REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A3125/2018

COURT *A QUO*: CASE NO: 3358/2016

(1)	REPORTABLE: YES / NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
15/3/19		
DATE		SIGNATURE

In the matter between:

TIPROW CONTROLS (PTY) LTD Appellant

And

BEEFTECH BOTSWANA (PTY) LTD Respondent

JUDGMENT

NKOSI- THOMAS, AJ

INTRODUCTION

[1] At issue in this appeal is the competence of the court *a quo* to grant the impugned urgent *ex-parte* orders of 4 November 2016, which it later confirmed on 9 May 2017. The impugned orders were granted by the Learned Magistrate Mrs K Abba (the Learned Magistrate) sitting in the Magistrates Court for the District of Ekurhuleni South East, held at Brakpan

[2] The appellant noted this appeal against the whole of that judgment and order. Although the respondent initially opposed the appeal it, on 5 December 2018, served a notice withdrawing its opposition but did not, thereby, concede the merits of the appeal, leaving same in the hands of this court. In the event when the appeal was called on 11 March 2019, it was fully argued.

[3] The grounds upon which the appeal was founded are, *inter alia*, the following:

[3.1] The legislative intention behind section 30 of the Magistrates Court Act 32 of 1944 (hereinafter "section 30") was the not the circumvention of normal trial action procedure on grounds that, if utilised, it would not be expeditious;[1]

[3.2] Public policy and the administration of justice require that the abuses of section 30 be not countenanced by this court;[2]

[3.3] The respondent was, throughout, aware that the appellant would oppose the urgent *ex parte* application and of the grounds of such opposition;[3]

[3.4] The Learned Magistrate grossly misapplied the law and/or misdirected herself inasmuch as she nevertheless proceeded to confirm the *rule nisi* in

---

1 Appellant's Practice Note (Practice Note) para 7.1.

2 Practice Note para 7.2.

3 Practice Note para 7.3.

circumstances where it had been pointed out to her that her initial *ex parte* urgent order was incompetent;[4]

[3.5] Section 30(1) does not confer jurisdiction upon a Magistrates Court to grant an interdict amounting to specific performance *ad factum praestandum* of a contractual obligation. Respondent's claim, *in casu,* amounts to a disguised specific performance of a contractual obligation which is not excluded by the exception contained in section 46(2)(c)(ii) of the Magistrate's Court Act[5]; and that

[3.6] The Learned Magistrate misdirected herself by ignoring the material non-disclosures made by the respondent in the *ex-parte* application in circumstances where it is trite that in ex-*parte* applications all material facts must be disclosed and that the non-disclosure in question need not be wilful or *mala fide* to incur the penalty of rescission.[6]

THE COMMON CAUSE FACTS

[4] On 4 November 2016 the court *a quo* granted an order on an urgent and *ex-parte* basis in the following terms:

[4.1] That condonation with the non-compliance with the rules of court as to service and time limits be granted in view of the urgency of the matter;

---

4 Practice Note para 7.4.

5 Practice Note para 7.5.

6 Practice Note para 7.6.

[4.2] That the Sheriff of the Court be directed to proceed to appellant's premises situate at Tiprow Controls (Pty) Ltd at 48 Apex Road, Apex Ext 3, Brakpan, and there and then serve the order, attach three items known as BS Black Measuring Case (the small case), remove them and deliver same to respondent's representative, a certain Mr Albertus Meintjies; and

[4.3] That the appellant be called upon to furnish reasons to the Magistrates Court by no later than 29 November 2016 at 09h00 as to why the order of 4 November 2016 should not be made final and why the appellant should not be ordered to pay the costs occasioned by the application.

[5] The above order of 4 November 2016 was confirmed on 9 May 2017.

[6] It bears emphasis that when the initial urgent *ex parte* order of 4 November 2016 was sought and obtained, respondent made the following allegations in the founding affidavit filed in support thereof:

[6.1] That the respondent conducts business in the sale of electronic measuring and data equipment contained in a portable case for purposes of identifying cattle used for traceability during the export of cattle from Botswana to Europe in terms of the European Common Market Rules;[7]

[6.2] That respondent purchases the portable cases for the unit from the appellant to which respondent subsequently adds the scale and computer in order to complete the unit; [8]

---

7 Record, Vol 1, p.4, Line 1 and further.

8 Record, Vol 1, p.4, Line 14 and further.

[6.3] That on 5 May 2016 Mr Meintjies, on behalf of the respondent, placed a purchase order of seven (7) large cases and four (4) small cases from the appellant;[9]

[6.4] That the respondent only paid the full purchase price of the *merx*, namely, the seven (7) large cases and three(3) small cases, on 20, 21 and 24 October 2016;[10]

[6.5] That prior to the above payment in full in respect of the *merx* on 20, 21 and 24 October 2016, respondent 14 May 2016 sent its representative, one Jan Grobler, to collect the said *merx;*

[6.6] That on that occasion six (6) large cases were handed to him;

[6.7] That respondent alleged at the time of the *ex parte* urgent application appellant was "*still indebted to the [respondent] for 1 large and three smaller cases";* and that

[6.8] That the appellant, however, on 13 September had raised a dispute as to respondent's entitlement to the delivery of the *merx* based, in part, on respondent's failure to fulfil it VAT payment obligations.

