**THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION)**

**JUDGMENT**

Case No: 22149/19

In the matter between

| | |
|---|---|
| **IN TIME MARKETING & SUPPLY (PTY) LTD** | **APPLICANT** |
| And | |
| **BUDGETMART (PTY) LTD t/a BM SOLUTIONS** | **FIRST RESPONDENT** |
| **NAVREEN RAJ CHALLA** | **SECOND RESPONDENT** |
| **BHUPENDER SINGH** | **THIRD RESPONDENT** |

**Coram:** Rogers J

**Heard**: 23 June 2020

**Delivered:** 2 July 2020 (by email to the parties and release to SAFLII)

**JUDGMENT**

**Rogers J**

[1] This is an application by In Time Marketing & Supply (Pty) Ltd ('ITM') to hold in contempt, and sanction, the second and third respondents for non-compliance with an order granted by Erasmus J on 10 February 2020. The second respondent is Navreen Raj Challa ('Challa'). The third respondent is Bhupender Singh ('Singh'), who is the sole director of the first respondent, Budgetmart (Pty) Ltd t/a BM Solutions ('BMS'). The respondents in the main application were BMS as first respondent and Challa as second respondent.

[2] Erasmus J's order, granted on a long-form notice of motion to which there was no opposition, reads thus :

'1. The Applicant, within 24 hours of this Order, shall be placed in possession and control of the entire software solution and database referred to and known as the e-commerce platform Great Offers, which comprises out of a Fintech Mobile application and the crypt token business known as Security Africa (collectively referred to herein as the "software solution") in the following manner:

1.1. The First and Second Respondents ("Respondents") are directed to provide the Applicant with all usernames and passwords required to gain access to, and take possession and control of, the software solution which is currently in control of the Respondents.

1.2. The Respondents are directed to inform the Applicant in writing of the exact location of the servers on which the software solution is to be hosted.

1.3. The Respondents are directed to provide to the Applicant physical access to any and all servers and platforms on which the software solution is hosted and assist the Applicant in the manner contemplated in paragraph 2 below, to the extent that it is in the Respondents' control to give to the Applicant possession and control of the software solution, supervised by such experts as may be appointed by the Applicant, at the Applicant's costs.

2. The Respondents' assistance, as envisaged in paragraph 1.3 above, shall include (but not be limited to):

2.1. Resetting the usernames and passwords allowing the Applicant remote and all access to the software solution;

2.2. Disconnecting the servers hosting the software solution from the First Respondent's network, and providing the Applicant with remote access via the Internet;

2.3. Permitting the Applicant to add additional equipment wherever the software solution is located in order to enable the recovery of access to and possession and control of the entire solution; and

2.4. Allowing the Applicant physical access to the servers and, insofar as it may be necessary, access to the solid state of conventional drivers in order to remove such drives, to reconfigure all passwords and usernames and reactivate and reconnect the software solution for use by the Applicant and its clients.

3. Directing that the First and Second Respondents pay the costs of this application the one to pay the other to be absolved.

[3] In the founding affidavit in the main case, ITM's deponent, Dhevanand Munnynund Panday ('Panday'), stated that he had been involved in the software development industry for five years, particularly in projects aimed at empowering previously disadvantaged individuals in Africa. He had met Challa in 2013 and had taken him under his wing by involving him in Panday's projects.

[4] Challa introduced Panday to Singh, and negotiations began for the development of application solutions in the e-commerce sector. Panday established ITM as a special purpose vehicle to host and become the owner of the application and related software. Challa's role was that of an intermediary between Panday and Singh's company, BMS, which would be the developer and engineer of the solution. The application was intended to provide users and customers in rural areas with an efficient method of selling and buying goods and services and of transmitting funds.

[5] The negotiations gave rise to a written contract between ITM (represented by Panday) and BMS (represented by Singh), signed in Cape Town on 28 September 2017. This agreement confirmed that BMS had been appointed by ITM to design and develop the Great Offers e-commerce portal and that BMS had transferred all rights and intellectual property in the related software and platform to ITM. Panday alleged that because BMS was mandated to develop the software solution, BMS was at all times in possession of all the information necessary to develop, access and alter the solution.

[6] When the main application was launched in December 2019, BMS had invoiced ITM R1,9 million for its services. Panday alleged, further, that although BMS had confirmed that the solution had been developed for ITM, BMS and Challa had, despite demand, withheld all information regarding the software solution. ITM had been unable to access the solution or to exercise any control over it. Panday expressed uncertainty as to BMS and Challa's intentions but drew the inference that they were trying to sell the solution to a third party.

