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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 2022/004302

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

16 SEPTEMBER 2022

In the matter between:

**DOTSURE INSURANCE COMPANY LIMITED
(REGISTRATION NUMBER: 2006/000723/06)**

First Applicant

**FORSURE SA (PTY) LTD
(REGISTRATION NUMBER: 2012/010608/07)**

Second Applicant

and

**B-SURE AFRICA INSURANCE BROKERS (PTY) LTD
(REGISTRATION NUMBER: 2012/145697/07)**

First Respondent

**UBERSURE INSURANCE BROKERS (PTY) LTD
(REGISTRATION NUMBER: 2015/295551/07)**

Second Respondent

**STEPHEN WILLIAMS
(IDENTITY NUMBER: [...])**

Third Respondent

JUDGMENT

SENYATSI J:

[1] This matter concerns an opposed application in terms of which the applicant, Dotsure Limited, seeks an order holding B-sure Africa Insurance Brokers (Pty) Ltd and Ubersure Insurance Brokers (Pty) Ltd to be in contempt of court as a result of their alleged willful and mala-fide breach of an Order of Mtati AJ of this Division dated 14 November 2019 (“Mtati AJ Order”).

[2] The applicant also prays that Mr Stephen Williams, the director of both the first and second respondents, be sentenced to 90 (ninety) day’s imprisonment or such other period as this court deems appropriate.

BACKGROUND

[3] The parties concluded a settlement agreement following litigation between themselves that B-Sure, B-sure Financial Brokers CC and all its related persons, inter-related persons and persons controlled by it or whom B-Sure controls (“B-Sure Companies”) would respect restraint of trade agreements concluded by Oakhurst (now Dotsure), (all its related persons, inter-related persons and person controlled by it or whom controls it)(including but not limited to Badger Holdings (Pty) Ltd, African Independent Brokers (Pty) Ltd, Online Software Solutions (Pty) Ltd, United Dealership Brokers (Pty) Ltd, Badger Hills Development (Pty) Ltd, Blenheim Insurance Administrators (Pty) Ltd and Oakhurst Life Limited (“the Dotsure Companies”) with its respective employees. The settlement agreement was concluded on 27 August 2015.

[4] Subsequent to the conclusion of the agreement, a dispute arose between the parties following the alleged breach of the settlement by the respondent.

[5] An urgent court application was launched by the applicant which led to the judgment by Mtati AJ of this division on 14 November 2019. In terms of the judgment, the first and second respondents were interdicted and restrained from engaging any employee of the applicant with intent to employ such employee without first complying with the terms of the settlement agreement, particularly paragraph 3.5 thereof which was made an order of court under case number 43481/2014. The first and second respondents were directed to give notice of the order to their directors, related persons, *inter-alia* persons and person's controlled by them within 10 (ten) days of the order.

[6] The respondents were not satisfied with the judgment by Mtati AJ and upon their leave to appeal having been refused, petitioned the Supreme Court of Appeal for leave to appeal the judgment. The application was also dismissed with costs by the Supreme Court of Appeal on 4 August 2020 and the judgment remains enforceable.

[7] The present application which was heard on 5 July 2022, is for a declaratory order that the respondents are in breach of Mtati AJ's Order and should therefore be held in contempt.

[8] The basis of opposing the application by the respondents is that the respondents relied on the judgment by Maier-Frawley AJ (*as she then was*) of this division, under case number 40018/2017 namely *Oakhurst Insurance Co Limited v B-Sure Africa Insurance Brokers (Pty) Ltd* 2017 JDR 2127 (GJ).

[9] I do not understand the basis of opposition to the current application. In my respectful view, it appears that the respondents are attempting to re-argue the matter, when the merits have already been dealt with by Mtati AJ in his judgement, the appeal of which was dismissed by the Supreme Court of Appeal. The matter has become *res judicata* and cannot be revisited and so will the judgement by Maier-Frawley J which extensively considered the Mtati AJ order.

[10] The respondents' basis of contention is that the breach finding by Mtati AJ ought

not to have been made, they argue that whether or not the restraint undertakings are enforceable is not an issue which arises in connection with enforcement of clause 3.5. They contend that the applicant is required to invoke clause 3.5 and that the employees in question are subject to restraint undertakings, because that is one of the jurisdictional requirements for the operation of the protocol.

[11] The respondents contend that when they wanted to employ the fourth respondent and learned that he was employed by a related company of the applicant and had signed a restraint of trade agreement in favour of the applicant's related company. They argued that they contacted Mr Hynes for consent. Mr Williams claims that Mr Hynes refused to grant permission for the employment of Mr Pickles in May 2022 and Mr Pickles was nevertheless employed despite the prevailing court order.

