

SOUTH AFRICA / JUDGMENT

Eldo Telecommunications Proprietary Limited and Others v Ohlsen and Others (17615/2020) [2020] ZAGPJHC 401 (31 August 2020)

[2020] ZAGPJHC 401**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Twala

CASE / FILE NUMBER

17615/2020

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 17615/2020****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****REVISED****Date:** 31/8/2020
In**the matter between:** ELDO
TELECOMMUNICATIONS PROPRIETARY
LIMITED
FIRST APPLICANT**DAMON:** IRVAN CLINTON CLIVE
SECOND APPLICANT

BHAWAN: MITESH
THIRD APPLICANT
AND
OHLSEN: TIM
UWE
FIRST RESPONDENT
WAINWRIGHT: MATTHEW
JAMES
SECOND RESPONDENT
ELDO GROUP HOLDINGS
PROPRIETARY
LIMITED
THIRD RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 31st of August 2020.

TWALA J

- [1] This is an application brought on urgent basis by the applicants seeking the enforcement of the court order granted by this Court on the 31st of July 2020 under the above case number 10249/2020, including an order that the first and second respondents are held in contempt of the said Court order.
- [2] The first and second respondents have filed its opposition to this application. In these proceedings my reference to the respondents should be construed as referring to the first and second respondents.
- [3] The genesis of this case emanates from an order consented to by the parties and granted by this Court on the 31st of July

2020. To put matters in the proper context, it is necessary for to now state the contentious paragraphs of the Court order being paragraphs 7 and 8 which provide as follows:

“Para 7 the applicants and the respondents undertake that only legitimate business expenses of the 1st applicant shall be effected by way of online banking payments on the account, and which payments require the prior consent of both the 1st respondent and the 3rd applicant, including but not limited to payment of salaries, operational expenses, invoices of suppliers and contractors legitimately employed;

Para 8 the applicants and the respondents undertake that all due and payable legitimate business expenses of the 1st applicant, including but not limited to salaries, operational expenses, invoices of suppliers and contractors legitimately employed, shall be effected as expeditiously as may be reasonably practical;”

- [4] Advocate Pincus SC contended on behalf of the respondents that, although matters of contempt of Court are inherently urgent, this matter was not urgent for it involves the payment of creditors and salaries. It does not deserve, so it was argued, to be brought in such a haste that the respondents are not given sufficient time as provided for in clause 9.23 of the Practice Manual of this Court. Furthermore, it was contended that even if the matter is found to be urgent that it should be enrolled in this Court, the applicants do not have the necessary authority to prosecute this application for there is no resolution of the directors authorising the deponent to act on behalf of the first applicant.
- [5] It was contended by Advocate Benson for the applicants that the majority of the directors signed the resolution circulated to them in terms of section 74 of the Companies Act, 71 of 2008 – hence a power of attorney has been filed appointing the legal representatives to proceed and act on behalf of the first applicant. Furthermore, so it was contended, the contempt of Court proceedings are by their nature urgent and the respondents do not dispute that. It is necessary for the Courts to enforce obedience of its orders otherwise the public will lose confidence in the legal system.
- [6] It is trite that the rules of the Court are there to facilitate the smooth running of the Court. Courts have been enjoined to encourage the litigants and their legal representatives to comply with the rules otherwise the Court system will be thrown in disarray. However, the Court has a discretion to allow non-compliance where there is no substantial prejudice to be suffered by any of the parties and where it is in the interests of justice.
- [7] In *Khunou & Others v Fihrrer & Son* 1982 (3) SA (WLD) the Court stated the following:
- “The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.”*
- [8] In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla & Another* (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY

2014) the court stated the following:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

