HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

6 MAY 2022
Date

Judge M.L. Senyatsi

Case no: A5015/2021

In the matter between:

POWER GUARANTEES (PTY) LTD	**First appellant**
NICHOLSON, BENITA	**Second appellant**
NICHOLSON, RAY VINCENT	**Third appellant**
and	
FUSION GUARANTEES (PTY) LTD	**Respondent**

***Case Summary*: STRIKE OUT APPLICATION, CONTEMPT OF COURT APPLICATION**

JUDGMENT

SENYATSI J

[1] The appeal before this court concerns certain orders made by Lapan AJ ("court a quo") in terms of which Appellants' answering affidavit dated 9 April 2019, being, paragraphs 10 and 12 to 18 thereof were struck out; Appellants were held to be in contempt of the order of Adams J dated 29 June 2018; Second and Third Appellants were

committed to prison for a period of 30 days, suspended indefinitely on condition that during the period of suspension, Appellants return to Respondent its confidential and proprietary information and Appellants were ordered to pay the costs of application.

[2] Appellants are not appealing the order by Adams J ("main order") which led to court a quo's contempt order. The main order found in favour of Respondent on illegal competition against Respondent remains unchallenged.

[3] The basis of appeal against the contempt order granted by court a quo is that the main order could not be complied with as the confidential information referred to therein, are not in the custody of Appellants and that the return thereof to the Respondent was impossible. Appellants contend that court a quo erred in issuing a contempt order against them.

[4] The issue that requires determination is whether or not the appeal has factual or legal merit based on the contentions made by Appellants.

[5] The brief background concerning the litigation in the main action deserves a mention. Respondent had sued Appellants for unlawful competition alleging that the latter unlawfully appropriated confidential and proprietary information to themselves.

[6] Respondent conducts its business as a guarantor of building construction contractors in the building services sector. The guarantees are issued for those building construction contractors performing building and related services for various departments of local and national governments.

[7] When a contractor gets a contract to build a building for the various departments, an application would be made to Respondent for a guarantee. The application will be assessed by Respondent before a guarantee is issued and if all requirements are met, a guarantee will be issued up to R5 million.

[8] The guarantee would be provided at the lowest cost to the applicant. Over the period, Respondent built a database of contractors to whom it marketed its products. The database was built using information obtained from the Construction Industry

Development Board ("the CIDB") website as a starting point. Significant amount was invested by Respondent in collecting the data over a period of time.

[9] The database contains information relating to the contract details of a contractor; the amount of the credit facility granted to a particular contractor; the rate payable by a contractor for a guarantee and the history of previous guarantees granted to each contractor.

[10] If the information was placed in the hands of a competitor, the latter would have a significant benefit. Any competitor who takes and uses the Respondent's confidential information without consent as contained in the database, would commit an unlawful competition.

[11] Appellants resisted the relief sought in the main application on the basis that the information on the contractors was not confidential as it was freely obtainable from the public domain. Appellants denied that they obtained or utilized information belonging to Respondent.

[12] Evidence of electronic communications by way of WhatsApp messages between Mr. Randall Fransman ("Fransman") and Third Appellant were presented to Adams J in terms of which Fransman confirmed that Third Appellant had utilized his cellular telephone to take 15 to 20 photographs of Respondent's client information as it appeared on Third Appellant's computer screen. Third Appellant sent the photographs to Fransman who then onward sent the WhatsApp messages to an unknown telephone number.

[13] Appellants did not object to the evidence of Fransman and did not provide an answer thereto. Consequently, Adams J accepted Fransman's evidence and issued and the main order ordering the confidential database to be returned to Respondent.

[14] Appellants contend that court a quo erred in holding them to be in contempt of the main court order. They state that they were not in possession of the material which were ordered to be returned to Respondent and that court a quo ought not to have issued the contempt order. They further argue that the court a quo ought to have allowed them to lead evidence by introduction the pleadings of the main application to prove the absence of willful intent to disregard the main court order.

[15] Appellants argue furthermore that the court a quo erred in denying them the opportunity to answer to the new evidence of Fransman, which was unchallenged in the main action, and by striking out the paragraphs that dealt with that aspect.

[16] In this appeal we are concerned with whether on the facts and the record before us, the court a quo erred in concluding that the Appellants were in contempt of the main order.

[17] We are also required to determine whether court a quo erred in striking out certain paragraphs of the opposing affidavit from the Appellants. I shall deal with the principles on striking out and later the contempt of court applications.

[18] Striking out in an affidavit is regulated by Rule 6(15) of the Uniform Rules of Court which provides that the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[19] The test of irrelevance of the allegations forming the subject of the application is whether such allegations do not apply to the matter before court or do not contribute in any way to a decision of the matter. The evidence must relate to the cause of action or merits of the case.