[12] The issue for determination is whether the application is urgent, secondly whether the appointment of the fourth respondent during May 2022 constituted a violation of the settlement agreement and Mtati AJ Order and whether the respondents should be declared to be in contempt thereof and secondly whether this application is urgent.

[13] In assessing whether the application is urgent it is important to have regard to the principles pertaining to urgency.

[14] In *IL & B Marcow Caterers (Pty) Ltd v Gretermans SA Ltd & Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd & Another*¹ it was held as follows:

“ It is clear from the requirements set out in Rules 27 and 6 (12) that the Court's power to abridge the times prescribed and to accelerate the hearing of the matters should be exercised with judicial discretion and upon sufficient and satisfactory grounds being shown by the applicants. The major considerations normally and in these two applications are three in number, viz the prejudice

¹ 1981 (4) SA 108 (C) at 112G -113A

that applicants might suffer by having to wait for a hearing in the ordinary course; the prejudice that other litigants might suffer if the applications were given preference; and the prejudice that respondents might suffer by the abridgment of the prescribed times and an early hearing.”

[15] In *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*² the court held as follows on considerations for urgency:

“[34] In this case, the first applicant did not drag its feet. It undertook efforts to resolve the problem that it had found at the Crazy Zebra by notifying the owners of their alleged non-compliance with the law, by attending a meeting in an effort to resolve the problem and that failed, by requiring an undertaking. When that was not forthcoming, it investigated further so that it had evidence of the level of noise emanating from the Crazy Zebra. In my view it approached its statutory duty regarding of safeguarding the right and interests of ratepayers in a responsible manner by seeking to persuade the respondents to comply and only then approaching the court for relief. In these circumstances it cannot be said that the first applicant has been dilatory in bringing the application. There is consequently no merit in this point.”

[16] In *Protea Holdings Ltd v Wright and Another*³, the court in dealing with contempt of court application said the following:

“It becomes necessary, therefore, that this provides a convenient stage, to deal briefly with the nature of contempt proceedings of this kind. The object of this type of proceeding, which is concerned with the wilful refusal or failure to comply with an order of Court, is the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order.”

² 2004 (2) SA 81 (SE) at para 34

³ 1978 (3) SA 865 (W) at 868 A-B

[17] It is common cause that the respondents have been involved in litigation over the enforcement of the settlement agreement which had been made an order of Court.

[18] It is also common cause that the fourth respondent, Mr Coetzee's restraint of trade agreement was enforced in a separate proceedings in the Labour Court which eventually led to Mtati AJ Order.

[19] It is also common cause that the fourth respondent, Mr Pickles resigned from For Sure, a related company of the applicant, during February 2022.

[20] It is also common cause that on 20 May 2022 Monday and 23 May 2022 there were telephonic discussions between Mr Williams (the third respondent) and Mr Hynes, a Director of ForSure regarding the consent to employment of Mr Pickles which consent was refused.

[21] Furthermore, it is common cause that Mr Pickles was employed on 1 June 2022 by Ubersure in breach of the settlement agreement.

[22] It is also common cause that on 31 May 2022, JJ Inc, the respondents' attorney contacted the applicant's Senior Legal Manager and sought various documents relating to Mr Pickles, including his employment contract. It is also common cause that between 31 May 2022 and 8 June 2022 various emails were exchanged between the respondents' attorney and the applicant in terms of which the applicant did not agree to release privileged information on the employment of Mr Pickles by Forsure.

[23] It is also not denied that on 7 June 2022, the applicant through its attorneys, demanded that B-Sure provide an undertaking that it would abide by the terms of the settlement agreement and the Mtati AJ Order and purge their breach thereof by terminating the employment of Mr Pickles by 10 June 2022.

[24] It is also common cause that the respondents denied in their reply that they were

in breach of the terms of the settlement and the Mtati AJ Order he stated that no undertaking would be given as requested.

[25] As the consequence of the refusal to provide an undertaking as demanded, the applicant launched the proceedings on 21 June 2022 for relief in terms of the notice of motion.

[26] The respondents contend that the application is not urgent on the basis that the applicant has failed to show that it would not be afforded substantial redress in due course.

[27] The respondents relied on *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty)*⁴ where it was held as follows:

“[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.”

[28] The respondents contend that the appointment of Mr Pickles on 27 May 2022 is historical and not ongoing.

[29] In my respectful view, the contention by the respondents is without merit. The applicant was not dilatory in taking steps for relief. Contempt of civil court order

⁴ 2011 JDR 1832 (GSJ) at para 6

applications are by their nature urgent. This Division deals with many such applications in urgent court because the authority of courts on their orders is something taken seriously and must, in the exercise of discretion on urgency, be resolved expeditiously. In the instant case, the applicants took all necessary steps to resolve the matter on enforcement of the court order but without success. I am therefore satisfied that the applicant has shown that the application deserves to be heard on an urgent basis.

