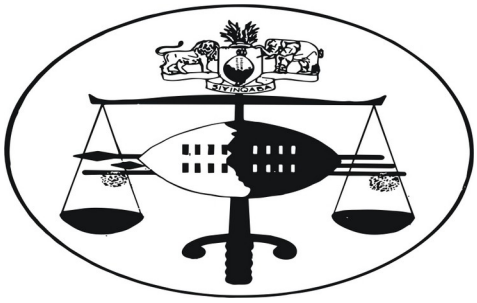

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **APPEAL NO.65/2009**

CITATION: [2010] SZSC 20

In the matter between

STANLIB SWAZILAND (PTY) LTD	**1ST APPELLANT**
LIBERTY LIFE SWAZILAND (PTY) LTD	**2ND APPELLANT**
TINEYI MAWOCHA	**3RD APPELLANT**
CALVIN MASEKO	**4TH APPELLANT**
RUDI MALAN	**5TH APPELLANT**
NICK HAINES	**6TH APPELLANT**
LARRY SHEAR, N.O.	**7TH APPELLANT**

AND

ABEL SIBANDZE	**RESPONDENT**
CORAM :	**RAMODIBEDI C.J.** **MOORE J.A.** **TWUM J.A**
FOR APPELLANT :	**ADV. WOUDSTRA**
FOR RESPONDENT :	**MR. Z. SHABANGU**

HEARD : 09 NOVEMBER 20

DELIVERED : 30 NOVEMBER 2010

Summary

Contempt of court – Alleged conduct in defiance of order of the High Court - Civil Contempt – Allegation of Civil contempt must be proved beyond a reasonable doubt – Evidential burden resting upon putative contemnor discharged upon a balance of probabilities – Court not empowered to act ex moro motu – Attorney and client costs – Principles for awarding costs upon attorney and client scale.

JUDGMENT

S.A. MOORE JA

OPENING

[1] This appeal arises out of a contract of employment between Mr. Abel Sibandze the Respondent herein and Stanlib Swaziland the first appellant. By letter dated 12 January 2006, Stanlib Swaziland, hereinafter referred to as the employer, offered Mr. Sibandze, hereinafter referred to as the employee, employment with Stanlib Swaziland in the capacity of General Manager. The letter which contained a number of detailed provisions was duly signed by the employee on 16 January 2006.

[2] As has so often happened in many cases which have reached the courts, the relations between employer and employee deteriorated to such an extent that on 24 June 2009, the employer informed the employee, by letter of even date, that he was being suspended while retaining all of his emoluments, benefits and entitlements in terms of his contract of employment with the employer. Paragraph 10 of the suspension letter is of importance.

It reads:

> *"It is again confirmed that your suspension will be for a reasonable period of time pending the finalization of an investigation into the issues raised in our letter dated 5 June 2009, and the conclusion of a disciplinary enquiry that will follow subsequent to the aforesaid investigation having suspected that you have committed an act, if proven, may justify your dismissal or disciplinary action."*

That daunting letter was followed by a NOTIFICATION OF A DISCIPLINARY ENQUIRY dated 29 July 2009 which incorporated a charge sheet bristling with some 10 charges which were conspicuous for their nebulousness, and lack of specificity. Fortunately, for

reasons which will emerge presently, this court is not required to consider the veracity or substance of those charges.

[3] The employee resorted to litigation in both the Industrial Court and in the High Court; but it is not necessary to trace the course of all of the several proceedings. An important order dated 16 November 2009, central to the purposes of this appeal, is that of Agyemang J sitting in the High Court in case No. 3444/09 which needs to be set out in full. It reads:

(i) *"The application for the review of the judgment of the Industrial Court of Swaziland, delivered in 15th September 2009 in the case described as; Industrial Court Case No. 473/09, is hereby granted, and the said judgment is set aside;*

(ii) *The application for an order directing that the pending disciplinary inquiry proceed in Braamfontein, Johannesburg as a matter of urgency, is hereby refused.*

(iii) *An order is made referring the matter back to the court a quo, differently constituted, for the merits*

of the application described as: Industrial Court Case no. 473/09, to be heard as an urgent matter.

(iv) Costs to the applicants." Underling added.

