



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 3688/2008

In the matter between:

UMGCWEMBE WABOBABE (PTY) LTD

Applicant

And

SWAZILAND SUGAR ASSOCIATION

1ST Respondent

MIKE MATSEBULA

2ND Respondent

Neutral Citation: Umgcwembe Wabobabe (Pty) Ltd v Swaziland Sugar Association & Another 3688/2008 [2012] SZHC 213 (14th September 2012)

Coram: M. Dlamini J.

Heard: 18th June 2012

Delivered: 14th September 2012

Contempt of court – civil – requirements thereof.

Summary: The applicant has filed an application for contempt of court following respondent's failure to comply with an order of this court. Respondent opposes the application for a number of reasons which are set hereunder.

Chronicles

[1] The applicant is a company duly registered in terms of company laws of Swaziland mainly carrying on the business of sugar as a commodity. 1st respondent is an association established in terms of the Sugar Act whose main function is to regulate the sugar industry in Swaziland. It is responsible, *inter alia*, for awarding upon application a quota to the sugar dealers. 2nd respondent is the Chief Executive officer of 1st respondent. Applicant was around 2002 granted a quota by 1st respondent. For reasons immaterial herein, that quota was withdrawn by respondents. Applicant on 5th February 2009 by way of urgency moved an application in this court to compel respondents to “unblock the applicant’s sugar allocation.” The applicant also prayed for specific amount to be paid by respondents as rebate and “bag deposit”. Judgment in favour of applicant was obtained on 13th February 2009 by default.

[2] Upon service of the orders in favour of applicant, respondents launched a rescission application. This application by respondents was dismissed by judgment delivered on 27th October, 2010, the learned judge having dealt with the merits thereof. Upon being aware of the dismissal of the rescission application, respondent partially complied by the order dated 13th February 2009 by paying only the rebate. Subsequently applicant instituted an application seeking *inter alia* for an order to have 2nd respondent committed to goal for contempt for 30 days or until such time the contempt is purged.

[3] This application was heard and **Maphalala M. C. B. J.** delivered a judgment wherein he dismissed the application on the basis that the 2nd respondent was not co-joined in the proceedings and there was no proof of service of the orders upon his person or any authorized person. He also ruled that the failure to pay for the “bag deposit” would be realized by execution and not by an order for contempt. He however, determined that the respondent, who was 1st respondent then, was in contempt as he outlines at page 38 of the book of pleadings:

“Respondent is clearly in contempt of the said judgment.”

This judgment was delivered on 27th June 2011. On 30th June, 2011 the applicant launched the present application.

[4] The present application was argued before me on the 18th June 2012.

Common Cause

[5] It is not in issue that the respondents are fully aware of the order of 22nd October 2010 dismissing their rescission application and the initial order of 18th February 2009 compelling them to reinstate the sugar quota to applicants and make specific payments.

[6] It is further common cause that the respondents have not fully complied with the order of 18th February 2009.

Issues

[7] The respondents however dispute that the “*willfully and mala fide*” refuse to comply with the court order. They support this point with the following allegation:

[8] Respondents raise a *point in limine* that the deponent on behalf of the applicant had failed attach a resolution by applicant proving his mandate to institute the present application.

[9] In its answering affidavit, respondents further aver that there was no quota available to be reinstated to applicant as applicant’s quota was awarded to Inceba Investments (Pty) Ltd. This was after an internal dispute arose within applicant and applicant’s failure to produce a declaratory order or an agreement signed by applicant or that applicant’s quota be transferred to another company. At paragraph 7.19 of page 53 of the book of pleadings the respondent state:

“The point that is being made is that the sugar allocation that this Honourable court has ordered the respondent to reinstate has already been enjoyed and utilized by Tsikati through Inceba Investment (Pty) Ltd and as such the respondent has supplied the sugar in terms thereof and has discharged its obligations in terms thereof and as such it cannot be in contempt of this Honourable Court.”

[10] At their paragraphs 13.2.2 they depose:

“In the second instance, the Respondent contends that it cannot comply with the order of court without itself breaking or acting contrary to the Sugar Industry Agreement in that an allocation of

sugar will be given without a quota. That industry agreement has the status of law.”

Determination

[11] It is with difficulty to state precisely what the matter *in casu* is for determination as I will fully demonstrate hereunder.