[7] Erasmus J's order was served on Challa on 26 February 2020 and at BMS' registered office and principal place of business on 28 February 2020. ITM's attorneys, O'Reilly Law Inc ('ORL'), also emailed the order to Challa and Singh.

[8] On 29 February 2020, and in response to the email attaching the order, Feke-Myeko Attorneys ('FMA') wrote to ORL to say that they had been instructed by Challa that compliance with the order 'will attract costs in the amount of R175 000 and this can be done in two months'. MFA furnished details of its bank account 'wherein the fund[s] must be transferred in order to comply with the court order'. Work would start 'with immediate effect once the amount has been paid'.

[9] In its reply of 2 March 2020, ORL stated that ITM would not make the requested payment. If there were costs involved to comply with the order, such costs were for Challa's account. ORL stated, further, that Challa had had ample opportunity to deliver the software solution and that if the solution had been ready for delivery, Challa would previously have advised ITM of the additional cost involved in handing it over. ITM thus drew the inference that the solution either was not complete or did not exist at all. Contempt proceedings were threatened if Challa failed to deliver the solution within 24 hours.

[10] It is unclear what happened over the next two and a half months. On 18 May 2020 the present application was launched for hearing on 23 June 2020. The notice of motion required the respondents to file their answering papers on or before 17 June 2020. On 29 May 2020 the respondents delivered a notice of opposition.

[11] It appears that there were settlement discussions, because on 3 June 2020 MFA wrote to ORL as follows:

'I have been in touch with [Challa] in terms of how this matter must be dealt with.

Our client is requesting an extension of time and as part of the settlement, kindly prepare a settlement agreement that will be signed and our client will at his cost transfer the necessary files that will enable this matter to be settled out of court. As part of the settlement our client will only be able to commence in June to transfer the system, kindly send us a notice of withdrawal.

By the end of October the system would have been transferred.

The agreement will include all that is needed to ensure the smooth transfer.

Kindly revert whether this is acceptable or not.'

[12] No settlement eventuated. On Friday 19 June 2019 MFA wrote to ORL to say that the respondents' opposing papers would be filed on Monday 22 June, adding: 'The clients are working on a number of systems to present the systems

availability and that will have an impact on the affidavit.' On the morning of 23 June ITM filed a replying affidavit, and I heard argument on the same day by audio-visual link.

[13] Challa made the main answering affidavit. There was a confirmatory affidavit from Singh. Challa gave a somewhat different account of the background. He said there was a verbal agreement between himself and ITM to develop the software solution. It was Challa who was responsible for the development of the solution. ITM requested the use of one of Challa's 'developers accounts' into which to deposit funds for the development because Challa did not have a business account. Challa approached BMS and Singh for this purpose. Challa 'issued agreements on [BMS] and [Singh) with [ITM]'. Funds received by BMS/Singh from ITM were transferred to Challa and to developers identified by Challa, because Challa had a 'network of developers he was working with'. BMS and Singh acted only on instructions from Challa and their sole responsibility was the disbursement of funds on his instructions.

[14] Challa admitted that the agreement was that the respondents would hand over the entire solution to ITM which would at all times be the rightful owner of the solution, but added the qualification that there were to be 'shares in the form of tokens distribution to other parties in the social security solution'. The blockchain technology used in the solution could not be held in a single server; it was a 'distributed system which has to be transparent to all the role players'. The call centre and e-commerce solution were 'hosted on a cloud server'.

[15] In regard to the respondents' alleged failure to hand over the solution, Challa said that the main cause of delay was that ITM would no longer agree to the distribution of tokens as initially agreed with Challa. A further cause of delay was the cost referred to in FMA's letter of 29 February 2020. ITM had failed to

assist Challa to finance these costs. Challa's failure to deliver was not deliberate: 'The respondents have always been in touch and informed the applicant of the costs and time-frames to transfer the system.' (In confirmation of this latter statement, Challa referred to FMA's letter of 29 February 2020, which postdated the granting of the order.)

[16] Challa denied that the respondents had 'refused' to transfer the solution; it had been practically impossible for Challa to do so without the funds. When funds were available to pay the developers, the transfer would be executed on ITM's instructions. The respondents proposed that the necessary funds be paid into the trust account of their attorneys. Once the platform was handed over, the money would be released to the respondents so that they could fulfil their obligations to third parties.

