

SOUTH AFRICA / JUDGMENT

Eco Tabs Gauteng (Pty) Ltd v Eco Tabs Africa (Pty) Ltd and Another (3212/2019) [2020] ZAMPMBHC 14 (17 June 2020)

[2020] ZAMPMBHC 14

COURT

Mbombela High Court, Mpumalanga

BEFORE

Kgoele

CASE / FILE NUMBER

3212/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MBOMBELA

(MAIN

SEAT)

CASE

NO: 3212/2019

In

the matter between:

ECO

TABS GAUTENG (PTY)

LTD Applicant

and

ECO

TABS AFRICA (PTY)

LTD First

Respondent

SHAUN

PATRICK

O'REGAN Second

Respondent

JUDGMENT

KGOELE J

1. This is an opposed application to find the first and the second respondents in contempt of Court. The application had its origin in the urgent Court, where it was struck off the roll due to lack of urgency. The only question before this Court is whether the first and second respondents are in contempt of the Court Order granted under case no: 1973/2018 on 1st February 2019. If the Court finds the respondents in contempt, the applicant requests the Court to further authorize it to approach this Court on the same papers for an order to imprison the second respondent.
2. The second respondent is the sole director of the first respondent. The applicant and the first respondent are currently involved in a pending action in this Court. There is a dispute arising from the validity of the cancellation of a distribution agreement entered into between the applicant and the first respondent on 31 January 2017, in terms of which the second respondent acted in his capacity as the representative of the first respondent. In order to have something in place to govern the situation pending the outcome of the action proceedings, they entered into an interim written agreement which was made an Order of Court on 1 February 2019.
3. The two contentious terms of the agreement were couched as follows in the agreement that was made an Order of Court:

“ 5.1 As agreed to in clause 1 of the January 31st 2017 agreement mentioned above, Eco Tabs Gauteng will continue as the exclusive distributors of the Eco Tabs and affiliated products throughout Gauteng, Swaziland and the area incorporating the West Witwatersrand Gold Mining Region, Eco Tabs Gauteng will further continue to be the exclusive distributor for all Eskom stations in South Africa and the African continent.”

AND

5.14 Eco Tabs Africa will not contact any of Eco Tabs Gauteng’s clients, will not interfere or be obstructive towards Eco Tabs Gauteng’s client’s relationships with Eco Tabs Gauteng and will not do business with any of Eco Tabs Gauteng’s clients”

4. Subsequent to the agreement being made an Order above, it is the applicant’s version that the respondents whilst being fully aware of the Court Order:
 - a) Contacted the applicant’s clients namely Eskom in contravention of paragraph 5.14 of the agreement. This came after the applicant received correspondence on 31 July 2019 which had been sent by the first respondent to Eskom;

- b) Illicitly and underhandedly obtained information from Eskom relating to the applicant's client's confidential contractual relationship with Eskom also in contravention of paragraph 5.1 of the said agreement;
 - c) Approached the applicant's customers with the intention of supplying Eco Tabs products directly to them;
 - d) Intercepted an invitation addressed to the applicant's staff from Johannesburg Water in order to attend a site meeting to tender for the remediation of certain bodies under the control of Johannesburg Water and did not forward this to the applicant;
 - e) Instructed one Bruce Goldsby to attend the scope of work briefing held by Johannesburg Water at Rosenttenville, Johannes on behalf of Eco Tab Africa.
5. The applicant further avers that immediately after the first conduct mentioned under (a) was brought to its notice, it sent a letter to the respondents so as to request them to desist from this conduct, but the respondents ignored same, and instead continued with the conduct mentioned in (b). It is the case of the applicant that it approached this Court after several letters were written to the respondents depicting the several conducts above, but the respondents failed to give an undertaking that they will stop contacting the applicant's clients. Instead, their attorney replied to their letters in a very short answer which was couched as follows:

"Please note that our client is currently abroad and we are unable to take instructions at this stage".

6. The applicant finally submits that the actions of the respondents are clearly indicative of the fact that they will not adhere to the Court Order or agreement, and their sole purpose is to take over/poach the applicant's clients at all costs. Further that, the respondents are simply flagrantly and intentionally on a mala fide basis, disobeying this Court's Order.
7. In his opposing papers the respondents raised two Points in Limine namely: No proper service of the application and misjoinder. I choose to deal with the Points in Limine first.

No proper service

8. The respondents' submission in this regard is that there is no proper service on the second respondent because no personal service was effected on him. Further that, it is trite law that personal service is required especially where imprisonment is sought as a sanction in any Contempt of Court proceedings. This application was only served on the first respondent's attorney of record. Therefore, the application is fatally defective and stands to be dismissed on this point alone.
9. I fully agree with the applicant's submission that this Point in Limine does not hold water. It is common cause that the applicant and the respondents are involved in a pending action before this Court. It is further common cause that the Court Order which is the subject matter of this application was issued in an application proceeding in this Court. Service on an attorney of record is therefore not irregular in the circumstances of this case.