[20] In dealing with the approach as set out in above, the court in *Beinash v Wixley*[1] held that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First the matter sought to be struck out must be scandalous, vexatious or irrelevant. In the second place the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.

[21] The basis of the application to strike out the impugned allegations before the court a quo related to the attachment of the notice of motion and all affidavits related to the main application that had been finalized by Adams J in the main application.

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[1] 1997 (3) SA 721 (SCA)

Respondent's contention was that Appellants were seeking to re-hear the main application despite them not having sought leave to appeal the main order and despite their repeated assurances that they abide by the judgment. I do not find that court a quo erred when it ordered that those paragraphs of the affidavit be struck out. The main action had clearly been finalized and there was therefore no basis to re-hear the main application before the court a quo. More importantly, Appellants had indicated that they would abide by the court order in the main action. Court a quo therefore correctly struck out the impugned allegations because if it had not done so, that would have amounted to the re-hearing the main application on which Adams J had already given a judgment.

[22] Appellants contend that the impugned allegations were not amounting to re-hearing the application in court a quo, but simply to introduce evidence which explains why they failed to comply with the court order granted by Adams J. They contend that court a quo ought not to have struck out the very evidence sought to be introduced to explain why they could not comply with the court order. This contention is without merit because Appellants themselves had stated in the proceedings before Adams J that they would abide by the court order. There was no new evidence of events after the order granted by Adams J which might explain why the order could not be complied with. Anything that happened before the order was granted by Adams J would only be relevant to challenging that order itself. This contention therefore must fail.

[23] The second issue is whether court a quo correctly found the Appellants to be in contempt of Adams J order. The leading case on the principle and requirements of contempt of court is *Fakie N.O v CC11 Systems (Pty) Ltd*[2] where the court summarized the principles and the elements as follows:

"To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional security in the form of a motion court, court application adapted to constitutional requirements.

[2] 2006 (4) SA 326 (SCA) at para [42]

(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 requirement of contempt (the order; service or notice; non-compliance; and willfulness 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 willfulness and mala fides; should the respondent to advance evidence that establishes reasonable doubt as to whether non-compliance was willful 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*".

[24] As regards common facts in this appeal, it is not in issue that Adams J had issued an order which Appellants were aware of. It was not disputed that Appellants had failed to deliver any of the Respondent's confidential and proprietary information to Respondent as required by the Adams J order. What is disputed is that Appellants were in position to deliver the said confidential and proprietary information in their possession to Respondent. Appellants contend that they do not have confidential and proprietary information in their possession which belong to Respondent. They did not lead evidence before Adams J on what happened to the database. They elected to resort to a bare denial as their defence.

[25] The claim by Appellants that they do not have the database of Respondent containing confidential and proprietary information in their possession was not supported by evidence and is therefore without merit. They did not challenge the correctness of such finding by Adams J that such confidential and proprietary information of Respondent had to be returned to the Respondent. It follows in my view that Respondent had discharged the burden of prove in court a quo that non-compliance with Adams J order was intentional and mala fides. I say this because, nowhere in the record did Appellant lead any evidence for instance to say that the Adams J order could not be complied with because the

confidential or proprietary information of Respondent had for instance been deleted or destroyed.

[26] It is trite that the order of Adams J upon which court a quo based its decision to hold Appellants in contempt stands unchallenged until set aside by the court. It is a principle of order law that until set aside, the court order must be obeyed even if it may be found to be wrong.[3] This is so because as observed in *Kotze v Kotze*[4] public policy requires that "...there shall be obedience to orders of Court and that people should not be allowed to take law into their own hands."

[27] Respondent would without doubt be prejudiced if the hearing of evidence already led in the Adams J order was to be allowed by court aquo. This would lead to the subversion of the Adams J order, which as already stated, remains unchallenged. It follows, in my considered view, that the appeal must fail.

ORDER

[28] The following order is made:

(a) The appeal is dismissed with costs.

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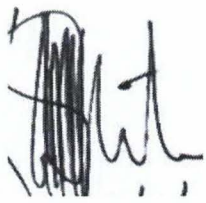
[3] See Bezuidenhout v Patensie Sitrus Beherend BPK 2001 (2) SA 224 (ECD) at 229 A- D, Culverwell v Beira 1992 (4) SA 490 (W) at 494 A-C, Zerga & Others v TT Empowerment CC [2012] 4 All SA 472 (GSJ) at [5] and [6]

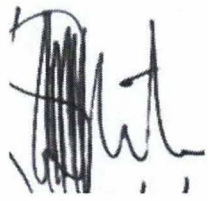
[4] 1953 (2) SA 184 (C) at 187F



M.L. SENYATSI
JUDGE OF THE HIGH COURT

I agree:

P.P S. YACOOB
JUDGE OF THE HIGH COURT



I agree:

P.P J. FRANCIS
JUDGE OF THE HIGH COURT

Heard:	20 October 2021
Judgment:	06 May 2022
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