[12] As already alluded to, and can be inferred from the judgment of my learned brother **M.C.B. Maphalala J.** as he then was, delivered on 27th June 2011 appearing at page 33 of the book of pleadings and further confirmed by applicants during submission, the question whether 1st respondent was in contempt or not, was determined by his Lordship **M.C.B. Maphalala J.**

[13] The 1st respondent in defence of the application for committal to goal for failure to comply with the order following a judgment delivered by my brother **Hlophe J.** raised before **M.C.B. J.** the same arguments advanced before me. In fact these very same arguments were advanced in support of the application for rescission which was before his **Lordship Hlophe J.** My learned brother **Hlophe J.** ably adjudicated upon each and every point raised by the respondent and came to a conclusion that they could not be sustained and therefore dismissed the application for rescission. The learned judge summed up the averments by 1st respondent in the following manner as reflected at pages 18-21 of the book of pleadings:

“5.1 The applicant allocated a sugar quota to the current respondent in terms of which the applicant was to utilize the

quota agreed between the parties in the manner outlined in a written agreement between the parties;

“5.2 Pursuant to the said allocation, it appears that the respondent then concluded an agreement with a certain Close Corporation from the Republic of South Africa, known as Carbon Blue Close Corporation, which was to utilize the respondent’s quota in terms of an agreement between them, whose effect was to make some directors or members of Carbon Blue directors or members in the respondent. It appears that there then ensued some misunderstanding between these members of the respondent as a result of which the competing factions in it started competing for the applicant’s attention which made it difficult for the latter to understand who between the two factions was the appropriate one for it to deal with.

5.3 It is contended that as a result of this state of affairs, the applicant advised or informed the respondent to resolve the dispute between its competing factions for it to be able to continue having business dealings with it. In fact, the applicant went on unilaterally withdraw or suspend the respondents’ sugar allocation or quota pending resolution of the dispute. It further directed that the said dispute be resolved either through an agreement between the parties or through a declaration being sought from court.

- 5.4 *This allocation was done in 2002 and the agreement on the use of the quota is said to have been for a period of three years renewable.*
- 5.5 *It would appear that the dispute between the two factions took a long time to resolve as no agreement could be reached between the parties, necessitating that the respondent institute court proceedings in September 2008, seeking an order of this court inter alia declaring that the agreement between the respondent and Carbon Blue Close Corporation had elapsed through effluxion of time. The effect of the declaration sought would be that whatever action was taken pursuant to the said agreement was of no force or effect. This matter was finalized with the granting of the final order aforesaid in October 2008. Carbon Blue Close Corporation had not opposed this application.*
- 5.6 *When respondent presented this order to the applicant, the latter is said to have insisted on a written agreement or a court order specifically declaring who the proper shareholders or directors of the respondent were between the two factions.*
- 5.7 *It was for this reason that the respondent instituted the proceedings that resulted in the order mentioned at paragraph 1 above which is sought to be rescinded in the proceedings.*

5.8 *Whilst the said application was served on the applicant's receptionist, it is contended that the court process had not been explained to her and she had thus not treated it with any urgency resulting in it being heard as an unopposed application on the day set. This further resulted in the order sought to be rescinded by means of this application."*

[14] The learned judge continues to adjudge at page 21.

"It is contended by current applicant that there was nothing to unblock as the agreement governing such allocation had already elapsed with the result that the allocation had been terminated with the quota initially allocated respondent being distributed to other interested parties as is the practice."

[15] This averment which was before **Hlophe J.** faces me at paragraphs 7.5, 13.2, 13.21

"7.5 The applicant failed to utilize the sugar allocation and in terms of the Sugar Industry Agreement a forfeiture of that unused sugar was applied. A copy of the letter advising the applicant of this dated 17th December 2001 is here annexed marked "BM 2".

13.2 The respondent submits in the first instance that there is no sugar allocation in the first instance;

13.2.1 The quota which the Honourable Court has ordered be given back to the applicant has in fact already been utilised by the applicant through its director Mr. Elmon Tsikati."

[16] It was also advanced before **M.C.B. Maphalala J.** as demonstrated in his judgment at page 35 paragraph 6 of the book of pleadings:

“The respondent argued that the sugar quota which it was ordered to reinstate has already been utilized by the applicant under another company in the name of Inceba Investments (Pty) Ltd; hence the applicant has no sugar quota with the respondent.”

[17] Respondents *in casu* also submit at page 47, paragraph 7.3 of their founding affidavit:

“7.3 The respondent contends that on the sugar quota that it has been ordered to reinstate has already been utilized by the applicant under another company in the name of Inceba Investments (Pty) Limited.”

[18] In support hereof reference is made to the correspondences marked “BM4 and BM6”. This argument was raised before **Hlophe J.** as appears at page 25 of his judgment and reference made to the two correspondence. The learned judge concluded at page 27:

“The relevance of these two letters to the issue at hand is that they indicate that as of May/June 2005, the sugar quota allocated respondent was still in existence and had not been terminated. They also indicate that same was at some stage offered a company related to the respondent (Inceba Investments) well after May 2005, but I cannot conclude whether such an offer was ever accepted by the Respondent as there is no evidence to enable to do so.”

and therefore

“This also confirms that as at October 2008 the sugar quota initially allocated the applicant was taken to be still available. This then suggest that it is an afterthought to consider it as having terminated in May 2005 as the court was advised during submissions.”

