

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 22621/11

DATE: 21 NOVEMBER 2011

5 In the matter between:

VIOLETTA MUKHAMADIVA Plaintiff

and

DIRECTOR GENERAL OF HOME AFFAIRS & 1 Defendants

10

J U D G M E N T

DAVIS, J

This matter was triggered by an order being granted by this
15 Court on 6 November 2011. The background was as follows:
While on duty, I was contacted by Mr Gary Eisenberg, who had
obtained my telephone number – correctly I might add – from
the duty registrar.

20 Mr Eisenberg informed me that an Uzbekistan citizen, Ms
Violetta Mukhamadiva had been detained by immigration
officials after arriving at Cape Town International Airport
aboard a Turkish Airline flight. He further informed me that it
was the intention of the officials to refuse Ms Mukhamadiva
25 entry and to place her on a departing aircraft. This was being

22621/11

done in the face of a valid visa which had been issued to her in Ankara, Turkey.

I immediately informed Mr Eisenberg that I would meet him in chambers in order to hear argument. Urgency was obvious because the aircraft was scheduled to depart at 17:10 that afternoon.

Mr Eisenberg came to my chambers together with Mr Katz SC.

10 It was clear from the admissions and documentation provided to me that the most sensible approach was to issue an order summoning the parties to appear before the Court at 10:00 the next day being 7 November in order for respondents to show cause why the applicant should not be permitted to enter

15 the Republic of South Africa on appropriate conditions.

The idea behind this order was clear: Applicant would, if it was deemed necessary by Respondents, be held at the airport pending the enquiry in court the next morning, at which time

20 the parties would be able to argue their respective cases pursuant to which a proper determination could be made.

At the same time, it was necessary to permit the applicant to consult with her legal representatives in preparation for the

25 hearing.

22621/11

Difficulties occurred, owing to the gross inefficiency of the Registrar's office of this High Court. The Duty Registrar, having given Mr Eisenberg my telephone number, then went
5 into 'a state of being incommunicado' – both from myself and Mr Eisenberg. This meant that inexcusable conduct the order could not be stamped. As much as I thought this might be a relevant aspect of the case, it appears from the evidence that this is not an issue which has caused concern.

10

Mr Eisenberg was then compelled to proceed to the airport in order to issue the order. To the extent that it is relevant, this form of service does take place in cases of urgency on a weekend when ordinary mechanisms for service are
15 unavailable to parties.

As noted, the matter was urgent. If the Applicant had rights to enter South Africa, the dispute had to be resolved as expeditiously as possible. She was about to be placed aboard
20 a Turkish airline flight to be taken out of South Africa, which act may have been in breach of her rights.

What occurred thereafter depends on two separate versions offered to the court.

25

22621/11

Mr Eisenberg testified in court, following upon an affidavit to which he had deposed (upon the request of this Court in order to determine whether a Court Order had been ignored in circumstances where a contempt charge might be appropriate) to the following effect: He rushed to the airport; he had considerable difficulty in being able to access immigration control. It appears that members of the security service, which has been contracted to deal with these matters at the airport, require significant education as to the implications of a court order and legal process. They are however, unfortunately, not before the Court.

Ultimately, Mr Eisenberg gained access to the Chief Immigration Officer for the day, Mr Hans Grobblers. By then, it appears to be common cause, Mr Grobblers already had taken possession of the order which had been issued by the Court. Mr Eisenberg had provided a copy to Inspector Wildschut. Although Mr Eisenberg was unaware at the time that Inspector Wildschut had served the order on Mr Grobblers, it now appears - after evidence that had been provided in Court - that this indeed had occurred. There is some dispute precisely at what time Inspector Wildschut served the order. According to Mr Grobblers, who also testified, the Turkish Airlines flight had already departed to the apron, on course to flying from Cape Town International Airport at 04:40 (albeit that the scheduled

21.11.2011/18:16-18:46/RV /...

22621/11

departure was 17:10). On his version, the order was served at approximately this time.

The best estimate that I was offered in the circumstances and
5 the one which appears to me to be completely reliable, is that
of Ms de Saude, a candidate attorney to Mr Eisenberg office.
She appeared to have a clear idea about the relevant time.
She testified that she had called Mr Eisenberg at 16:30 and, in
her view, it was approximately at this time that Inspector
10 Wildschut would have gone off to serve the order. According
to her, at 16:35, when she arrived at international arrivals, she
met Mr Eisenberg and Ms Vorster, who was employed by
Mavericks, and who were at that stage waiting for Mr Wildschut
to return because – as I understood from her evidence – he
15 had proceeded to deliver the court order. I must assume
therefore, given the distance between the entrance to the
arrivals hall and where Mr Grobber says he received Inspector
Wildschut at the immigration booths, he would have received
the order at approximately 16:35. This may mean that, he had
20 received the order before the Turkish aircraft had left the
airbridge.

