

**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 3797/2013

In the matter between:

**JACOBUS PETRUS CROUS**

1<sup>st</sup> Applicant

**FRANCIS GEORGE DILLEY**

2<sup>nd</sup> Applicant

And

**ITAU SOYA (EDMS) BPK**

Respondent

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**HEARD ON:** 5 OCTOBER 2015

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**JUDGMENT BY:** RAMPAL, J

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**DELIVERED ON:** 26 NOVEMBER 2015

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- [1] These proceedings concerned an application for leave to appeal. The applicant, the first respondent in the main application, appeals against the whole of the judgment I gave and the order I made against him. The judgment in question was delivered on 14 May 2015. The respondent, the applicant in the main application, opposes the current application.
- [2] The second respondent in the main application, cited as the second applicant herein, was not before me in the current application notwithstanding the formal heading of the notice in

terms of Rule 49(1)(b) filed on 9 July 2015. On 28 July 2015 the second respondent filed a sworn statement in which he clarified that he was not the second applicant in these proceedings as the aforesaid notice appeared to suggest.

[3] The order I made on 14 May 2015 reads as follows:

- “1. The respondents are found guilty of contempt of court;
2. The first respondent is sentenced to 3 months imprisonment wholly suspended for two years on the first condition that he returns the required books to the applicant within 21 calendar days of this order and on the second condition that he is not again found guilty of contempt of court committed during the period of suspension;
3. The second respondent is, subject to paragraph 79.4 *infra*, cautioned and discharged;
4. The respondents are directed to pay the costs of the application jointly and severally, the one paying the other to be absolved.”

[4] The applicant was aggrieved by the verdict as well as the sentence - hence this application.

[5] The grounds on which the applicant seeks leave to appeal and the criticisms of my judgment were embodied in a 9 page document described as:

“Kennisgewing van Aansoek vir Verlof om te Appelleer.”

I have taken note of all of them. There was nothing new in them. I considered all of them in my judgment. Therefore, I deem it unnecessary to deal with them at length in this judgment. I abide by my judgment.

- [6] Mr. Williams, counsel for the applicant, dealt with five points of criticism on the basis of which he submitted that the order was untenable as regards the verdict and the sentence. The thrust of the critique was that it was practically impossible for the applicant to comply with the court order because he no longer had the respondent's books in his actual possession.
- [7] Mr. Reinders, counsel for the respondent, submitted that it was never the case of Mr. Gouws, the current applicant, that he could no longer return the books to Itau, the current respondent, because, as it was now argued, he had already destroyed them by the time the court order was made.
- [8] The essence of the defence put up by Mr. Gouws was that he and Mr. Dilley, the second respondent in the main application, left the books of Itau on the table in the office the day they vacated the factory premises. I rejected his defence as false in my judgment. Mr Gouws was shown to be an untruthful witness. Among others, he used secret books, he sold his employer's goods and pocketed the money. Moreover, he frustrated the very meeting where the handover was supposed to take place. Such a deceitful character was unlikely to leave cash books on the employer's table or desk knowing all too well that such books would certainly and seriously incriminate him. However, now that

his dishonest conduct has been exposed there is no more any need for him to conceal the books. All he has to do now is to return the books to the respondent. That is the right thing to do.

[9] As Mr. Reinders correctly submitted, it was never the pleaded case of the applicant that he could no longer physically return the books because they no longer existed. There was virtually no evidence as to where, when, how and by whom the books were destroyed, if ever they were. In the absence of credible and reliable evidence of destruction, the submission that it was practically impossible for the applicant to comply with the court order was speculative, baseless and hollow argument. If the books were indeed destroyed before the court order was made, then the applicant only has himself to blame for not candidly taking me in his confidence. Neither in his answering affidavit nor in his testimony did he venture to say that he had destroyed the books which was why he could no longer return them to the respondent.

[10] There is one further important and basic consideration that must be brought to account in an application of this nature. There was absolutely no submission, written or oral, that I had committed any misdirection let alone a material misdirection that vitiated my judgment. In the absence of a material and appealable misdirection either on a question of law or matter of fact an application for leave to appeal cannot succeed.

[11] In the circumstances I am not persuaded that the matter has a reasonable prospect of success on appeal. Given the peculiar

circumstances of this particular case, I am of the firm view that no other reasonable court would come to a different conclusion.

[12] Accordingly I make the following order:

12.1 The application for leave to appeal is dismissed.

12.2 The applicant is directed to pay the costs.

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**M.H. RAMPAL, J**

On behalf of applicant:      Adv. A Williams  
Instructed by:  
Hill McHardy & Herbst Inc  
Bloemfontein

On behalf of respondent:    Adv. S.J. Reinders  
Instructed by:  
Rossouws Attorneys  
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