[4] The Appellants took legal advice. They acted throughout on legal advice which they had received from their legal representatives. They were counseled that, paragraph (ii) of the above order did not preclude them from holding the proposed disciplinary inquiry in Braamfontein Johannesburg. Accordingly, the Appellants having failed to effect personal service upon the employee, the disciplinary enquiry was held there in his absence on Friday, 20 November 2009. The employee was found guilty on all charges and dismissed.

[5] The employee was outraged at what he viewed as the appellants' blatant disregard of the order of Agyemang J. He therefore fired off a Notice of Motion dated 24 November 2009, accompanied by a certificate of urgency, claiming *inter alia* orders:

"3. Interdicting the Respondents from implementing the recommendations of the disciplinary chairperson of 20th November 2009.

4. Setting aside the decision of the chairperson of the disciplinary enquiry of the 20th November 2009."

And more ominously:

*5. "That the order referred to in **3** and **4** above should operate with immediate and interim effect pending finalization of the Application.*

*6. A rule nisi do hereby issue calling upon the Respondents to show cause on or before the **27th November 2009**, why;*

*6.1 The Third Respondent as Chairman of the First and Second Respondents' Board of Directors should not be committed to goal for a period of sixty (**60**) days for contempt of the Court Order granted by this Honourable Court dated **16th November 2009;***

*6.2 The Fourth, Fifth and Six Respondents as directors of the First and Second Respondents should not be committed to gaol for a period of sixty (**60**) days for contempt of the Court Order granted by this Honourable Court dated **16th November 2009.***

*6.3 The Orders referred to in **3** and **4** above should not be made final.*

7. Costs of this Application on the scale between attorney and own client."

[6] The application was heard on 25 November 2009 by MCB Maphalala J who delivered an extempore judgment on 4 December 2009. This was followed by a written judgment dated December 2009 in which the court *a quo* gave exhaustive consideration to the issues before it. Paragraph [66] reads:

"I now make the following order:

(a) The Rule Nisi is hereby confirmed in respect of prayers 1,2,3 and 4.

(b) The Respondents are directed to pay costs of this application on a scale between attorney and client.

(c) *The Respondents are directed to comply with Order No. 3 of the Executive Part of the judgment delivered by Justice Agyemang of the 16th November 2009, namely, that an order is made*

referring the matter back to the Court a quo, differently constituted for the merits of the application described as ***Industrial Court Case No. 473 of 2009*** *to be heard as an urgent matter."*

(d) The Registrar of the Court a quo is hereby directed to allocate a date or dates within three days of this Order for the hearing of the matter described as **Industrial Court Case No. 473 of 2009**, *and that such matter be finalized within fourteen (14) days of this Order.*

(e) Pending finalization of the matter described as ***Industrial Court Case No. 473/2009***, *no disciplinary hearing will be heard as between the parties."*

[7] The appellants were not content with the above order. They gave Notice of Appeal on the very day that the extempore judgment was pronounced in these terms:

(a) On the facts, the requisites for an order for committal for contempt of court were not established. The learned judge erred in failing to apply the applicable principles of law relating to

contempt of court to the facts and in finding that the respondent acted deliberately in contempt of the order of Agyemang J.

(b) In particular, there was no evidence to show that there had been any breach of a previous court order,

(c) There was further no evidence that there was any willful, ***mala fide*** *or intentional conduct on the part of the relevant respondents, such as to show any disregard of or contempt for a court order.*

(d) The applicant failed to discharge the onus of proof.

(e) The issue in contention between the parties had in any event become academic because of recent developments.

(f) His Lordship erred in failing to find as aforesaid and furthermore erred in:

(i) granting orders which had not been sought by the applicant, which related to issues which were not matters which the court a quo was called upon to decide and which dealt with

issues which were not argued before his Lordship.

(ii) *confirming previous interim orders which related to issues which had become academic justifying the discharge – and not the confirmation – of those interim orders;*

(iii) *ordering the first to sixth respondents to pay the costs on a punitive scale.*

[8] The appellants synthesized their grounds of appeal and their amended grounds at paragraph 30 of their Heads of Argument in this way challenging:

30.1 *The failure by the respondent to prove allegations sufficient to sustain an order for contempt, thereby not affording the appellants a fair trial as guaranteed by the Constitution of the Kingdom of Swaziland Act 2005 ("Contempt of Court");*

30.2 *Finding that the third, fourth and fifth appellants were properly joined in the proceedings and that orders were made against them("Joinder");*

30.3 *The erroneous granting of relief **mero motu** by the honourable Court (**"Mero Motu Relief")**; and*

30.4 *The awarding of costs on a punitive scale or at all ("Costs").*"

It may be convenient to examine, seriatim, the contending submissions under the heads highlighted by the appellants viz:

(i) Contempt of Court
(ii) Joinder
(iii) *Mero Motu* Relief
(iv) Costs.

