



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 3190/2018P

In the matter between:

IHLOBO FOOTWEAR CC

Applicant

and

BATA SOUTH AFRICA (PTY) LTD

First Respondent

FUTURA FOOTWEAR LIMITED

Second Respondent

ORDER

- (a) The application for a declaratory order regarding contempt is refused.
- (b) It is declared that the first respondent's failure to comply with para 2.2 of the order made by Gorven J on 20 April 2018 was unlawful, and it is ordered to comply fully with that order.
- (c) The first respondent is ordered to pay the costs of this application on the attorney and client scale.

JUDGMENT

Delivered on: 28 May 2018

Ploos van Amstel J

[1] The application before me is for an order declaring the first respondent, Bata South Africa (Pty) Ltd, to be in contempt of an interim order made by Gorven J on 20 April 2018, and for an order directing it to purge its contempt.

[2] In the main application the applicant, Ihlobo Footwear CC, seeks an order, pending the finalisation of arbitration proceedings, suspending the purported cancellation of a written agreement between the parties, and directing the first respondent to continue to place orders with the applicant as it had done before. In the alternative it seeks an order declaring clause 29 of the agreement, which provides for termination by either party on 30 days' notice, to be unconstitutional and contrary to public policy. The main application is on the opposed roll on 22 June 2018. I refer to the first respondent herein as 'Bata'.

[3] When the application came before Gorven J he made an interim order, pending the hearing of the main application, suspending the purported cancellation of the agreement, directing Bata to continue to place orders with the applicant as it had done before the purported cancellation, and directed that his order would not derogate from any right (not contained in clause 29) to cancel the agreement.

[4] The basis on which the applicant seeks to hold Bata in contempt is that, in defiance of the order of 20 April, it has placed no orders with it and has made it clear that it does not intend to do so. Bata admits that it has placed no orders with the applicant pursuant to the order, but contends that it was not obliged to do so as it cancelled the agreement on 24 April 2018, in response to a repudiation of the agreement by the applicant.

[5] I have to decide therefore whether Bata's cancellation of the agreement on 24 April was valid, and if not, whether its failure to comply with the order of 20 April was wilful and therefore in contempt.

[6] The background of the matter is follows. In terms of a written agreement signed on behalf of the applicant on 7 August 2015 it was appointed by Bata (which was then known as 'Futura Footwear Ltd') as an independent contractor to provide it with the services described in the agreement, which involved the cutting, preparation,

assembling and stitching of materials and components in the production of footwear. The agreement provided that Bata provided no guarantees relating to the level of business activity or profitability other than as expressly stated in the agreement. The applicant warranted and undertook that its personnel would be suitably trained, competent and skilled and have the necessary experience to operate the equipment and timeously and efficiently perform the services. The equipment referred to was specialised equipment which Bata undertook to supply to the applicant for the purpose of performing the services. Clause 29 provided that the agreement could be terminated by either party by giving 30 days' written notice to the other party.

[7] The applicant was one of six independent contractors who signed similar agreements and performed similar services.

[8] The deponent to the applicant's founding affidavit in the main application says the applicant has been doing work for Bata since before 2010. He says the first written contract was introduced in about 2010. In 2013 Bata asked the applicant to increase its production capacity, as a result of which the applicant moved its plant from Colenso to Hammersdale and purchased new equipment at a cost of about R400 000. He says the most recent contract which the applicant was asked to sign is the one of 7 August 2015, to which I have referred. The vast majority of the applicant's work has been done for Bata, which is for all practical purposes its only customer. Its turnover is approximately R30 million per year and it employs 280 permanent staff, most of whom are African females.

[9] Towards the end of 2017 the applicant was asked to sign a new contract. It contained terms which caused concern for the applicant, such as a requirement for personal suretyships and increased penalties for defective and late deliveries. The six independent contractors consulted an attorney, who provided comments on the proposed agreement, which were submitted to Bata towards the end of January 2018. Its response, in so far as the applicant was concerned, was a letter dated 27 February 2018, in terms of which Bata gave the applicant 30 days' notice of its termination of the agreement.

[10] The applicant says its attempts to discuss the matter with Bata came to nought, and it has referred the purported cancellation to arbitration as provided for in the written agreement.

[11] The applicant launched an application in this court on 15 March 2018, in which it seeks an order, pending the finalisation of the arbitration proceedings, suspending the purported cancellation of the agreement and directing Bata to continue to place orders with it as before. This is the application to which I have referred as 'the main application' and which is due to be heard on 22 June 2018.