Furthermore, the primary goal of the application coming to the respondents' attention was achieved despite it being served on their attorney of record. This is also shown by the fact that the notice of intention to oppose was filed in this Court on 3 September/2019, which was clear 7 days before the urgent application was set down for and heard. That is why the urgent application was opposed including this application. In my view, there was no prejudice on the part of the respondents occasioned by the manner of service, and in particular, the first respondent did not point to any. In addition to this, the prayers sought by the applicant do not clearly envisage imprisonment at the present moment, but, a declarator of Contempt of Court.

Misjoinder

10. The second respondent avers that he was not a party to the Order that was granted under case number: 1973/2018 and has only acted as a representative of the first respondent, therefore there is a misjoinder. This Point in Limine raised is also in my view misconceived. I fully agree with the applicant's submission that it is clear that the applicant joined the second respondent in this proceedings firstly, out of abundance of caution and also, to satisfy the Court that he is fully aware of the Court Order against the first respondent (the company). Secondly, according to the averments made by the applicant to substantiate its application, the action/conduct complained of clearly points to the fact that he was personally aiding and abetting the company to breach the Order of Court. In this regard the applicant avers, amongst others in its papers, that he is the one who contacted the applicant's clients and also withheld information from the applicant. These alleged action/conduct clearly directly affect him as the sole director of the company. A director of a company, who with knowledge of a Court Order against a company, causes the company to disobey the Court Order, lends himself to guilty of a Contempt of Court.
11. In the case of Twentieth Century Fox Film Corporation and others v Playboy Films (Pty) Ltd and another[1] at paragraph 203 King AJ stated:

"A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is

himself guilty of a contempt of Court. By his actor or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a court would have difficulty in ensuring that an order ad factum praestandum against a company is enforced by a punitive order, Vide Halsbury 4th ed vol 9 at 75. Consequently, Jagger who had knowledge of the order of Court is guilty of a contempt of an order of this court. An order ad factum praestandum against a company should also be served on its directors if a punitive order is to be sought against the directors in order to establish knowledge of the order of Court."

12. In my view, the applicant successfully made factual foundation for the joinder of the second respondents.

CONTEMPT OF COURT

13. The requisites which must be certified beyond reasonable doubt before a Contempt of Court Order can be issued are:
 - a. an order was granted;
 - b. against the respondent;
 - c. the respondent was either served with the Order or was informed of its contents and had knowledge of same; and
 - d. the respondent disobeyed the Order or neglected to comply with it.
14. It appears from the papers that requirements (a) and (b) are common cause between the parties. As far as (c) is concerned, even though the second respondent decries that the Order was not served on him, he does not necessarily deny that he has knowledge of the Order from the contents of the affidavit disposed by him. What is clear from the papers is that this Order was granted by Strydom AJ in an application whereby the first respondent opposed the merits and was legally represented. It is difficult for one to conceive that the second respondent, as the sole director of the first respondent, was not present in Court when the Order was made. The contents of the answers given in his affidavit in opposition of this Contempt of Court application as it will be apparent later in this judgment, reveals that he was present when the Order was made. I am thus satisfied that the respondents were informed of the Order and or, had knowledge of the contents of same. The three requirements were thus met, and the last one this Court has to grapple with is the requirement under (d).
15. In reply to the applicant's case, the second respondent avers that the applicant did not approach this Court with clean hands as it violated the same Order on the same day that it was granted by contracting one John O'Malley, a representative of Eco Tabs USA via Facebook informing him of the Order. Apart from this averment being proof that the second respondent was aware of the Order and was probably present when the Order was made, this averment depicts that the second respondent does not seriously and convincingly deny the conduct complained of by the applicant. It furthermore does not take away his conduct which is complained of. What is even worse is that, the first respondent only makes bare allegation of the applicant's disobedience of the Order and does not quote or refer to a paragraph in the agreement which the applicant was allegedly contravening by informing others and or John, of the Order. This defence is totally ill-conceived. It is quite clear that the letter was sent to keep all the relevant role players informed of the Court Order, as the applicant explained in its replying affidavit. After all, the applicant was duty bound to inform whoever will be affected by the Order.
16. In their answering affidavit, the respondents attached various remittance advices dating from 29 November 2018 till 28 May 2019 which according to the second respondent, he retrieved from Eskom and serve as proof of his allegation that applicant is also committing tender fraud. The respondents pin the colour of their mast on this perceived tender fraud by

the applicant and also, rely on it as ammunition and the reason why they contacted Eskom. It is better to quote the said paragraph verbatim from their answering affidavit because it is crucial to the decision in this matter. In paragraph 33 the deponent to the answering affidavit who is the second respondent said the following:

“The first respondent, with the reasonable belief that the applicant was committing tender fraud, requested that Mr. Boshoft to address a letter to Eskom bringing the potential fraud to the attention of Eskom. It was with this intention that the first respondent contacted Eskom and not with the intention of violating the Court Order and as such the first respondent’s conduct was not mala fide.”