CONTEMPT OF COURT

[9] At paragraph [29] of his computer judgment MBC Maphalala J declared:

> "*Furthermore, to make an order for costs, it is necessary to decide whether or not the Respondents were in contempt.*"

At paragraph [66] he ordered that:

> *"The Respondents are directed to pay costs of this application on a scale between attorney and client."*

In making the above order, it seems clear that the judge had decided that the appellants were in contempt. As the court *a quo* saw it at paragraph [35]:

> *"The issue for the Court to decide is whether or not the Respondents acted in contempt of the judgment of justice Agyemang in holding a disciplinary hearing in Johannesburg on the 20th November 2009 against the Applicant."*

[10] The judge based his decision that the appellants were in contempt upon the following findings:

> *"A proper interpretation of the judgement (of Agyemang J) is that the Respondents were prohibited from holding the disciplinary hearing in Johannesburg, and, the matter was referred back to the court a quo for the hearing of the merits.*

The Applicant has shown that an order was granted against the respondents not to hold the disciplinary hearing in South Africa, but, that they disobeyed the order. The law stipulates that once the applicant has proved this, willfulness will normally be inferred and the onus will be on the respondent to rebut the inference of willfulness on a balance of probabilities.

I am satisfied that the Respondents disobeyed the judgment willfully and ***male fide****. The judgment was clear and unambiguous; hence, the Respondents cannot be heard to say that there could be another interpretation of the judgment.*

The need – for the respondents to approach the court for an interpretation – did not arise in this case in the light of the clear and unambiguous interpretation.

The conduct of the respondents has been deplorable and highly contemptuous of the judgment of this Court."

REQUIREMENTS FOR GRANTING AN ORDER OF COMMITAL

[11] The law as stated in The Civil Practice of the Supreme Court of South Africa, Fourth Edition at page 825 hereinafter Herbstein & Van Winsen is that:

> *"An applicant for an order of committal must show –*
>
> *(a) that an order was granted against the respondent;*
>
> *(b) that the respondent was either served with the order or informed of the grant of the order against him and can have no reasonable ground for disbelieving that information; and*
>
> *(c) that the respondent has either disobeyed the order or neglected to comply with it*.
>
> *Consolidated Fish Distributors (Pty) Ltd v Zive & Others 1968 (2) SA 517 (C) at 552, and the authorities there cited; Culverwell v Beira 1992 (4) SA 490 (W) at 493D."*

It is common cause that the appellants – excluding the third, fourth and fifth appellants – were aware of the

order of Agyemang J of 16 November 2009. It is also common cause that, with the full knowledge of the order, the other appellants, did hold, or were privy to the holding of a disciplinary inquiry on 20 November 2009 at Braamfontein Johannesburg South Africa.

[12] The nub of the controversy between the parties, under the contempt of court head, is whether or not the holding of the disciplinary inquiry amounted to a contemptuous flouting of the order of the high court, deserving of the severe penal sanction of 60 days' imprisonment, with no plea for a fine, or any abatement of the rigor of that draconian punishment, if the putative contemnors repented and purged their alleged contempt.

[13] In his Heads of Argument, counsel for the respondent supported the findings and order of MBC Maphalala J in this way:

> *"Respondent submits that the appellants acted contemptuously and as such the High Court acted within its powers to convict them for Contempt of Court and to further issue a punitive costs Order to send a strong warning to other would be offenders to respect court Orders.*

The appellants' response was encapsulated in their Heads of Argument thus:

"37 In order therefore to succeed with an order for contempt an applicant has to demonstrate that:

37.1 He had obtained an order in terms of which the respondent was ordered to do or refrain from doing something (an Order ad factum praestandum);

37.2 The respondent had breached the order;

37.3 Such breach had been:

37.3.1 deliberate; and

37.3.2 mala fide.

