

SOUTH AFRICA / JUDGMENT

Jim Fung Industrial Limited v National Regulator for Compulsory and Another (21624/09) [2011] ZAGPPHC 111 (27 May 2011)

[2011] ZAGPPHC 111

COURT

North Gauteng High Court, Pretoria

BEFORE

Louw, Webster, Rabie

CASE / FILE NUMBER

21624/09

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Source record**NOT REPORTABLE****IN THE NORTH GAUTENG HIGH
COURT,
PRETORIA REPUBLIC OF
SOUTH AFRICA****DATE: 27 MAY 2011****CASE NO 21624/09****In**

the application between:

JIM
FUNG INDUSTRIAL
LIMITED.....Applicant
and
NATIONAL
REGULATOR FOR
COMPULSORY.....First
Respondent
SPECIFICATIONS
OF SOUTH AFRICA
SCHNEIDER
ELECTRIC SOUTH AFRICA (PTY) LTD.....Second
Respondent

JUDGMENT

LOUWJ,

- [1] On 13 October 2009 the applicant launched an urgent application ("the urgent application") in this Court for an order interdicting and restraining the first respondent from destroying the applicant's electrical products pending the outcome of a review application.
- [2] On 22 January 2010, by agreement between the parties, the order attached at page 292 of the papers was made an order of court ("the court order").
- [3] On 29 June 2010 the first respondent served an application under the above case number on the applicant alleging that the applicant was in contempt of the court order ("the contempt application").
- [4] Both applications were enrolled for hearing on Monday, 6 December 2010.
- [5] I have to determine:
- [5.1] the costs of the urgent application;
- [5.2] the contempt application. BACKGROUND
- [6] The applicant is a Hong Kong based manufacturer of electronic power cord sets, electrical plugs and a variety of electrical socket-outlet adaptors.
- [7] The first respondent is the National Regulator for Compulsory Specifications of South Africa, an administrative body and a juristic person established in terms of section 3(1) of the National Regulator for Compulsory Specifications Act 5 of 2008 ("the Act").
- [8] The second respondent is Schneider Electric South Africa (Pty) Ltd ("Schneider"). The applicant manufactured a variety of electrical adaptors for Schneider. No relief was sought against Schneider in the urgent application.

THE URGENT APPLICATION LAUNCHED ON 13 OCTOBER 2009

- [9] On or about 3 August 2009 the first respondent issued a Directive ("the 3 August 2009 Directive"), alleging that the products that were listed in the Directive ("the Directive products"), identified as snapper 2, 3 and 31 electrical products, were non compliant with the SABS Compulsory Specification VC8008 Plugs, socket-outlets and socket-outlet adaptors read with SANS 60884-1:2006 ("the Specification").
- [10] The Directive products were manufactured by the applicant.
- [11] The applicant only received the 3 August 2009 Directive on 17 September 2009.

- [12] The 3 August 2009 Directive specified that the first respondent required that the applicant "obtain a letter from the Regulator of the country of its origin within 60 days from the date hereto to the effect that the above-mentioned consignment or batch of article will be accepted by the aforesaid Regulator".
- [13] On 30 September 2009 Edward Nathan Sonnenburgs ("ENS"), the applicant's attorney of record, requested an extension until 3 December 2009 to allow the applicant to gather information regarding the alleged contravention of the compulsory specification and to make arrangements for the return of the goods to China. The first respondent was requested to provide a copy of the SABS test report on which the 3 August 2009 Directive was based.
- [14] Notwithstanding the advices to the first respondent that the Hong Kong Regulatory Authority would not issue any letter of authority

unless it had been provided with the SABS report, and despite the request for an extension until 3 December 2009 to, inter alia, obtain the letter of authority, the NRCS issued a notice on 8 October 2009 in terms of which the first respondent intended to take the Directive products into storage on Tuesday, 13 October 2009 for purposes of destruction.