Further in paragraph 34 the following was said:

“Should the above honourable Court find that the aforementioned conduct amounts to contempt of Court, I hereby apologize to the court...as

it was not the intention to offend the dignity and respect of the Court but rather to prevent fraud being perpetrated against Eskom...”

17. I may pause here to indicate that what the applicant is perceived to be doing, which according to the respondents amounts to fraud, is not worth of being mentioned in this judgment. Besides it being irrelevant for the consideration of this matter, it is couched in a convoluted manner and it will just add to the prolixity of this judgment, which fact I am totally avoiding. Of significance is that the above quoted paragraphs clearly signify that the respondents admit to the conduct the applicant avers that they contacted Eskom. Whether it was to report the alleged fraud or not, is irrelevant for the issue before this Court. If it was indeed because of the alleged fraud on the part of the applicant, the respondents had a lot of avenues/authorities to resort/report to in order to expose this rather than contacting Eskom. To now allege contempt on the side of the applicant and or fraud is too late, irrelevant and also unsubstantiated.
18. The other admission the respondents made is regarding the attendance of the meeting by Mr Bruce Goldsby at Johannesburg Water. He said the meeting was attended to keep up to date with the general tender requirements within its industry and any changes in tender procedure. That they did not specifically engage with Johannesburg Water at the meeting. Further that, they never intended to tender. The respondents also submitted that they attempted to inform the applicant about the tender.
19. The reason for attending the meeting as provided cannot salvage the case of the respondents. By mere attendance of a meeting under the guise of Eco Tabs, its contempt on its own. Whether at that meeting the respondents did or not engage with Johannesburg Water is completely irrelevant. The respondents, on the same breath allege that they attempted to forward the tender information to the applicant as soon as they got the information about the tender. But what comes out vividly clear from this averment is that they do not explain what happened or what caused the “attempt” to become a failure. This unfortunately lend credence to the conduct as explained by the applicant to the effect that

the respondents intercepted this tender information document sent to it, and did not forward it, which resulted in the applicant not being able to tender for the specific project. This is sufficient

proof disobedience of the Order and of the damage which is suffered by the applicant as a result of the respondents' actions.

20. I am thus satisfied that the applicant managed to prove all the requisite requirements that the respondents disobeyed and did not

comply with the Court Order. Having made this finding, the respondents therefore bears the legal burden to disprove wilfulness

and mala fides. I can do no better than quote the following paragraph in the case of Gauteng Province Driving School Association and Others v Amaryllis Investments(PTY) Ltd and another[2] where the Supreme Court of Appeal re-iterated the test applicable in this regard as follows:

"[19] Respect for the authority of the courts is foundational to the rule of law. Civil contempt is not solely an issue inter partes, but also an issue between the court and the party who has failed to comply with its order. It is thus as much about vindicating judicial authority as it is about vindicating individual rights. In Fakie NO v CCII Systems (Pty) Ltd 2006 (4) 326 (SCA) para 41, Cameron JA stated:

'Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisite contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt'

21. In my view, an analysis of all the reasons the respondents advanced to justify the various conduct they admitted to, cannot, as already indicated above, avail them. The respondents therefore failed dismally to advance any aorta of evidence which establishes that there is a reasonable doubt as to whether their non-compliance was not wilful and mala fide. I am also satisfied that the second applicant disobeyed the Court Order in his capacity as the director of the first respondent. The conclusion that I reach is that Contempt of Court was thus established beyond a reasonable doubt in respect of both respondents.

22. Consequently, the following Order is made;

22.1 That the first and second respondents are found to be in Contempt of the Court Order issued out of this Honourable Court on 1 February 2019 by the Honourable Acting Judge Strydom;

22.2 That the second respondent be committed to imprisonment for Contempt of Court for a period of 30 days;

22.3 The Order made in paragraph 22.2 is hereby suspended for a period of two years on condition that the respondents comply with the Order granted 1 February 2019 within 7 (seven) days of this Order being personally served on him;

22.4 That should the respondents fail to comply with this Court Order, the applicant be allowed to approach the above Honourable Court for an order for the second respondent's committal to prison, on the same papers, supplemented where necessary;

22.5 That the applicant be granted leave to supplement his papers, should the need arise;

22.6 That the respondents pay the costs of this application jointly and severally, the one paying the other be absolved.

JUDGE OF THE HIGH COURT

APPEARANCES:

Legal representative of the Applicant: Adv. J Prinsloo

Instructed by: IM Hutchesson Attorneys

c/o Swanepoel & Partners Inc

Counsel for the Respondent: Adv. DM Dennis

Instructed by: De Waal Boshoff Attorneys

c/o Christo Smith Attorneys

Date reserved 28 May 2020

Date handed down 17 June 2020

[1] 1978

(3) SA 202 (W)

[2] (0006/11)

[2011] ZASCA 237 1 December 2011)

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