38 The above requirements need to be proved beyond reasonable doubt.

See ***Fakie's*** *case supra at [33]; Steffen v Rex (Swaziland Appeal Case No. 12/2000)*

39 The Fakie judgment has been followed in a number of decisions and it will be submitted that it is now settled that in an application for committal to prison for contempt of court an applicant must,

in order to be successful, prove the contempt beyond reasonable doubt and that there is an underlying court order and that the respondent, with the knowledge of the order, acted in a manner which is in conflict with the terms of that order.

See for example ***Dezius v Dezius*** *2006 (6) SA 395 (TPD) at para [17] and [18];* ***H v M*** *2009 (1) SA 329 WLD at para [5], [9] and [10]; and* ***Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd*** *2009 (3) SA 305 WLD at para [22] and [23]*

40 Even in the event that the Honourable Court should find that the requirements for contempt need only be proved on a balance of probability, we submit that this test has equally not been satisfied by the respondent's case."

[14] The appellants' general grounds of attack upon the order of the court *a quo* may be subdivided as follows together with their supporting arguments and submissions:

(i) No order *ad factum praestandum,* that is to say, for the performance of a particular act,

had been made. The order was not cast in imperative terms mandating the respondents to do a specified act nor did it forbid them from doing an act.

(ii) The order was not clear or unambiguous. It simply refused to grant the application for the hearing in Johannesburg without specifically forbidding it or declaring that it could not proceed without the sanction of the court.

(iii) It did not have the effect of an interdict prohibiting the holding of the disciplinary enquiry in Johannesburg.

(iv) The learned judge merely declined to grant the declaratory order sought by the employer directing that the disciplinary enquiry take place in South Africa without delay.

[15] Page 53 of the record shows Agyemang J referring to s.34 (2) (d) of the constitution. This is evidently a typological slip. Her Ladyship must have been referring to s.32 which is captioned **Rights of workers.** S.32 (4) (d) reads in essence 'Parliament shall enact laws to

– (d) protect employees from victimization and unfair dismissal or treatment.' In her Ladyship's view, which I respectfully endorse, the protective cover of s.32 (4) (d) which insulates employees from the specified hazards, did not deprive employers of their common law right 'to discipline an employee using fair means and according to law.'

[16] Agyemang J was astute to avoid what she called the pitfall of making 'upon review, a declaratory order directing the holding of the disciplinary enquiry in South Africa without delay,' The pith of her Ladyship's judgment on this aspect of the matter is to be found at page 25 which reads:

> *Upon what would this court make the order sought by the applicants? It seems to me that although this court has been given material on the papers to consider whether the declaratory order sought should be granted, it ought not to do. This is because as I have said before now, this court in such an adventure would be usurping the statutory exclusive jurisdiction of the* ***court a quo*** *to deal with labour matters in Swaziland, per S.8 of the Industrial Relations Act 2000;*

furthermore it will be determining the merits of the application before the ***court a quo*** *without hearing full arguments from both parties in that regard.*

This is what happened when the court a quo in a ruling apparently on points of law, terminated the proceedings by the grant of a final interdict thus disabling itself from dealing with the merits of the application."

[17] Whatever may be said about whether or not such remarks affect the interpretation of the order of the court as a matter of law, it is certainly arguable that the court's refusal to grant the order sought, did not in any way pronounce upon the merits of holding the disciplinary inquiry in Johannesburg. Her Ladyship was also fearful of assuming a jurisdiction which she clearly viewed as lying within the exclusive statutory preserve of the Industrial Court of Swaziland. Counsel for the appellants further submitted that:

(v) The Order of the court could not properly be construed as preventing the appellants from holding the enquiry in Johannesburg.

(vi) The appellants have accordingly not breached the Order of the court and cannot therefore be in contempt of the Order of Agyemang J of the 16th November 2009.

(vii) The appellants reasonably relied upon the legal advice and the interpretation placed upon the Order by their legal representatives. They could not therefore be in contempt.

(viii) Further, their conduct was not intended to be, and was not *mala fide.*

(ix) The three appellants who had no personal knowledge of the Order could not be in contempt of it.