- [15] On or about 12 October 2009 ENS received a letter from the first respondent in which the first respondent refused to grant the extension sought by the applicant. In addition, the first respondent refused the applicant access to the test reports upon which the 3 August 2009 Directive was based.
- [16] The issue of the destruction notice coupled with the first respondent's refusal to give a written undertaking that it would not destroy the products pending the outcome of further investigations by the applicant and the determination of application proceedings that the applicant intended to institute caused the applicant to move for urgent interim interdictory relief.
- [17] On 12 October 2009 ENS sent a letter notifying the first respondent that the applicant would immediately proceed with an urgent
- application.
- [18] On the evening of 12 October 2009, the first respondent sent a further facsimile to ENS at 18h58 that evening in which the first respondent indicated that it would grant the applicant an extension on condition, inter alia, that:

[18.1] the Directive products are removed from Schneider's possession by no later than close of business on 12 October 2009 and placed in the possession of the first respondent;

[18.2] the applicant paid the costs associated with the removal, transportation, storage and any other associated costs which might be incurred;

[18.3] the applicant would take all reasonable steps to ensure that the non-compliant products be returned to China as soon as possible,

failing which the products would be destroyed.

[19] The applicant was further advised that the Board of the first respondent would meet on 22 October 2009 to decide on the length of the extension that would be afforded to the applicant.

[20] The applicant's attorney only had sight of this letter after the urgent application was launched on the morning of 13 October 2009.

[21] The applicant sought the following order in the urgent application:

[21.1] interdicting and restraining the first respondent from destroying the products pending the outcome of an application reviewing and setting aside the decision of the first respondent to issue the 8 October 2009 Directive;

[21.2] Directing the first respondent to provide a copy of the report upon which the 3 August 2009 Directive is based.

[22] On 13 October 2009 ENS received a further letter from the first respondent in which the first respondent sought an undertaking, inter alia, that the applicant would not proceed with the urgent application on 16 October 2009 in light of the contents of the letter sent the previous evening.

[23] In a letter from ENS dated 13 October 2009 the applicant confirmed that:

[23.1] the first respondent had undertaken not to destroy the products referred to in the 3 August 2009 Directive pending a meeting of the NRCS Board on 22 October 2009 at which the first respondent would motivate for a reasonable extension to be granted to the applicant in order for the applicant to obtain the letter from the Chinese Regulator regarding the return of the products to China and to arrange the return accordingly;

[23.2] the applicant would communicate to the first respondent, before 22 October 2009, the time period required in order for the applicant to obtain the letter from the Chinese Regulator;

[23.3] Schneider had confirmed that the products referred to in the 3 August 2009 Directive would be available for removal by the NRCS' at second respondent's head offices on Friday, 16 October 2009;

[23.4] In the event that the Board failed to grant a reasonable extension, the applicant would proceed with the urgent application.

[24] The urgent application was set down for 16 October 2009.

[25] No answering affidavits were filed in the urgent application due to the various responses received from the first respondent after service of the urgent application on it.

[26] The urgent application was removed from the roll on 14 October 2009.

[27] The applicant was provided, for the first time, with a copy of the SABS test report on which the 3 August 2009 Directive is alleged to be based, on 13 October 2009 under cover of a letter from Schneider's attorneys.

[28] In the circumstances, the Applicant contends it was necessary, in light of the first respondent's unreasonable attitude in refusing to grant an extension to the applicant to obtain the letter of authority and in view of the threat that the applicant's products would be destroyed, to proceed with the urgent application

THE REINSTATEMENT OF THE URGENT APPLICATION - 1 DECEMBER 2009

[29] The Directive products were in Schneiders possession.

[30] Arrangements were made to transport the Directive products on 16 October 2009 to facilities ear-marked by the first respondent. The applicant and Schneider had agreed that Schneider, who was in possession of the Directive products, would ensure that only the products that were listed in the 3 August 2009 Directive would be transported to the first respondent's facility.

[31] At the behest of the first respondent, the storage facility was changed from the Germiston storage facility to a storage facility at Access Freight International (Pty) Ltd, 85 Maple Street, Pomona, Kempton Park ("the Access warehouse").

[32] On 23 October 2009 the applicant was notified that the Board of the first respondent agreed to grant the applicant an extension until 3 December 2009 to obtain the necessary letter of authority from the Chinese Regulator ("the 23 October 2009 Directive"),

failing which the Directive products would be destroyed.

[33] Once a count of the products in the Access warehouse had been done, the applicant concluded, based on the quantity of products in the Access warehouse, that Schneider delivered products to the first respondent that fell outside the terms of the 3 August 2009 Directive. Only products produced before December 2007 fall within the 3 August 2009 Directive. From the quantity of products in the first respondent's possession the applicant concluded that products that were manufactured after December 2007 were probably handed over to the first respondent.