[17] Challa alleged that the system was 'fully developed' but that in order for it to be 'operational and live' the respondents needed to 'activate the smart contract which would hold the crypto currency'. This would require ITM to open 'a main Ethereum wallet which should be funded by no less than 15 Ethereum for transaction charges'. Even if transferred to ITM, the system would not be functional 'until this part is concluded by [ITM]'. (Ethereum is a crypto currency platform similar to Bitcoin.) Challa expressed himself willing and available to assist ITM 'for a smooth transition of the transfer of the software'.

[18] As to urgency, Challa said that 'by their very nature, software systems are developed and transferred over time'; the transfer could not be done in a few hours. Technicians had to be employed to undertake the transfer of the system. This included 'verifying server configuration, testing [and] resolving bugs that exist in any software solution once the transfer is initiated'. The timeframe was

two to six months, and it was necessary for Challa and ITM ‘to work together to find an amicable way for the transition to take place’.

[19] The replying affidavit was made by ITM’s attorney, Mr Brent Petersen. He reiterated that ITM would not pay any further funds to the respondents. He attached his firm’s letter of 2 March 2020 and FMA’s letter of 3 June 2020, pointing out, with reference to the latter, that Challa had therein accepted the costs associated with a transfer of the system. He denied that BMS was simply an account used by Challa. ITM made deposits to BMS based on invoices rendered by the latter. ITM’s contract was with BMS. Challa was merely an intermediary.

[20] Petersen said that the functionality of the software solution must be capable of being demonstrated in a controlled environment. The respondents had not submitted any evidence to demonstrate the existence and capabilities of the solution.

[21] It is beyond reasonable doubt that the respondents, upon whom the Erasmus J order was duly served and of which they had knowledge, failed to comply with it. In order to avoid the penal consequences of contempt (committal or a fine), they bear an evidential burden to put up evidence casting reasonable doubt on the conclusion that their non-compliance was deliberate and *mala fide* (the latter meaning knowledge that the non-compliance was unlawful). See *Fakie NO v CCII Systems (Pty)* 2006 (4) SA 326 (SCA) paras 9-10 and 42.

[22] Several points need to be made about the import of Erasmus J’s order. The first is that it did not require the respondents to undertake further development or to guarantee the handing over of a fully functioning software solution. The entire system, such as it was as at 10 February 2020, had to be handed over. If it was an incomplete system, or a system which was unable to function, or which had bugs, so be it. Once ITM was in possession of the system such as it was, ITM could

assess whether it had received value for money or whether it wished to pursue financial remedies against one or more of the respondents.

[23] The second is that the order did not leave scope for the respondents to demand payment as a precondition for compliance. If the respondents had wished to make the case that they were contractually entitled to an additional payment before the system was handed over, they should have opposed the main application. Erasmus J's order does not necessarily exclude a claim by one or more of the respondents for an additional contractual payment but it does exclude the putting up of such a claim as an excuse for non-compliance. Any such claim would have to be pursued independently of compliance with the order.

[24] The third point, similar to the second, is that the order does not entitle the respondents to insist that ITM distribute 'tokens' as a precondition to handing over the system. Once again, if the respondents wished to advance the case that they were not obliged to hand over the system until tokens were distributed, they should have done so in answer to the main case.

[25] Erasmus J's order is not ambiguous in any of these respects. The respondents do not say that they erroneously interpreted the order to require some additional work by them or to entitle them to demand payment or the distribution of tokens as a precondition for compliance. This disposes of the respondents' allegations about the further steps needed to make the solution 'operational and live' and to verify server configuration, test, resolve bugs and the like. It also disposes of their complaint that ITM failed to pay the demanded sum of R175 000 or to agree to the distribution of tokens.

[26] The absence of payment from ITM might, however, be relevant if the respondents' evidence were that they are unable to comply with the order because they lack the financial resources to pay third parties whose cooperation is needed

in order to transfer the system in its current state. If the respondents were financially unable to comply with the order, their failure would not be wilful.

[27] I do not think that the respondents' evidence is of a quality which raises a reasonable doubt in this respect. MFA's letter of 29 February 2020 did not say that the respondents lacked the money to comply with the order. The assertion was that compliance would 'attract costs', and a demand was made that ITM pay R175 000 in this regard. The demanded sum was not explained. No breakdown was furnished. It was not said whether and to what extent the amount represented fees demanded by the respondents or amounts payable to third parties.