[18] The Respondent's submissions on the matter of contempt of court are that:

(i) *The Appellants acted contemptuously and as such the **High Court** acted within its powers to convict them for contempt of court and to further issue a punitive costs order to send out a strong warning to other would be offenders to respect Court Orders:*

*(ii) The Appellants' **mala fides** regarding their contempt is exhibited by their denial that there was at any stage any Order issued interdicting the holding of a Disciplinary Enquiry against the Respondent in the history of the litigation between the parties. The Appellants made this allegation with the full knowledge of the order that had been previously issued by the **Industrial Court** under Case No. 473/09 interdicting the holding of the said Disciplinary Enquiry.*

*(iii) This clearly shows that in their disobedience of the Order of the court **a quo** under **High Court Case No. 3444/09,** the Appellants were undoubtedly acting **mala fide** having adopted a strategy to pretend that they were not aware of the interdict, yet is was served upon them;"*

The application brought before MBC Maphalala J at paragraph 6.1. and 6.2 called upon the appellants to show cause why they should not be committed to prison for contempt of the Court Order granted by this Honourable court dated 16th November 2009. It is fundamental in contempt of court proceedings that the putative contemnor must be clearly informed of the

order or orders of the court which he is alleged to have disobeyed. The judge was aware that the allegation of contempt related to the judgment of the 16th November 2009. For he wrote in paragraphs [6] and [35] of his judgment:

> "*[6] It was argued on behalf of the applicant that the purpose of the present application was to enforce the judgment of Justice Agyemang delivered on the 16th November 2009.*
>
> *[35] The issue for the Court to decide is whether or not the Respondents acted in contempt of the judgment of Justice Agyemang in holding a disciplinary hearing in Johannesburg on the 20th November 2009 against the Applicant.*
>
> *Counsel for the Respondent nevertheless argues strenuously in his Heads of Argument that the Appellants' arguments that they were not precluded from holding the disciplinary enquiry by the order of the 16 November 2009 were incorrect, downright misleading and calculated to intentionally mislead the court when one takes into consideration the order that was previously*

issued by the Industrial Court interdicting the Disciplinary Enquiry.

[19] It must be noted at the outset that the penal remedy which the employer was seeking in essence, was the imprisonment of the human appellants. It could not of course procure the imprisonment of the inanimate companies even though they enjoyed legal personality.

[20] The curtailment of the right to personal liberty of the subject, amounts to the deprivation of a fundamental constitutional right enshrined in section 16 of the Constitution of the Kingdom of Swaziland. An abridgement of the right to personal liberty can only be countenanced if permissible by the constitution itself, by law, and by due process. The incarceration of the subject cannot be inflicted whimsically, capriciously, or through the baseless importunities of a disappointed litigant.

[21] Moreover, in the context of this case, the well established principles governing contempt of court proceedings, must be strictly and broadly observed and generously applied, so as to ensure that a party charging contempt and importuning the imprisonment of a fellow subject, may only succeed if he or she is

able to meet the stringent requirements which must be established if the allegations of contempt are to prevail.

[22] There appears to be some debate as to whether contempt of court in civil proceedings is a criminal offence, or whether the willful disobedience of an order of a competent court in circumstances amounting to contempt of court in civil proceedings is conduct, not amounting to a crime, but which may nevertheless be properly visited with penal sanctions. *See S v Beyers (3) SA 70 (A)*.

[23] This seeming dichotomy was confronted by the Supreme Court of Appeal of South Africa in *Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326* where Cameron JA, writing with the concurrence of Howie JA and Cachalia JA for the majority, saw the issue of civil contempt before the court as requiring a consideration of 'the nature of this form of contempt of Court, and whether, in these civil proceedings, the standard of proof to be applied in determining whether the Auditor-General was in contempt is a balance of probabilities or beyond a reasonable doubt.'

[24] This is how Cameron JA stated the law of South Africa in the context of the South African constitution under the heading Contempt of Court at paragraphs [6] – [7].

> *"[6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.*
>
> *[7] The form of proceeding CCII invoked appears to have been received into South African law from English law and is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum), to approach the court again, in the event of non-compliance, for a further order declaring the non-complaint party in contempt of court, and imposing a sanction. The sanction usually, though not*

invariably, has the object of inducing the non-complier to fulfill the terms of the previous order."

[25] But, the definition of Cameron JA notwithstanding, the non criminal component in civil contempt proceedings remains as essential element in determining the appropriate sanction to be visited upon the contemnor. In essence, the aggrieved party is interested in most cases, not so much in having the contemnor punished, but in invoking the coercive sanction of the court as a means of securing compliance with its order. This is how Cameron JA discussed these characteristics of civil contempt proceedings at paragraphs [8] – [10].