Mr Katz who appeared on behalf of the Applicant in effect,
contended that this matter could be resolved by examining the
25 records of the Turkish Airlines' departures on that day.

22621/11

Be that as it may, Mr Eisenberg then testified that finally he was allowed through immigration, where he encountered Mr Grobbler. At this point the time was closer to 05:00. Mr
5 Eisenberg says at some point he saw the Turkish Airline being transported to the apron.

When he came across Mr Grobbler, he testified that Mr Grobbler was waiting for him. Mr Grobbler had shaken his
10 head from side to side as if to say: no, that is, I am not going to comply with the order. Mr Eisenberg testified that he showed Mr Grobbler the order and Mr Grobbler said that he could not take the order from him. He had been instructed not to take the order. When asked as to why, it appeared that a
15 Mr Mellet - who looms large in these proceedings and about more later - had so instructed him.

At this point Mr Eisenberg testified that he was in a serious predicament. He had granted an order from a court which
20 would have protected the rights of the applicant. The responsible department appeared to have no interest in implementing the order. He called the Judge who had issued the order (being myself) and told him that he had found Mr Grobbler and asked the Judge to speak to Mr Grobbler. Mr
25 Grobbler then said that he was not prepared to speak to the

22621/11

Judge.

Mr Eisenberg testified that he could not remember if he gave a reason why he would not speak to the Judge, but, given this
5 attitude, it was clear that there was little that Mr Eisenberg could do save for phoning the Judge a third time at which point he was requested to depose to an affidavit.

Mr Grobbler also testified. In essence, he testified as follows:
10 by the time he had received the order it was approximately at 16:40; the Turkish Airlines' flight had departed; at this stage the applicant had been handed over to the Turkish Airlines, placed on the plane and as the plane had begun its journey, the responsibility for her custody resided with the captain of
15 the plane and not with Mr Grobbler or other members of the immigration department. There was, in his view, nothing that he could now do to implement the order. He emphasised that it was not his wish to be in contempt of the order.

20 There is considerable dispute between Mr Grobbler and Mr Eisenberg's testimony as to precisely how they negotiated with each other. I should however place on record the following: when Mr Eisenberg called me the second time and asked what should he do to which I then suggested I should speak to Mr
25 Grobbler, he had behaved in an extremely calm manner. I

22621/11

heard no abuse or any other communication when I was on the one end of the phone until Mr Eisenberg came back to inform me that Mr Grobblers was not prepared to speak to me.

5 Mr Grobblers gave a rather odd and, I would suggest, unacceptable reason for not answering the telephone. He suggested that Mr Eisenberg had been known to intimidate members of the Department and he could not possibly believe that a Judge was on the other end of the phone. Had he
10 simply taken the call, he would have found that there was a Judge on the other end of the phone, who was anxious that a court order was not being observed.

Mr Grobblers had the good grace to admit that perhaps, upon
15 reflection, he was wrong not to have taken the call. Indeed, may I say, if Mr Grobblers had taken the call and explained his difficulties, it may well have been that we would not have had to go through much of this particular process. Had Mr Grobblers explained to Mr Eisenberg exactly the problems of
20 implementation at so late an hour, I suspect the issue could have been resolved. Arguably better counsel could have prevailed as to exploring the possibility of the order being implemented when the plane landed in Johannesburg. Although the respondents are responsible for ensuring that
25 immigration laws in South Africa are implemented properly and

22621/11

it is obviously of significant public interest that illegal persons should not be allowed into the country, it is also so that other people including entrants to the country may have rights. The Department, like every department of government, must follow
5 the principles of the rule of Law. We no longer live in an apartheid state. All Departments are subject to the law and there should be some measure of co-operation between parties in these circumstances to ensure that the law and thus court order.

10

So much for the facts.

This is a most unfortunate case because it is common cause that an order of the Court was not complied with. Does this
15 omission constitute contempt of Court on the part of Mr Grobblers?

Long ago in 1899 Melius de Villiers The Roman and Roman Dutch Law of Injuries at 166 wrote:

20

“Contempt of Court may be adequately defined as an injury committed against the person or body occupying a public judicial office by which injury the dignity and respect which is due to such
25 office or its authority and administration of justice

is intentionally violated.”

The reason for holding these proceedings is to vindicate the reputation of the Court. If court orders are ignored, our constitutional democracy will be destroyed in the final analysis. It is vital that courts ensure that the legitimacy and efficacy of the judiciary and the entire legal system is protected. Contempt of court is a mechanism to ensure the protection of those vital components of our constitutional democracy.

The test for contempt is not an easy one as Mr Albertus, who appeared on behalf of respondents, correctly observed. In brief, the requirements are that the refusal to obey should be both wilful and *mala fide* and that unreasonable noncompliance provided it is *bona fide* does not constitute contempt.

As Cameron JA said in Fakie Nov CCII Sytems (Pty) Ltd 2006(4) SA 326 (SCA) at paragraph 10:

20

“They show 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.

