an order, although the payment of money is involved, *ad factum praestandum*.

[15] This, however, not the end of the matter.

[16] In considering the relief claimed in this regard, there are two questions that need to be considered.

[17] The first question is whether the Applicant proved all the elements of contempt beyond all reasonable doubt (see: ***Fakie N.O. v CCII Systems (Pty) Ltd 2006(4) SA 326 (SCA)*** at

344G, para [42]), the relevant question here being whether it has been so proved that the Respondents were or are in wilful and *mala fide* disobedience of the Order.

It would appear that the Respondents at the time and, I add, also the Applicant's attorney understood the Order to have meant that when the containers were released the 30 day period within which payment was to be made commences to run. It also appears that the Respondents are of the view that, although the containers had been released, they had not yet been released to the Respondents.

Although the parties are now in agreement that the Respondents were, on a proper interpretation of the Order, required to have made the payment forthwith or within a reasonable period after the granting of the Order, I am unable to hold that they were in wilful and *mala fide* disobedience of the order. In any event, as is apparent from the argument advanced on behalf of the Respondents, they were until the hearing of this matter advised that the order is an order *ad pecuniam solvendam* where contempt proceedings are inappropriate.

[18] This brings me to the second question as to the efficacy of the order at this stage.

It is common cause that the Respondents failed to institute the action envisaged in the Order which raises the question whether they are still bound to pay the amount to their attorneys to be held in trust.

If not, it would appear that contempt proceedings are inappropriate at this stage.

It would appear that the Applicant may have realized this difficulty, hence the order claimed in paragraph (d) of the Notice of Motion that the Respondents be ordered to forthwith pay the amount to the Applicant.

[19] In the circumstances I am unpersuaded that all the elements of contempt has been proved against the Respondents beyond all reasonable doubt.

[20] This brings me to the question whether the Applicant is entitled to the order envisaged in paragraph (d) of the Notice of Motion.

Paragraph (d) of the Notice of Motion

[21] As already indicated, the Applicant now claims, particularly, in view of the fact that no action has been instituted as envisaged in paragraph 2 of the Order in question, an order in terms of which the First Respondent is ordered to forthwith pay the amount in question to the Applicant.

[22] Mr. Van Rooyen SC, however, submitted that the payment of the amount is the subject matter of the proceedings in Case No. 2438/06 which are, as I have already indicated, still pending and that it is for the Applicant to approach the Court in those proceedings to grant judgment in its favour for that amount and in any event it is still open to the Respondents to institute a counterclaim against the Applicant in that matter which may have an effect on an application for default judgment in that amount.

[23] I agree.

For the reasons set out in this judgment the application is dismissed with costs.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT

On the instructions of:-

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DATE OF HEARING

23 April 2009

JUDGMENT DELIVERED ON

28 April 2009