"[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable could evidence lack of good faith).

[10] These requirements – that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. 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. **Honest belief that non-compliance is justified or proper is incompatible with that intent."** Emphasis added.

[26] In the Swaziland case of *Madeli Fakudze v The Commissioner of Police et al Criminal Appeal No. 8/2000*, at page 9 of the computer judgment Steyn JA, with whom Browde and Zietsman JA agreed, also noted that:

> *"Normally in cases of civil contempt it is left to the aggrieved party in the civil proceedings to seek the relief. This must obviously be so because he wished to coerce his adversary to comply with the court order and secure the relief claimed."*

Their Lordships had earlier at pages 8-9, rejected what they described as the novel proposition that because contempt of court was also a criminal offence it could only be enforced via the criminal justice process. This Court also emphasized at page 9 that:

> "*Indeed there are numerous cases reported in the Swaziland reports where the very opposite process to that contended for was followed. See in this regard* ***Craw and Another v Jarvis 1982-87 (1) SLR 218*** *and* ***ICS Group v Michel Jean Restaurants Ltd 1982-86 SLR 474.***

[27] In *Herman Steffen v Rex Criminal Appeal No. 12/00*, the appellant was **indicted** on a charge of contempt of court. He appealed against his conviction and sentence. Browde JA, with whom L. Van Den Heever JA and D.L.L Shearer JA agreed, declared that:

> *"In my judgment there was no good ground for finding that the evidence... proved beyond reasonable doubt the ingredients of the offence set out in the indictment.... In my judgment contempt of court was not proved and the appeal must therefore succeed."*

This case is authority for the self evident proposition that, in a criminal prosecution for contempt of court, the allegation of contempt must be proved beyond a reasonable doubt. It also lends support to the proposition that, even where only civil contempt is alleged, it must be proved beyond a reasonable doubt. It also bolsters the rule that, even where only civil contempt is charged as in this case, the criminal standard of proof must apply because of the penal sanctions faced by a civil contemnor. By the same token, it follows ineluctably that where the evidential burden rests upon the putative contemnor, that burden is discharged upon a preponderance of probabilities.

[28] It is evident that the judge *a quo* did not consider adequately or at all the possibility that the order of Agyemang J of 16 November 2009 may have been interpreted in good faith in the way in which the respondents' legal representatives advised. The Court's finding was that Agyemang J's intention was clear from the language used in the judgment. This tunnel-visional view of the words of the order foreclosed all other probabilities, and steered the court *a quo* into misdirecting itself. Courts as well as the legal profession, would be put out of business if any word or group of words written in the English Language were so pellucid as to be capable of one interpretation only to the exclusion of all others. Lord Denning recognized this verity when he wrote:

> *"The English language is not an instrument of mathematical precision. It would be much the poorer if it were."*

[29] MBC Maphalala J concluded that the Respondent disobeyed the Order of Agyemang J willfully and *mala fide* upon his own determination that the words of the order were clear and unambiguous. The court *a quo*

excluded from its consideration that, for example, if a person "*bona fide* believed that he was not required to comply with the court's order, a committal for contempt will not be granted." See Herbstein & Van Winsen page 826 and the cases cited therein. A *fortiori*, a committal order will not be granted where that belief is founded upon legal advice. Mere knowledge of the order of the court does not without more, as the court *a quo* suggests, negative a *bona fide* belief that a party is not bound by its terms.

[30] The court *a quo* suggested that if the meaning and interpretation of the judgment was ambiguous, the respondents' attorneys would have been expected to approach the court for an interpretation. This reasoning ignores the fact that the legal representatives of the respondents were in no doubt that the Order did not inhibit the respondents from holding the disciplinary inquiry in Johannesburg. The subsequent abandonment of the enquiry and the dismissal of the employee stemming from it is credibly explicable, as the respondents have suggested, by their desire to remove at least one c*asus belli* from the burgeoning amalgam of controversies between the parties.

JOINDER

In the light of the conclusions reached on the question of contempt of court, it is not necessary to consider the issue of joinder.