[12] When the application came before Gorven J he made orders regarding the delivery of a notice in terms of rule 16A and further affidavits, and adjourned the matter to 22 June 2018. He also made the order to which I have referred, pending the hearing on 22 June, suspending the purported cancellation of the agreement and directing Bata to place orders with the applicant as would have been done if the purported cancellation of the agreement had not taken place.

[13] Gorven J made the interim order on 20 April. Bata placed no orders pursuant to the order, and on 24 April its attorney addressed a letter to the applicant in which it purported to terminate the agreement on the basis of a repudiation thereof by the applicant.

[14] The first enquiry is whether the applicant had repudiated the agreement in the respects contended for in the letter of termination. It is not easy to determine from the letter precisely what the alleged act of repudiation was said to be. The first part of the letter refers to statements made in the applicant's founding affidavit regarding representations made to it by a Bata employee (one Kazi) as to an expected increase in production, and the applicant's contention that this entitled it to reasonable notice of termination of the agreement, as opposed to the 30 days for which it provided. The letter then refers to emails sent to the applicant by Kazi, confirming the increased production, and states that Bata has discovered that Kazi had sent the emails at the request of the applicant. Then follows an allegation that the applicant knew that it did not have the capacity to produce 4500 pairs of shoes per day, and therefore knew that Bata had not approved the increased production. It should be noted that the letter refers incorrectly to an alleged contention by the applicant that the agreement had been varied so as to guarantee work of 4500 pairs per day. There is no evidence of such a contention by the applicant in the papers. Its contention was rather that because of the representation regarding increased production it would not be fair to allow Bata to cancel the agreement on 30 days' notice. Be that as it may, this part of

the letter concludes with the allegation that the applicant and Kazi had colluded to commit a fraud.

[15] Then follows a paragraph which reads as follows: 'Moreover, in contending as they have in the founding affidavit regarding the terms of the alleged agreement and in taking steps to enforce such alleged terms, which are the product of their fraudulent and collusive dealings with Kazi, Ihlobo has repudiated the agreement concluded with our client/s. Our client/s hereby accept such repudiation and forthwith terminate any and all agreements concluded with Ihlobo for the provision of services.'

[16] There was no suggestion in the founding affidavit that the terms of the agreement had been varied by anything that transpired between the applicant and Kazi. The deponent did say that in January 2018 the applicant was not given a specific figure for the year but was told that production would be higher than in 2017. He then makes the averment that by this conduct either a tacit agreement was concluded or the written agreement was amended to provide that Bata would be obliged to supply to the applicant the same volume of work during each year as it did the previous year, adjusted proportionately to any change in Bata's production targets. This had nothing to do with the alleged collusion between the applicant and Kazi. The deponent refers to the email concerning the 4500 pairs per day and says the applicant wanted this in writing to support its application for finance to purchase further equipment. He does not contend that this constituted a guaranteed minimum order. He does contend that in the light of the representation a much longer notice period should apply for the termination of the agreement.

[17] Bata's answering affidavit in the main application was deposed to on 23 March 2018. The deponent confirms that Kazi may have discussed production targets with the applicant, but maintains that he had no authority to agree to a variation of the contract or to guaranteed minimum orders. There is no suggestion in the answering affidavit of a repudiation of the agreement by the applicant. The first reliance on an alleged repudiation was in Bata's further supplementary answering affidavit, deposed to on 25 April 2018. The change in stance appears to have been based on Bata's conclusion that there had been fraudulent collusion between the applicant and Kazi with regard to the expected increase production.

[18] The applicant maintained throughout that there had been no collusion, that Kazi had conveyed to it that the required production would increase and that it had asked him to confirm this in writing in support of its application for further finance. No affidavit by Kazi was put up by Bata and the high water mark of its evidence in this regard is that Kazi had no authority to make the statements which he is said to have made.

[19] An analysis of Bata's complaint is that the applicant contended that it was entitled to more orders, on the basis of what it had been told by Kazi. The applicant also contended that because of its additional financial commitments arising out of the additional equipment which it bought, Bata should continue to give it work for a reasonable period, which it contended was five years. All this appeared in the applicant's affidavits which formed part of the record when Gorven J made the order of 20 April.

[20] It remains unclear to me what precisely Bata contended constituted a repudiation which entitled it to cancel the agreement. There was at no stage any suggestion by the applicant that it did not intend to fulfil its obligations to Bata in terms of the contract or that it intended no longer to be bound by it. In those circumstances it cannot be said to have repudiated the contract. See *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A); *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another* 1993 (3) SA 471 (A) 480 I - J. It should also be noted that according to Bata's affidavits the applicant at no stage made any demand relating to the 4500 pairs referred to in the emails from Kazi.