[7] Respondent alleged in the *ex-parte* application that it had corresponding contractual obligation in Botswana for delivery and supply of the cases and that it was being prejudiced by the appellant's withholding of the same. Respondent alleged further that it was suffering a loss in the order of R3 000,00 per instrument per day cumulatively amounting to a loss of R9 000,00 per day in respect of the three units.

---

9 Record, Vol 1, p.4, Line 24 and further.

10 Record, Vol 1, p.4, Line 25 and further.

[8] Respondent asserted in the court a quo that it had a clear right to the cases which it had allegedly paid for, that such a right was being infringed by the appellant and that it had no other remedy other than approaching the Magistrates Court on an urgent basis to obtain redress.

[9] The Learned Magistrate proceeded, based on the aforegoing, to grant the impugned orders.

[10] The single issue that arises in this appeal is whether the impugned orders were competent. That is the question to which I now turn. I deal with it in two parts, firstly, being the competence of the interim order of 4 November 2016 and, secondly, the final order of 9 May 2017.

THE COMPETENCE OF THE URGENT EX-*PARTE* ORDER OF 4 NOVEMBER 2016

[11] Rule 55(3)(a) of the Rules for the conduct of the proceedings of the Magistrates Court of South Arica, provides as follows:

> *"No application in which relief is claimed against another party shall be considered ex-parte unless the court is satisfied that –*
>
> *(i) the giving of notice to the party against whom the order is claimed wold defeat the purpose of the application; or*
>
> *(ii) the degree of urgency is so great that it justifies with the dispensing of notice.*

[12] One would look in vain, in the affidavit filed in support of the urgent *ex-parte* application, firstly, for the allegation that giving of notice of the appellant *in casu* would have

defeated the purpose of the application, and secondly, for allegations demonstrative that the degree of urgency was so great as to justify the dispensing of the notice to the counter-party. No primary facts were put up to shore up such a contention.[11]

[13] The above failure is, without more, fatal to the respondent's application. The court a quo ought to have dismissed the application on that score alone.

[14] On the contrary, the appellant's section 34 rights as enshrined in the Constitution were allowed to be infringed without any constitutionally sound justification.

[15] All that was alleged in the affidavit filed in support of the *ex-parte* application was that:

> *"Applicant has a contract in Botswana to supply the said measuring units and to has to meet deadlines for the supply and delivery thereof. At this point in time the Applicant cannot do so because Respondent is withholding the three cases from Applicant. Applicant has been placed on terms by its clients to meet certain deadlines and is also losing business on a daily basis. "*

[16] Quite apart from the respondent not having put up primary facts rendering the mater so urgent that the appellant should be deprived of the fundamental right of *audi alteram*

---

[11] In *Radebe v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C*–E. the Court had the following to say in this regard:

> *"If I am incorrect, or inaccurate, in regarding the crucial allegation in the answering affidavit as a conclusion of law, it is at best for appellant an inference, a 'secondary fact', with the primary facts on which it depends omitted... In the instant case it is a legal result only that has been 'pleaded'. Respondent failed to deny these allegations in a replying affidavit. This is of no legal consequence since they do not amount to statements of fact disclosing a defence to respondent's claim..."*

partem, there was also no case made out that service of the application on the counter-party would have frustrated the very purpose of the application.

[17] The court a quo was simply not seized with an *Anton Piller* type application.[12]

[18] What the court a quo was simply seized with was a clear specific performance application sought contrary to the provisions of sections 46(2)(c) of the Magistrate's Court Act.

[19] The learned magistrate clearly misdirected herself as regards both the interim order and the final order in circumstances where any entitlement thereto has simply not been shown on the papers.

[20] Her orders must clearly be set aside.

[21] Counsel assured this Court that an order upholding the appeal will yield a practical outcome.

[22] That then clears the way for this court to overturn the judgment of the Court a quo.

WAS THE CONFIRMATION OF THE INTERIM ORDER COMPETENT?

[23] Based on what has gone before, it follows ineluctably that the confirmation order falls, similarly, to be overturned.