MERO MOTU RELIEF

[31] Counsel for the Appellants has argued that the Order directing them "to comply with Order No.3 of the Executive Part of the judgment delivered by Justice Agyemang on 16th November 2009, namely, that an order is made referring the matter back to the Court *a quo,* differently constituted for the merits of the application described as: Industrial Court case No. 473 of 2009 to be heard as an urgent matter" should be set aside for the following reasons:

(i) Case No. 440/2009 was heard by the Industrial Court on 4 August 2010 and judgment had not been delivered in that matter as of the 11th October 2010 when Appellants' Heads of Argument were filed.

(ii) The Appellants have abandoned the disciplinary enquiry held in Johannesburg and have accepted that any further disciplinary hearing should be held in Swaziland.

(iii) Accordingly, there is no basis for the remission of case no. 473/2009 back to the Industrial Court.

(iv) The is no basis on which the learned judge *a quo* could have granted an interdict prohibiting the continuance of the disciplinary hearings until case no. 473/2009 had been finalized.

(v) The respondent did not ask for such an order and this aspect was not pleaded, argued on canvassed before the court *a quo*.

(vi) The order was highly prejudicial to the appellants.

(vii) The un-pleaded issues were not fully canvassed and ventilated before the court nor was there full argument on the matters.

(viii) In essence, the court had made the order in breach of the *audi alteram partem* rule which is an integral element of the rule of law.

(ix) The Respondent had not even prayed for the ruling in his pleadings. This amounted to an irregularity which stood to be corrected on appeal.

[32] It is a fundamental principle of the adversarial common law system of justice that the judge is merely an umpire, particularly in civil proceedings, whose role is confined to holding the ring and who must not descend into the arena where his vision may be clouded by the dust of battle and where his objectivity may become impaired. This principle was illustrated in *Kerbel v Kerbel 1987 (1) SA 562 (W)* where it was held per Coetzee DPJ at page 566, that the court's inherent power did not go beyond its ordinary power of ensuring that vexations or frivolous proceedings not be taken,

and that the exception of *lis alibi pendens* is not one the Court *mero motu* takes.

[33] Counsel for the appellant did not address this question in his Heads of Argument. Accordingly, bereft of the benefit of his assistance, I have reached the conclusion that counsel for the respondents' points under this head are also well taken.

COSTS

[34] The principles relating to the award of costs were authoritatively stated by Holmes JA in *Ward v Sulzer 1973 (3) J 701 (A*) at 706 – 707 where that much respected and learned judge wrote that in general, the basic relevant principles in regard to costs may be summarized as follows:

1. *In awarding costs the Court has a discretion to be exercised judicially upon a consideration of all the fatcs; and, as between the parties, in essence it is a matter of fairness to both sides. See* ***Gelb v Hawkins, 1960 (3) SA 687 (AD)*** *at p. 694A; and* ***graham v Odendaal, 1972 (2) SA 611 (AD)*** *at*

p. 616. Ethical considerations may also enter into the exercise of the discretion; *see* ***Mahomed v Nagdee, 1952 (1) SA 410 (AD)*** at p. 420 in fin.

2. *The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs; see* ***Nel v Waterberg Landbourers Kooperatiewe Vereniging, 1964 AD 597*** *at p. 607, second paragraph. Moreover, in such cases the Court's hand is not shortened in the visitation of its displeasure; see* ***Jewish Colonial Trust, Ltd v Estate Nathan, 1940 AD 163*** *at p. 184, lines 1 – 3.*

3. *In appeals against costs the question is whether there was an improper exercise of judicial discretion, i.e. whether the award is vitiated by irregularity or misdirection or is disquietingly inappropriate. The Court will not interfere merely because it might have taken a different view.*

[35] Holmes JA was not content to let matters rest there. He set out *in extenso* the excerpt from the judgment of the court *a quo* which he described as the trenchant denunciation of the conduct of the appellant which was so egregious as to warrant the award of costs to be paid on the attorney-and–client scale. I reproduce it in this judgment because it describes the kind of conduct which warrants a punitive costs award. I do so because of late, unmeritorious demands for punitive costs orders have been made in the most trifling circumstances as if such orders should be made as a matter of course. The passage which is set out below should serve to remind litigants of the kind of conduct which justifies punitive awards. That passage appears at page *707 of Ward v Sulzer* and reads:

> *'It is not an award which the Court lightly makes. There must be something which is reprehensible or morally indefensible in the conduct of the party before the Court will make such an order; it is made to mark its disapproval of the conduct of the litigant. In favour of the defendant I cannot overlook the fact that it is common cause that he was* ***bona fide*** *in regard to the will at the time when he was appointed as (intestate) executor and did not remember that the... will was in*

existence, but I have pointed out earlier in my judgment that these remarks do not apply to the debt of R 5000 and do not apply to the half share in the property or rentals. ***He knew full well about these matters but concealed them. That was inspired in my view, by rapacity; perhaps also by the fact that he was getting married again****. There is some suggestion in his conversation with Mr. McCarthy that he felt that he had really worked and built the business up and regarded the business and its proceeds as his property rather than belonging to Mrs. Sulzer who did not work for the business. In fact, on numerous occasions in the course of that conversation, he said that he did not know what was wrong with Mrs. Sulzer, that she had lost her balance and was claiming things that she knew full well she was not entitled to.* ***I have found that he misled her; he told her lies; he invented a lie about a supposed conversation with the deceased when she was very ill. That is an intentional untruth. He has to be forced by action to repay the R 8 217 and he persisted in his untruths until the very last day and up to the present moment. I have also referred to his conduct in regard to the share transfer***

certificates which he completed in 1969 as proof of a conversation which I found never took place when the deceased was supposed to have expressed her satisfaction that he had repaid the debt of R 5 000. Those documents were tampered with by him even in 1970 when he cancelled those stamps which were only circulated on 1st January 1870. That is the conduct of a person who would go to great lengths in manufacturing evidence, inventing evidence, and in expounding untruths.

Accordingly I have concluded that this is a case in which I should mark the Court's disapproval of the conduct of the defendant and that that should be demonstrated by ordering costs to be paid on the attorney-and-client scale.' *Emphasis added.*

[36] *At paragraph [52] of its judgment, the court a quo* in the instant appeal justified its award of punitive costs in this way:

I agree wholeheartedly with the Applicant that he has been put out of pocket by the contemptuous

conduct of the Respondents. For this reason, I consider this case to be a proper one to grant the Applicant costs at a scale of attorney-and-client.

The judge then cited the well known passage from Herbstein & Van Winsen page 718 which is set out at paragraph [53] of his judgment.

At paragraph [55], the judge supplemented the out of pocket ground by adding that "the conduct of the respondent has been deplorable and highly contemptuous of the judgment of the court." He reasoned that 'this has the effect of undermining the dignity of the court and bringing its reputation into disrepute." He concluded that "this court has an obligation to protect its dignity and reputation from such conduct."

The conduct of the appellants in this case is undeserving of the strictures heaped upon them by the trial judge. They were pelted with a succession of legal proceedings by the respondent. They took and acted upon legal advice. They also launched legal salvos of their own in the courts when so advised. The record reveals that the appellants' lawyers had expressed their considered opinion in writing that the respondents

could properly conduct the disciplinary enquiry in Johannesburg. They cannot therefore be held in contempt.

[37] For all the foregoing reasons, and particularly in the light of the authorities cited, the findings of the Court *a* quo that the respondents were in contempt of court cannot be supported. The order directing them to pay costs of this application on a scale between attorney and client based as it was upon a finding of contempt must accordingly be set aside.

CONCLUSION

[38] Because of the intensity and multiplicity of the legal proceedings between these protagonists, much heat and ill will have been generated, substantial costs incurred on both sides, and much valuable time, which the appellants could have expended in conducting their business, while the respondent pursued his career, has been irretrievably lost. If I might venture to express an opinion, it would be that the controversy between these parties might lend itself to a pacific settlement through one of the alternative dispute resolution mechanisms

which have proved to be such efficacious substitutes for protracted and costly litigation. Mediation may any well suggest itself in the context of this case, because of its flexibility which affords the parties the opportunity to contribute substantially towards the achievement of a settlement or agreement satisfactory to both sides.

ORDER

[39] The orders of this court are:

(i) the appeal is allowed with costs;

(ii) the orders of the court *a quo* are set aside and replaced with the following order:-

"The application is dismissed with costs."

_____

S.A. MOORE

JUSTICE OF APPEAL

I agree _____

M.M. RAMODIBEDI

CHIEF

JUSTICE

I agree

_____

DR. S.TWUM

JUSTICE OF APPEAL

Delivered in the open court on this .... day of November 2010.