[34] The applicant made several attempts to obtain a letter of authority from the Chinese Regulator but without success.

[35] On 24 November 2009 the applicant obtained a declaration from Henry Hai Li of Henry and Co law firm in Shenzhen which declares that:

[35.1] the CQC (regarded by the first respondent as the Chinese Regulator) does not have the authority to issue a letter as requested by the first respondent;

[35.2] there was no obstacle to the return of the goods to China.

[36] On 25 November 2009, ENS addressed a letter to the first respondent:

[36.1] attaching the Henry Hai Li declaration in compliance with the first respondent's request for a letter from the Chinese Regulator, or CQC, confirming that the products may be returned to China;

[36.2] confirming that there is no impediment, according to the Henry Hai Li declaration, to the return of the Directive products to China;

[36.3] Affording the first respondent until 17h00 on Friday, 27 November 2009 to indicate whether it intends to destroy the Directive products after 3 December 2009.

[37] Having failed to receive any response to the letter of 25 November 2009, the applicant had no choice but to launch an urgent application to prevent the goods from being destroyed. The applicant was of the view that:

[37.1] the Henry Hai Li declaration sufficed for purposes of satisfying the first respondent's request for a letter of authority and the applicant was therefore entitled to have the products returned to it; and that

[37.2] the products should be tested for compliance with the Specification pending the outcome of a review application.

[38] The applicant reinstated the urgent application brought earlier by supplementing the founding affidavit and amending the notice of motion.

[39] On 1 December 2009, the applicant served the amended urgent application for an interim interdict in which the applicant sought

the following order:

[39.1] delivering the products that were in the Access Warehouse to the applicant; alternatively

[39.2] Interdicting and restraining the first respondent from destroying the products in accordance with the 8 October 2009 Directive as amended by the 23 October 2009 Directive pending the outcome of a testing of the products and a review application.

HEARING ON 3 DECEMBER 2009

[40] The parties appeared before his Lordship Mr. Justice Webster on 3 December 2009.

[41] The first respondent did not file an answering affidavit and attacked the application on the basis of lack of urgency only.

[42] The question of urgency was argued on 3 December 2009.

[43] On 17 December 2009 his Lordship Mr. Justice Webster granted a judgment, in writing, in which he found that the application was urgent.

[44] On 17 December 2009 the honourable Judge Webster made the following order:

[44.1] that this matter is urgent and must be heard on an urgent basis;

[44.2] That pending the finalization of this application the adaptor plugs referred to in the directive issued by the first respondent dated 8 October 2009, as amended by the directive issued by the first respondent dated 23 October 2009, which is annexed to the Notice of Motion marked "C" be not destroyed;

[44.3] Costs be costs in the cause.

[45] On 23 December 2009 the honourable Judge Webster made the following order:

[45.1] The respondents file their answering affidavits within ten days from the date of the order and the applicants file their replying affidavit within ten days from the date of service of the answering affidavits.

[46] The first respondent failed to file an answering affidavit within the time periods determined by his Lordship Mr. Justice Webster.

[47] On 11 January 2010 the applicant enrolled the application for hearing on the urgent roll for 19 January 2010.

[48] The applicant filed short heads of argument and a practice note on 14 January 2010.

[49] The first respondent filed its answering affidavit on or about 19 January 2010.

[50] On 22 January 2010, by agreement between the parties, the following order was made an order of court:

1. "The products which are the subject of the First Respondent's Directive dated 3 August 2009 {"the Directive), which consist of all Snapper 2, 3 and 31 products which bear only markings/inscriptions pertaining to Clipsal, Snapper and voltage identical to those products that appear on the photographs on page 4 of the SABs test report ML/103122, a copy of which is attached marked "A", and which products were seized in accordance with the Directive and which are currently in the possession of the First Respondent at the Access Warehouse 85 Maple Street, Pomona, Kempton Park ("the warehouse"), may forthwith be destroyed by the Applicant, under the direct supervision of the First Respondent, provided that the resultant salvage shall immediately be released to the Applicant in South Africa.
2. the parties will jointly attend to the sorting of all the products currently under the control of the First Respondent at the warehouse so as to identify the products in paragraph 1.
3. The Applicant shall be afforded a reasonable opportunity of verifying that all the products that have been identified and earmarked for destruction in terms of paragraph 1 bear only the markings pertaining to Clipsal, Snapper and voltage that are identical to those that appear on Annexure "A".