[28] The answering papers do not take this much further. Challa does not state that the amount required is still R175 000. He provides no breakdown of costs supposedly involved or to whom they are payable. Having regard to other allegations in his affidavit, it seems that some of these costs must relate to further development which (according to the respondents) is required in order for the system to be 'operational and live" and to be fully configured, tested and debugged. As I have said, that is not work which the Erasmus J order requires to be done. Since the respondents do not dispute that the system has always belonged to ITM, and since they do not say that ITM has failed to pay for all work actually done to date on the development of the solution, it is unclear to me why handing over the system *as is* should attract any significant cost, and the respondents' papers fail to elucidate.

[29] The respondents have furnished no information as to their respective financial positions. Furthermore, and as pointed out in the replying affidavit (with reference to FMA's letter of 3 June 2020), they seem to have been prepared at that stage to transfer the system at their own cost. In the answering papers, filed about three weeks later, the respondents made the proposal that the money be paid into

FMA's trust account so that once the platform was handed over, funds might be released so that the respondents could fulfil their obligations to third parties. This indicates that the respondents do not need money upfront in order to hand over the system.

[30] The answering papers do not contain evidence indicating, as a reasonable possibility, that the respondents are objectively unable to hand over the system because of ITM's alleged refusal to distribute tokens. The need for tokens to be distributed was not alleged in MFA's letters of 29 February 2020 and 3 June 2020. The identity of persons to whom tokens are supposedly owed has not been disclosed. Since it is not in dispute that the respondents have throughout developed the solution on the basis that ITM is the sole owner, it is not apparent on what basis a distribution of tokens to third parties could be a precondition for ITM to exercise its sole ownership.

[31] As to the time it takes to hand over a software system, the respondents' allegations are vague in the extreme. No information is supplied as to the steps that will have to be taken to hand over the system as is. The estimate of 'two to six months' is unacceptably broad. One does not know to what extent this estimate presupposes the performance of further work in order to enhance the system beyond its current state. The respondents have failed to explain why, if it was not possible to hand over the system promptly, they did not oppose the main application and provide the court with information as to what period would be reasonable. They do not set out exactly what steps have to be taken and how long each step takes.

[32] During argument I pointed out to Mr Feke-Myeko that Erasmus J's order had not required the respondents to hand over a fully functioning system and that the obligation was simply to hand over the system as it exists. I asked him why

handing over the system as it exists, warts and all, should take so long. He agreed that this ought not to take long. I asked him to take instructions. After the lunch adjournment he told me that his instructions were to ask for 45 days but I am still left in the dark as to why so long is needed.

[33] In fairness to the respondents, I note that the notice of motion in the main case did not include a provision that such handover should occur 'within 24 hours' of the order. No time was specified. Presumably Erasmus J was persuaded that it was desirable to specify a time within which there should be compliance. Assuming, however, that 24 hours was unrealistic, the respondents could and should have applied to court in terms of rule 42(1)(*a*) or under the common law to have the order amended in accordance with a more realistic time-limit.

[34] It also needs to be emphasised that even if the 24-hour period was unrealistic, the contempt application was only launched about three months after the granting of the order. The question is not whether the respondents are in contempt by failing to comply within 24 hours but whether they are in content by failing to do so by the time the contempt application was launched.

[35] Furthermore, although the main focus has fallen on the handing over of the entire solution, Erasmus J's order required the respondents to do a number of specific things, even though in themselves they might not amount to the handing over of the entire system. The respondents have not explained why they have failed to provide to ITM with (a) the usernames and passwords required to gain access to the software solution; (b) information in writing as to the exact location of the servers on which the solution is hosted; (c) physical access to the servers and relevant hard drives. Even now, these matters remain undisclosed. One can understand why ITM entertains suspicions that the system may not exist at all and that it has been 'fleeced'.

[36] In the circumstances, I am satisfied beyond reasonable doubt that the respondents have displayed a contemptuous attitude towards their obligations under the order and that they have done so deliberately and with knowledge that they were acting in wrongful violation of the order. Singh, as the sole director and controlling mind of BMS, may permissibly be found in contempt, even though he was not in his personal capacity a party to the main application (*Twentieth Century Fox Film Corporation & others v Playboy Films (Pty) Ltd & another* 1978 (3) SA 202 (W) at 203C-D; *Readam SA (Pty) Ltd v BSB International Link CC & others* 2017 (5) SA 183 (GJ), where the second respondent, Slim, who was the controlling mind of the first respondent company, was found guilty of contempt and sentenced to suspended incarceration).

[37] For unexplained reasons, ITM's notice of motion only seeks findings of contempt against Challa and Singh, not also against BMS. Although a finding of contempt is also justified as against BMS, I will not make an order directly against it, since none was sought.