25 Honest belief that noncompliance is justified a

22621/11

proper or incompatible with that intent.”

I cannot, beyond a reasonable doubt, conclude that Mr Grobblers had wilful intent. In my view, Mr Grobblers had been
5 placed in a situation of some considerable difficulty. Consider that fact that according to his evidence, which was uncontested, he contacted his supervisor – one Ms Geneva Hendricks. She occupies a higher station in the department than does Mr Grobblers. What does she tell him: effectively not
10 to obey the order. Why? Because the order basically has cited, the Director General of the Department of Home Affairs and the Minister of Home Affairs. Ms Hendricks wants to take a ‘cheap’ point that somehow every single member of the immigration authority should be cited in a case like this on the
15 basis that somehow delegated authority is not encapsulated in the legislation. See however section 3 of the Immigration Act 13 of 2002.

I put the following scenario to Mr Grobblers, to which
20 understandably he had no answer because frankly, the procedures of the Department do not appear able to deal with these questions: A child is about to be secreted out of the country. A parent wishes to prevent this from that taking place and obtains an order, issued on a Sunday. The matter is of
25 great urgency. The attorney acting on behalf of the distraught

22621/11

parent, rushes to the airport to be confronted either by a technical argument, that as the Director General of the Department and the Minister of Home Affairs are the Respondents, she must proceed to Plein Street, as if the office
5 would be open for business on a Sunday afternoon. The child is on board the aircraft which lands in Johannesburg. The Department takes the view that since the child is now in the custody of the airline, there is nothing that the official can do. One has only to set out those facts to realise the problem. It
10 appears to me that at best for respondents there is serious lack of education that immigration officials require in order to deal with these difficult questions which could allow them to implement the law and safeguard legal rights.

15 Mr Grobblers was confronted with another issue. According to his testimony, a report which appeared in one of the newspapers which quoted the Head of the Immigration for the Western Cape, Patrick Tariq Mellet to the effect that he told immigration officials not to accept "anything like the Court
20 Order" and rather indicated that these need to be served at Parliament. If correctly quoted: what possible mind conceives of this kind of response in a case of urgency?

In short, in my view I cannot find Mr Grobblers to be guilty of
25 contempt. I consider he behaved wrongly, improperly and, in

22621/11

certain instances, stupidly. He should, of course, have taken the telephone to find out whether a Judge was on the other end of the phone. He may have then said, how do I know you are a Judge? To which the reply would have come: I can
5 proceed to the airport and, if necessary identify myself with a Judge's card. There are other ways of dealing with the matter, but not to talk to the Judge meant that there was a clear breakdown between the department and the court. I do not think that Mr Grobblers deliberately defied the order. He was,
10 upon reflection, a prisoner of – what I would consider to be – an inappropriate approach which had been taken by the Department.

Mr Katz suggested that Mr Grobblers had tailored his evidence
15 regarding the early departure of the aircraft. That may be so but my overall impression is that he acted improperly but not with wilful contempt.

However this matter cannot end here, particularly because on
20 the evidence, including that of Mr Groblers, respondents' officials appear to have been instructed incorrectly. As the respondents, included the Minister and Director General, it is only appropriate that their delegee in the Western Cape respond.

25

22621/11

A report must be provided by the Head of Immigration for the Western Cape, Mr Patrick Tariq Mellet, which informs this Court precisely as to what procedures are adopted by his officials when a court order is so issued, particularly in a case
5 of urgency. Mr Mellet must report to this Court as to exactly what the Departmental Officials are instructed to do when a court order is so issued.

Further, Mr Mellet is to provide this Court with a plan that has
10 been adopted or will be adopted to educate immigration officials to comply with the constitutional requirements of this country, in particular to compliance with court orders.

15 I want to thank both Mr Katz and Mr Albertus for conducting what is not an easy matter with great dignity and much thought. The Court is indebted to both of them. I also want to place on record that Mr Eisenberg acted as one would expect of an attorney. We need to remember that we cannot
20 judge an attorney by virtue of the fact that we may not have regard for some of the clients for whom they act. That appears to have been part of the theme that emerged from the testimony of Mr Grobblers and it disturbs me.

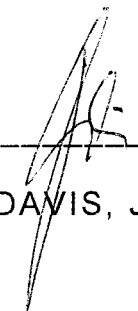
25 There was a time in this country, in its dark past, when

22621/11

counsel, who acted for the political opposition to a racist and sexist government who were singled out for 'special treatment' by officials. The very point of the independent role of the legal profession is to take cases that come to them and they act
5 without fear or favour in the best traditions of the profession. If Mr Eisenberg, or any other attorney, acts in breach of the ethics of his or her profession, there are mechanisms and proceedings to deal therewith. In this case, Mr Eisenberg acted as I would have expected him to have done, with
10 diligence for the clients whom he serves.

It is ordered that Mr Mellet produce the report as required in this judgment within two months of this judgment being finalised.

15



DAVIS, J