[19] Respondents have informed this court that applicant was faced with internal dispute which precipitated the withdrawal of the quota. Again this argument was before **Hlophe J.** who ruled as appears at page 24 of the book of pleadings.

“When the sugar quota was unilaterally withdrawn by the applicant, it is common cause that the respondent was not given time limits within which its dispute had to be resolved. It was not for instance advised that same should be resolved within the three years contemplated in the terms of the agreement between the parties. An impression that same was open-ended was given.”

[20] The learned judge concludes as follows in relation to the points raised by 1st respondent at page 29:

“It was applicant (respondent herein) unilateral action which in the first place deprived the respondent of the right to enjoy the sugar quota allocated it. In my view, this is completely unwarranted and unnecessary because whatever misunderstanding there was, same was between the respondent and Carbon Blue CC and applicant should not have concerned itself therewith.”

[21] When the learned judge **M.C.B. Maphalala J.** was deliberating on the first application for contempt of court, he summarized paragraph 10 of the judgment at page 37 of the book of pleadings:

“Similarly it is apparent from the evidence that the respondent has not complied with the default judgment issued on the 13th February 2009; the dismissal of the application for rescission meant that the respondent should comply with the said judgment. The respondent is clearly in contempt of the said judgment.”

[22] I have already stated that the only reason the honourable judge did not grant the prayers sought by applicant then is that the 2nd respondent as CEO as the person intended to be committed to goal was not cited in the application and further not served in person.

[23] The learned judge further stated at his paragraph 14 of the judgment at page 40:

“The order relating to the unblocking of the quota is capable of enforcement by contempt proceedings and the order relating to the payment of money is not so capable of enforcement.”

[24] From the foregoing it is apparent that the applicant prepared yet another application wherein 2nd respondent was co-joined following the ratio in his Lordship **M.C.B. Maphalala J.**'s judgment:

[25] In brief, as I sit in the same jurisdiction as **Hlophe J.** and **M.C.B. Maphalala J.**, my duty is not to scrutinize their judgment and adjudicate on them. That is the preserve of the Supreme Court which I dread to tread.

[26] From the two judgments of **Hlophe J.** and **M.C.B. Maphalala J.**, it is clear that the submissions made by 1st respondent and advanced on behalf of both respondents *in casu* were deliberated upon and decision taken. In brief the matter was *res judicata* in so far as the merits were concerned, including the question of contempt as it was decided by his Lordship **M.C.B. Maphalala J.**, as already demonstrated above in his detailed judgment of 27th June 2011.

[27] However, I do take note that there are two new averments made by respondents in this matter which were not before my brothers **Hlophe J.** and **M.C.B. Maphalala J.**

[29] Before I highlight the new grounds by respondents, it would be prudent to mention the following:

[30] Contempt of court order emanating from civil proceedings has been defined by **Van Copenhagen J. in Holtz v Douglas and Associates (O.F.S.) cc En Andere 1991 (2) S.A. 797 at 798** as follows:

“...as an intentional refusal or failure to comply with the order of a competent court.”

[31] On the question of “*intention*” **Goldin J. in Haddorn v Haddon 1974 (2) S.A. 181** the honourable court held:

“Where an applicant in proceedings to commit the respondent for contempt of court, in that he has disobeyed an order of court of a nature justifying such punishment, has proved that the respondent has disobeyed the order of court which was brought to his notice, then both willfulness and mala fides will be inferred. The onus is

then on the respondent to rebut the inference of mala fides or willfulness on a balance of probabilities.”

[32] Have the respondent *in casu* rebutted the inference of willfulness and *mala fides* on their part? I pose this question on the basis of the new grounds that respondents have raised.

[33] Respondents have deposed at page 58 paragraph 13.2.2:

“13.2.2 *In the second instance, the respondents contends that it cannot comply with the Order of Court without itself breaking or acting contrary to the Sugar Industry Agreement in that an allocation of sugar will be given without a quota. That industry agreement has the status of law.”*

[34] The Sugar Act No.4 of 1967 reads as definition of quota:

“ *“quota” means permit or licence to grow sugar cane for the manufacturing of sugar and to deliver in each year as specific tonnage of sucrose to be extracted there-from.”*

[35] The court order granted against respondents was to *“unblock applicant’s sugar allocation”*.

[36] Respondents in defence of the order to unblock at paragraph 7.14 page 51 of the book of pleadings aver:

“7.14 Tsikti (applicant’s deponent) has enjoyed the benefit of sugar allocation or finally granted to the applicant and then transferred to Inceba Investment (Pty) Ltd. ...”