---

12 Anton Piller KG v Manufacturing Processes Ltd & Ors [1975] EWCA Civ 12, [1976] 1 All ER 779 (8 December 1975).

[24] The situation in this regard is aggravated by the fact that all the evidence bearing on the triability of the matter had come to hand, and yet, the court a quo proceeded to confirm its earlier *ex parte* rule nisi.

[25] Its confirmation of the rule nisi was incompetent because:

[25.1] Firstly, section 30(1) does not confer jurisdiction upon a Magistrates Court to grant an interdict which amounts to an order for specific performance *ad factum praestandum* of a contractual obligation.[13]

[25.2] Secondly, section 46(2)(c) provides in peremptory terms that a court shall not have jurisdiction in matters *".... in which is sought performance without an alternative of payment of damages except in -*

(iii) the delivery or transfer of property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Government Gazette;"

[26] It is common ground that although the respondent sought an order akin to specific performance of a contractual obligation, it did not seek an alternative of payment in damages.

[27] Accordingly, on the clear reading of both sections 30 and 46(2)(c) of the Magistrate's Court Act, the order granted by the Learned Magistrate was simply incompetent as she had no jurisdiction in that regard.[14]

---

13 See *Jones and Buckle, The Civil Practice of the Magistrates Court of South Africa 10th Edition, Vol 1, the Act at 159 dealing with Section 30, lines 1 – 3.*

14 Badenhorst v Theophanous 1988 (1) SA 793 (C) at 798 – 9; Roberts v Gladys Properties (Pty) (Ltd) 1946 (WLD) 90 at 93.

GOOD FAITH AND PUBLIC POLICY

[28] It is trite that an applicant in an *ex-parte* application has the obligation to disclose fully all material facts that might influence a court in the coming to a decision and that a non-disclosure or suppression of such information need not be wilful nor *mala fide* in order to occur a penalty of rescission. [15]

[29] In the *Schlesinger* case the court set aside an *ex-parte* order with costs on an attorney and client scale against the applicant who had displayed a reckless disregard of a litigant's duty to a court in making a full and frank disclosure of all known facts that might influence the court in reaching a just decision.

[30] The *dictum* in the *Schlesinger* case applies with equal force *in casu.* The respondent being fully aware of the material disputes of fact pertaining to its entitlement or otherwise to the three cases, elected not to take the court into his confidence in that regard. That, clearly, is the sort of conduct not to be countenanced by this court.

CONCLUSION

[31] Based on all of the aforegoing factors, the inescapable conclusion is that this appeal falls properly to be upheld and that the respondent be ordered to pay the costs occasioned thereby.

---

15 Jones and Buckle 9th Ed Vol 2; Rule 55; Schlesinger v Schlesinger 1979 (4) SA 342 (W).

APPROPRIATE ORDER AS TO COSTS

[32] Counsel for the appellant made the submission that taking into account the serious nature of the non-disclosure and the misstatements of material facts in the *ex -parte* application, this court should express its displeasure by awarding costs on an attorney and client scale.

[33] The difficulty in awarding costs on such a scale against a litigant who, presumably, knew no better, might yield an injustice. Accordingly, the appropriate order in the circumstances appears to be costs *de bonis propriis* on an attorney and client scale.

ACCORDINGLY, I WOULD MAKE THE FOLLOWING ORDER:

(a) The Appeal is upheld.

(b) The respondent's attorneys of record, Rautenbach Attorneys[16] are ordered to pay the costs occasioned by this appeal, *de bonis propriis,* on an attorney and client scale.

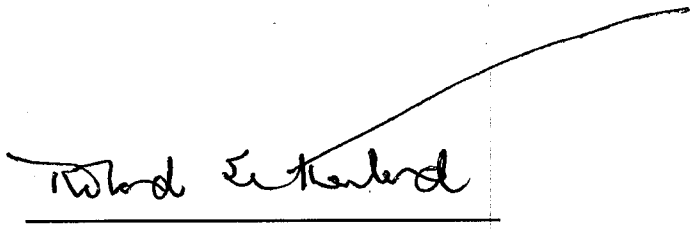
LINDI NKOSI-THOMAS

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

16 Rautenbach Attorneys are the successors-in-title to Swanepoel Attorneys in this matter.

I agree



ROLAND SUTHERLAND

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 11 March 2019

Date of judgment: 19 March 2019.

Appearances:

Counsel for the Appellant: S L REES

Instructing Attorneys: TUGENDHAFT WAPNICK BANCHETT PARTNERS

Counsel for the Respondent: NO APPEARANCE

Instructing Attorneys: RAUTENBACH ATTORNEYS