4. The products that are to be destroyed by the Applicant shall be destroyed in such a manner that preserves the plastic components

thereof separately to the non-plastic components in order that the Applicant may trade with or use the molten plastic, separately to the steel components.

5. The First Respondent shall provide the Applicant with 150 articles of each of the product categories described in the Directive. The Applicant shall not trade with these products in South Africa.
6. All the products that fall outside the ambit of the Directive that were seized by the First Respondent and that are currently held at the warehouse shall be submitted for testing ("the tests"), within ten days from the date of this order, for compliance with compulsory specification VC8008 plugs, socket out-lets and socket out-let adapters - coverage per Government Notice R442 of 3 April

1998, sub clause 3.1 with reference to clause 28 of SANS 60884-1:2006 -glow wire test ("the specification"] ("the untested products).

7. the tests shall be conducted by Test Africa at the cost of the Applicant, provided that Test Africa is SANAS accredited at the date of testing. The test results will be final and binding on the parties.
8. the samples for testing shall be identified as follows:

8.1. the untested products will be sorted into batches by the parties jointly:

8.2. a batch is defined with reference to each category of product (i.e. Snapper 2, 3 or 31) and each code variation embossed on each adaptor;

8.3. one sample per batch will represent one sample for testing; 8.4 each sample will be selected by the First Respondent.

The tests shall be conducted in the presence of a representative of each party ("witness testing").

All products that are found by Test Africa to be non compliant with the specification shall be destroyed by the Applicant, under the direct supervision of the First Respondent, and in accordance with the procedure set out in paragraph 3 above, and the salvage thereof immediately surrendered to the Applicant.

11. all products that are found by Test Africa to be compliant with the specification shall immediately be released to the Applicant.

12. the costs of the application under the above case number shall be argued at a later stage during the ordinary course."

COSTS OF THE URGENT APPLICATION UP TO 22 January 2010

[51] In exercising my discretion as to the award of costs I highlight the factors set out hereunder:

- [52] The applicant exported the Directive products to South Africa. These are the products referred to in paragraph 1 of the court order of 22 January 2010. These goods were, as I was informed on the date of hearing hereof, destroyed on the previous day (i.e. on Sunday 5 December 2010). It was for the applicant to ensure that all the products it exported to South Africa complied with the South African Specifications and Standards. The First Respondent did not create the problem.
- [53] The First Respondent has to perform its statutory duties in terms of the Act. In terms of section 15(1) of the Act, if the Chief Executive Officer of the First Respondent, on reasonable grounds suspects that a commodity or product or a consignment or batch of a commodity or product does not conform to or has not been manufactured in accordance with a compulsory specification that applies to it, the Chief Executive officer may issue a directive to ensure that any person who is in possession or control of the commodity or product, consignment or batch, keeps it in his/her possession or under his/her control at/on any premises specified in the directive and does not tamper with or dispose of it,
- [54] Of importance for present purposes are the provisions of section 15
- (3) of the Act in terms of which, if the First Respondent finds that a commodity or product does not conform to the compulsory specification, the First Respondent may;
- a) take action to ensure a recall of the product;
 - b) direct in writing that the importer of the consignment returns it to its country of origin, or
 - c) directs that the consignment or batch of the product concerned be confiscated destroyed or dealt with in such other manner as the First Respondent may consider fit.
- [55] It is clear from Annexure A to the amended Notice of Motion that the First Respondent firstly gave the Applicant the opportunity to, in terms of section 15(3)(b) satisfy it that the product could be returned to China. Only failing such proof, that the goods had to be destroyed in terms of section 15(3) (c).
- [56] The Applicant had great difficulty in obtaining the requisite proof of authorisation to re-export the product. The First Respondent did not facilitate this process by refusing, in its letter of 12 October 2009, to grant the applicant access to the SABS test reports. In my view, the stance taken by the First Respondent in that letter to state that the Applicant is not a South African company and does not have locus standi, is totally unreasonable. South African citizens and foreigners are entitled to due process (i.e. administrative justice). The First Respondent also refused for no good reason that I can discern, to accept the declaration from Henry Hai Li dated 24 November 2009. That is a very comprehensive letter by an expert in the field of import and export stating clearly that there was no authority in China to issue the letter that the First Respondent required and furthermore that there was no obstacle to the return of the goods to China.