- [9] I agree that the applicants did not give the respondents sufficient time to file their papers as provided for in the practice manual of this Court. However the Court, being mindful that it was dealing with a contempt of Court case, it allowed the matter to stand over for two days giving the parties ample time to attend to the filing of the papers. Since the contempt of the Court order proceedings are by their nature urgent and the parties having had sufficient time to file their papers, I condoned the non-compliance by the applicants with the practice manual of this Court for I could not find any prejudice to be suffered by the respondents. I therefore ordered that the matter be heard as it was urgent.
- [10] Rule 7 of the Uniform Rules of Court requires a power of attorney to act to be filed, but that the authority of anyone acting on behalf of a party may be disputed, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act.
- [11] It is on record that upon receipt of the answering affidavit wherein the issue of authority was raised by the respondents, the applicants immediately circulated the notice in terms of Section 74 of the Companies Act to the other directors to consent and or sign the resolution authorising the deponent to act on behalf of the first applicant and the majority of directors duly signed the resolution – hence a power of attorney was filed appointing the legal representatives to represent the applicants. I am therefore of the respectful view that the applicants have the necessary authority to act in this case. Moreover, in my view these proceedings are a continuation of the matter where the respondents consented to an order which order the applicants are now intent of enforcing. My understanding of the above quoted authorities is that non-compliance with the rules by the litigants should not be encouraged but may be condoned where the interest of justice so demand and would be best served.
- [12] It is long established law that, for an applicant to prove that the respondent is in contempt of a Court order, it must prove: (a) the existence of the court order; (b) service or notice thereof; (c) non-compliance with the terms of the order and (d) wilfulness and mala fides beyond reasonable doubt on the part of the respondent. (See Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Case No: CCT217/15 and CCT 99/2016 (26 September 2017))
- [13] It is common cause that the applicants have met requirements (a) to
- (c) and that now the burden rests with the respondents to prove that they acted reasonably in the circumstances and that there was no mala fides on their part.
- [14] I find myself in disagreement with Advocate Pincus SC that the Court order at paragraph 7 requires the parties to discuss and obtain consent from the first respondent before payment is made. If that was intended by the order, then a mechanism would have been provided to resolve any disagreements at that point and the order does not have that. It is on record that

the payments the first respondent is querying relate to a company which has been doing business with the first applicant for some time and has been paid with no issues until the dispute arose between the directors. In my respectful view, it is disingenuous for the respondents to now come up with some other interpretation of the Court order. Nevertheless, the respondents do not dispute that the first applicant has been doing business with this company for some time but now question the involvement of the second applicant in the said company as a director thereof and that he did not disclose to them which issue was not raised in the main application when they consented to the order. In my view this argument is irrelevant to these proceedings.

- [15] Furthermore, it is on record that the applicants have attempted to communicate with the respondents when they realised that the first respondent has failed to authorise the payments and they were ignored. As time progressed, the respondents requested the source documents of the legitimate business expenses and these were furnished to them and nothing happened thereafter. The applicants only became aware of the respondents concern in not paying these business expenses when the respondents filed their answering affidavit in these proceedings. If the Court order intended that the parties should negotiate or that the consent of the first respondent should be sought in the sense of analysing each and every transaction and the respondents do not want to engage with the applicants or simply ignore them, then that would defeat the purpose of the order. Even if it is accepted for a moment that the consent of the respondents was necessary to be sought before payment is made of the business expenses as contended for by the respondents, the unavoidable conclusion in this case is that the consent of the respondents was unreasonable withheld and was to frustrate the applicants from conducting the business of the first applicant.
- [16] I am in agreement with Advocate Benson that the respondents are conflating issues when they now raise the issue of non-payment of certain taxes to the South African Revenue Service for refusing to pay the legitimate business expenses as ordered. The first respondent is a director of the first applicant and has a fiduciary duty to report the governance issues of the company to the relevant authorities. It cannot be said that that justifies disobedience of the Court order. Although I accept that there is animosity between the directors of the first applicant, the respondents deliberately and intentionally disobeyed the Court order to force their hand in the business of the first applicant. Nothing turns on the issue that the respondents acted on legal advice. I hold the view that, if the respondents were advised by their legal representatives that they should not communicate with the applicants regarding their concern on the legitimate business expense and simply ignore to comply with the Court order, then that legal advice was patently wrong and they have to live with the consequences thereof.
- [17] I therefore conclude that the respondents conduct in the circumstances of this case was unreasonable and mala fide. The applicants have therefore proven their case against the respondents beyond reasonable doubt and are therefore entitled to the relief they seek although with some amendments.

[18] In the premises, I make the following order:

1. Paragraphs 1; 2; 3; 5; 6 and 7 of the notice of motion are granted

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing:

28th August 2020

Date of Judgment:

31st August 2020

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Prepared on 14 October 2026 · Esheria