[21] Bata again purported to cancel the agreement on 3 May 2018. Its attorney contended in a letter to the applicant's attorney that the applicant only had 37 employees registered with the National Bargaining Counsel for the Leather Industry as at December 2017, that it had failed to pay its employees the prescribed minimum wage, and that this constituted a further repudiation of the agreement. The letter states that Bata accepted this repudiation and again cancelled the agreement. While this may have been a breach of the applicant's obligations in terms of clause 20 of the written agreement, it did not constitute a repudiation. Bata's remedy would have been a notice calling on the applicant to remedy the breach and, failing that, a notice of cancellation.

[22] I conclude therefore that Bata has not shown that the applicant repudiated the agreement and that its purported termination of the agreement on 24 April and 3 May was invalid and of no effect.

[23] It follows that Bata's failure to comply with the order of 20 April, by not placing orders with the applicant, was a breach of that order and unlawful. It remains to consider whether such failure was wilful and constituted contempt of court.

[24] In *Fakie NO v CCII Systems (Pty) Ltd*¹ Cameron JA said 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 fide*. He said 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 the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide*, though unreasonableness could evidence lack of good faith. He added² that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.

[25] An important change to the question of onus was brought about by the decision in *Fakie*. The majority judgment held that the common law should be developed in accordance with constitutional principles so that a respondent in contempt proceedings is no longer required to disprove wilfulness and *mala fides* on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. In that case it was held on appeal that the explanation offered by the Auditor-General established a reasonable doubt as to whether the delay in complying with the orders in question had been wilful and *mala fide*. The court set aside the finding of contempt and the associated penalty, but confirmed the declaratory order that the Auditor-General had failed to comply fully with the court order, and a further order putting him on terms to comply with the order.

¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 9

² At para 10

[26] Counsel for the applicant referred me to authority for the proposition that a person may not disobey a court order on the basis of legal advice which he takes at face value.³ This seems to me to be generally correct, but, nevertheless, in each case one needs to determine in the particular circumstances whether a reasonable doubt with regard to wilfulness has been established.

[27] The circumstances here are somewhat unusual in the sense that the conclusion that the applicant had repudiated the agreement and that Bata was entitled to cancel it, was reached during consultations and preparations for the drafting of a supplementary affidavit. Although this aspect of the matter was not directly addressed in the answering affidavit, it is probable in my view that it was Bata's legal representatives who were responsible for the new approach. There may well have been an over-zealous attempt to find a basis on which Bata could avoid placing further orders with the applicant. Those legal representatives will do well to bear in mind that in contempt proceedings wilfulness may be found to be present in the form of *dolus eventualis*.⁴ A more responsible approach would have been to approach the court for confirmation that in the light of the repudiation Bata was no longer obliged to place orders with the applicant in compliance with the court order.

[28] There is in my view a reasonable doubt with regard to the requirement of wilfulness on the part of Bata, with the result that I am not willing to hold it in contempt.

[29] I propose to follow the approach in *Fakie*, and order Bata to comply fully with the order of 20 April 2018. I do not consider it appropriate to order the furnishing of the information requested by the applicant. This information is private and belongs to its competitors. It should not be difficult to determine, having regard to the volume of the orders placed before the purported cancellation, whether Bata is complying with the interim order. I do intend to order Bata to pay costs on a punitive scale in order to demonstrate my displeasure at its failure to comply with the order of 20 April without seeking directions from the court.

³ *Heg Consulting Enterprises (Pty) Ltd and others v Siegwart and others* 2000 (1) SA 507 (C)

⁴ *Supra* 518

[30] The order is as follows:

- (a) The application for a declaratory order regarding contempt is refused.
- (b) It is declared that the first respondent's failure to comply with para 2.2 of the order made by Gorven J on 20 April 2018 was unlawful, and it is ordered to comply fully with that order.
- (c) The first respondent is ordered to pay the costs of this application on the attorney and client scale.

Ploos van Amstel J

Appearances:

For the Applicant : A J Troskie SC (together with) S Pudifin-Jones

Instructed by : Hay and Scott
Pietermaritzburg

For the Respondents : C A Nel

Instructed by : Macgregor Erasmus Attorneys
Pietermaritzburg

Date Judgment Reserved: 17 May 2018

Date of Judgment : 28 May 2018