[57] Thus a lot of litigation could have been avoided had the First Respondent consented to the return of the goods to China. There is nothing on the papers by the First Respondent stating that it is aware of another competent authority in China and why it did not accept the aforesaid declaration. The Applicant was in the circumstances forced to proceed with the urgent application dated 13 October 2009 as well as the urgent application of 3 December 2009. The applicant is therefore entitled to its costs up to 3 December

2009. I take note of the fact that in the judgment by Webster J the costs of 3 December 2009 were ordered to be costs in the cause. That contemplated costs in the contemplated review application, which application became unnecessary. I am therefore at liberty to reconsider that order

[58] On the other hand, in favour of the First Respondent, it is also true that the confusion which was created by Schneider can also not be blamed on the First Respondent. Schneider, engaged in a contractual dispute with the Applicant, returned directive as well as non-directive products. After the goods had been sorted it appears from the first respondents version that only 266 150 of the 1 358 100 products fell within the ambit of the 3 August 2009 directive and had to be destroyed. Thus, the first respondent's was successful in its initial purpose of having the directive products destroyed.

[59] The Applicant was not successful in its main relief contained in paragraph 2 of the Notice of Motion namely to have all the product returned to it. It was also not successful in a review application to set aside the First Respondent's directives referred to in paragraph 3.3 of that Notice of Motion.

[60] Taking all the above into account, it is my view that it would be fair to order the First Respondent to pay the Applicant's costs in the main application up to 3 December 2009.

THE COSTS OF THE CONTEMPT APPLICATION

[61].I shall refer to the parties in the contempt application on the same basis as above (i.e. as they are referred to in the main application).

[62] The First Respondent did not make out a case for contempt. It is clear from the answering affidavit in the contempt application [hat the applicant acted on legal advice in not having the directive products destroyed forthwith. Thus, in my view, the applicant did not act wilfully and mala fide.

[63] After the applicant had obtained further legal advice from Senior Counsel it accepted that it was bound by paragraph 1 of the court order although it had until then held the bona fide believe that It could have the agreement between it and the applicant which culminated in paragraph 1 oUhe court order set aside.

- [64] For the purposes of a costs order it is however not decisive whether there was contempt or not. The applicant had to execute paragraph 1 of the court order and the First Respondent had to act on the applicant's request to execute it. Thus the First Respondent was successful in eventually having the directive product destroyed.
- [65] However the First Respondent acted totally unreasonably in not agreeing to the non-directive products to be re-tested after it had become apparent that the tests done by Test Africa on 5 February 2010 were unreliable.
- [66] Already on 12 February 2010 the applicant's attorney wrote a letter in this regard to the First Respondent's attorney. The response was that the test results were final and binding. The applicant throughout March and April 2010 obtained further proof of the fact that Test Africa did not do its tests with reliable test apparatus. On various occasions the First Respondent's representatives were invited to meet with the applicant's representatives and experts, but these invitations were refused.
- [67] Up to the stage of the bringing of the contempt application the First Respondent stuck to its view as per its letter of 18 March 2010 that it was entitled to rely on the test reports by Test Africa as it was an institution accredited by the South African National Accreditation System ("SANAS"). The First Respondent issued its contempt application at the end of June 2010. It was only in the replying affidavit of 18 November 2010 that the First Respondent conceded in paragraph 8 of that reply that the testing was not in accordance with paragraph 6 of the court order of 22 January 2010. The First Respondent states that it arrived at that conclusion "having considered the Respondent's [Jim Fung's] answering papers and having conducted its own investigations". It is not clear from the First Respondent's reply when it so conducted its own investigations and what had changed its decision.
- [68] It is not in dispute between the parties that an appropriate institution to do the re-testing is SABS Commercial (Pty) Ltd,

accordingly, to that extent paragraphs 7, 10 and 11 of the court order have to be amended.

I accordingly make the following order:

1. Paragraphs 7, 10 and 11 of the order by Rabie J dated 22/01/2010 is amended by deleting in these paragraphs any reference to Test Africa and substituting therefore SABS Commercial (Pty) Ltd;
2. The First Respondent is ordered to pay the costs of the main application up to 03/12/2009. After this date each party is to bear its own costs.
3. The contempt application is dismissed
4. In the contempt application each party is to bear its own costs.

JUDGE OF THE HIGH COURT

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