[30] I now deal with whether the respondents are in contempt of the Mtati AJ Order.

[31] The principles on the approach that courts should adopt in civil contempt applications is trite. In *Kotze v Kotze*⁵ it was held as follows:

“Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be. Where, however, the order relates to a child, the court is, or should be adamant on its due observance. Such an order should be made in the interest of the welfare of the child, and the court will not tolerate any interference with or disregard of its decisions on these matters.”

[32] The elements to succeed in proving a contempt of Court have been held in *Consolidated Fish Distributors (Pty) Ltd v Zive and Others*⁶ to be:

“...the deliberate, intentional (i.e. wilful), disobedience of an order granted by a court of competent jurisdiction ... In Southey v Southey, 1907 E.D.C. 133 at p137, it was said that application for an attachment had to show a willful and material failure to comply with the reasonable construction of the order. The requirement of materiality is hardly ever mentioned in the cases, however, probably for the reason that in 99 percent of these cases the whole order was disobeyed, which is obviously a material non-compliance. It is reasonable to suggest that where most of the order has been complied with the non-

⁵ 1953 (2) SA 184 (C) at p187

⁶ 1968 (2) SA 517 (C)

compliance is in respect of some minor matter only, the court would take the substantial compliance into account, and would not commit for minor non-compliance.”

[33] The applicant for committal needs to show:

- (a) that an order was granted against the respondent; and
- (b) the respondent was either served with the order⁷ and
- (c) the respondent has either disobeyed it or has neglected to comply with it.

[34] In *Fakie N.O v CCII Systems (Pty) Ltd*⁸ the Supreme Court of Appeal had an opportunity to consider the constitutional characterisation of contempt of court and held as follows:

“[42] To sum up:

- (a) *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
- (b) *The respondent in such proceedings is not an ‘accused person’, but is entitled to analogous protections as are appropriate to motion proceedings.*
- (c) *In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
- (d) *But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes*

⁷ See *Sholtz Estate v Carrol*, 23 S.C. 430

⁸ 2006 (4) SA 326 (SCA) at [42]

a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”

[35] In the instant case, I am of the view that the applicant has succeeded in proving all the elements required to show contempt.

[36] What remains to be established is whether the respondents especially the first and the second respondents all controlled by Mr Williams, have succeeded in providing evidentiary requisites that non-compliance was not wilful and *mala fides*.

[37] Mr Williams on behalf of the first respondents, relies on what he believed was an incorrect finding made in the Mtati AJ Order. He contends that he did not need to comply with the court order because all he had to do was to follow the protocol established in clause 3.5 of the settlement agreement as confirmed by the Mtati AJ Order. He states that having contacted Mr Hynes of Forsure for consent to employ Mr Pickles, it did not matter if the consent was granted or refused, and that he could go ahead and employ Mr Pickles. This contention is against the clear intention of the Mtati AJ Order.

[38] The contention by Mr Williams does not, in my view, succeed in showing evidence pointing to that non-compliance with the court order was not wilful and *mala fides*. On the contrary it points to the opposite. He clearly instructed the first and second respondents' attorney to, deny that the respondents were in breach of the court order. This is demonstrated by his attempt in the answering affidavit to revisit the merits of the Mtati AJ Order as well as referencing arguments made in the leave to appeal order at the Supreme Court of Appeal. He seems to suggest that the refusal of leave to appeal was not properly considered by the Supreme Court of Appeal. This is impermissible.

[39] I regard the stance adopted by Mr Williams as a deliberate, wilful and *mala fides*. As a consequence, the first and second respondents have not intended to comply with the settlement agreement as well as the Mtati Order.

[40] It follows therefore that the applicant must succeed in its application.

ORDER

[41] The following order is made:

(a) The rules relating to forms, service and time periods are dispensed with and this application is heard as an urgent application as provided for in Rule 6(12) of the Uniform Rules of Court;

(b) It is declared that the first, second and third respondents are in contempt of the order granted by Mtati AJ on 14 November 2019;

(c) The third respondent is committed to prison for a period of 80 (eighty) days for contempt of court fully suspended for a period of 30 (thirty) days on condition that they comply with the Mtati AJ Order, failing which, the Sheriff of this court with the help of the South African Police Service is authorized to give effect to this order for committal of the third respondent;

(d) The first, second and third respondents are ordered to pay the applicants costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved on a party and party scale.

ML SENYATSI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD:

5 July 2022

DATE JUDGMENT DELIVERED:

16 September 2022

APPEARANCES

Counsel for the first to third applicant:

Adv AG South SC

Adv JHF Le Roux

Instructed by:

Edward Nathan Sonnenbergs Inc

Counsel for the first to third respondents:

Adv EJJ Nel

Instructed by:

Jansen and Jansen Inc.