[38] Although the respondents' contempt calls for sanction, the primary focus at this stage, particularly since this is the first (and hopefully only) contempt application that will be required in this matter, must be to bring about compliance with Erasmus J's order. Although the respondents have by now had four months to comply and have not justified any significant extension of time, ITM's counsel submitted a draft order which would give the respondents a further two weeks. Since this judgment has, due to my other commitments, already been delayed by slightly more than a week, this will give the respondents more than three weeks from the date of the hearing to achieve compliance.

[39] Although the respondents' allegations about the time and money they need are flimsy, I intend to include, in my order, directions for the filing by the

respondents of detailed affidavits if for any reason they are unable to comply with any part of the order within the specified period. This is not because, at present, they have adduced satisfactory evidence to raise a reasonable doubt as to their financial and/or technical ability to comply but to ensure that if they hereafter claim such an inability, the court and ITM are given proper particulars of the inability.

[40] As to sanction, IMT in its notice of motion proposed a fine of R100 000, failing payment of which committal to prison for 30 days. In the alternative, IMT proposed that the said sanction be suspended for three years subject to compliance with my order and Erasmus J's order. In the draft order submitted by IMT's counsel, it is proposed that the respondents be committed to prison for a period of 30 days, suspended for six months subject to compliance with my order and Erasmus J's order.

[41] I have come to the conclusion that I should not order incarceration, even suspended, at this stage. Hopefully the present judgment and order will be enough to bring the respondents to their senses. I therefore intend to impose a fine of R30 000, suspended on appropriate conditions.

[42] IMT has asked for costs on the attorney and own client scale. On my understanding, the insertion of the word 'own' adds nothing to an order for the payment of costs on the attorney and client scale. Subject to this, it is customary in contempt applications for costs to be awarded on the attorney and client scale (cf *Readam supra* para 45) and I see no reason not to do so in this case.

[43] I make the following order:

(a) It is declared that the second and third respondents have committed contempt of the order granted in this matter by Erasmus J on 10 February 2020 ('the Erasmus order') and they are found guilty of such contempt.

(b) Each of the second and third respondents is sentenced to a fine of R30 000, which sentence is suspended for a period of one year on condition that the said respondents, as well as the first respondent as represented by the third respondent,

(i) timeously comply with the terms of this order and with the Erasmus order;

(ii) do not, during the period of suspension, commit contempt of this order or of the Erasmus order.

(c) The respondents (including the first respondent) must comply with the Erasmus order by not later than Monday 20 July 2020.

(d) If the respondents fail to comply with the Erasmus order by Monday 20 July 2020, and if they claim that they were unable to do so, they must nevertheless comply with so much of the Erasmus order as it is within their power to do.

(e) In the eventuality envisaged in para (d) above, the respondents must, by not later than Friday 24 July 2020, deliver affidavits containing the following information:

(i) If the respondents claim that they can only comply with the order by spending money and that they lack the necessary financial resources, their affidavits must contain the following details:

(aa) a breakdown of the amounts that have to be paid in order to achieve compliance;

(bb) the names, physical addresses, email addresses and telephone numbers of the persons to whom money has to be paid;

(cc) the services for which each such payment is required;

(dd) sufficient information about each such respondent’s financial position to establish that they are unable to effect the payments required.

(ii) If the respondents claim that compliance requires cooperation from third parties which such third parties have refused to give, the affidavits must contain the following details:

(aa) the names, physical addresses, email addresses and telephone numbers of the persons whose cooperation is required;

(bb) the nature of the cooperation required from each such person;

(cc) particulars of when the cooperation was requested and when it was refused.

(iii) If the respondents claim that there are technical obstacle making compliance impossible, the affidavits must contain the following details:

(aa) precise particulars of the technical obstacles;

(bb) the actins needed to overcome the obstacles;

(cc) the anticipated date by which each such obstacle will be overcome.

(f) The respondents, jointly and severally, are ordered to pay the applicant's costs of suit on the attorney and client scale.

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

| | |
|---|---|
| For Applicant | G Potgieter<br>Instructed by<br>O'Reilly Law Inc, Tygervalley<br>c/o England Slabbert Attorneys Inc<br>1st Floor, Equity House<br>107 St Georges Mall<br>Cape Town |
| For Respondent | T Feke-Myeko<br>Feke Myeko Attorneys<br>102 Lapa Building<br>380 Bosman Street<br>Pretoria |