[37] At its next paragraph (that is 7.15) at page 52 respondents hold:

“7.15 Furthermore, since the quota was transferred to Inceba Investments...”

[38] From the preceding paragraphs on respondents’ showing it is clear that the *“unblocking of sugar allocation”* and the quota referred to the same transaction. These were words used interchangeably. To say that respondents cannot unblock the sugar allocation because there is no quota or rather respondent would be violating the law is nothing else but splitting of hairs by respondent. This ground stands to be rejected therefore.

[39] Respondents have averred that the applicant has failed to annex a resolution indicating that the deponent has authority to institute the present application.

[40] The history of this matter is that the first application was instituted by way of motion proceedings. The deponent was Mr. Tsikati, the managing director. A rescission application was filed. The authority of Mr. Tsikati was never challenged. Subsequently an application for contempt of court was instituted and as already shown, it was heard by **M.C.B. Mphalala J.** Even here, Mr. Tsikati was the deponent. His mandate was not challenged. It is upon the present application in answer thereto that the respondent is challenging Mr. Tsikati’s mandate. Surely the failure to challenge Mr. Tsikati’s mandate earlier must be reasonably taken by the courts to have his

mandate to institute the proceedings to have been acquired by the respondents. Further, previous correspondence on the very subject matter of the withdrawal of the applicant's quota from respondents always reflected the salutation, "*Attention Mr. Tsikati*".

[41] It was on the basis of the above that during the submissions. I allowed the applicant to file the resolution. I was further persuaded by the *dictum* in **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd, Appeal Case No.23/2006** where a similar issue attended applicant's application where his **Lordship Justice Tebutt J. A.** an unanimous judgment held at page 14:

"It is extremely unlikely that Nkabinde would have embarked upon a frolic of his own to launch a High Court application, with its attendant costs without the approval of the Board."

[42] *In casu* an additional factor comes into play. When the matter was argued, the said Mr. Tsikati was deceased. If, this application was embarked **app...** by Mr. Tsikati outside the consent and approval of the applicant board, the matter would not have proceeded as Mr. Tsikati was by then lying in his rest bed. That on its own clearly demonstrated that the board had given its approval to institute the proceedings before court.

[43] **His Lordship Terbutt** at page 16 of **Shell Oil supra further states; citing Balck and Co. (S.A.) (Pty) Ltd. v Van Zummeren and Another 1982 (2) S.A. 112 (W):**

"Where in an application the applicant does not state in his founding affidavit all the facts within his knowledge but seeks to do so in his replying affidavit, the approach of the court should nevertheless

always be to attempt to consider substance rather than form in the absence of prejudice to the other party.”

[44] **His Lordship (Shell Oil supra)** at page 18 neatly sums up the position as follows:

“The approach in any event commends itself to me as being in accordance with sound common sense. An allegation by a deponent that he is duly authorised to depose to an affidavit on behalf of a corporate body is generally not expected to be challenged and accordingly the source of his authorities is not usually set out by the deponent. If, however, as occurred in casu his authority is challenged or denied in the answering affidavit it would grossly be unfair not to allow the deponent to set out the source of his authority.”

[45] The authority was subsequently filed by applicant.

[46] Lastly, on this ground, I must point out that it was a technical point not proving any absence of willfulness or mala fides on the part of respondents. A litany of authorities are to the effect that:

“The court does not encourage formalism in the application of rules. The rules are not an end in themselves to be observed for their own sake. They are provided to clear the inexpensive and expeditious competition of litigation before the courts.” [**Trust Bank Bpk v Di'ttrich 1997 (3) S.A. 740 C**]

[47] Again his **Lordship Justice Terbutt** concluding a similar ground in **Shell Oil** *op.cit.* wisely states at page 23:

“The learned Judge a quo with respect, also appears to have overlooked the current trend in matters of this sort, which is now well recognized and firmly established, viz. not to allow technical objections to less than perfect procedural aspects to interfere in the expeditions and if possible, inexpensive decisions of cases in their real merits.”

[48] In the foregoing respondents’ technical point stands to fall.

[49] **Jafta J.** in **Chetcutti v Chetcutti [2001] 1 All S. A. 62 (LCC) 75**, following a *dictum* in **Protea Holdings Ltd v Writwt and Another 1978 (3) S. A. 865 (W)** at 871 stated:

“It is vital to the administration of justice that those affected by court orders obey them. Our courts cannot tolerate disregard of (sic) its orders.”

[50] *In casu* I was persuaded by Mr. Flynn, for respondent, that should I find the respondents to be in contempt, I should not rush to commit 2nd respondent to goal but afford him a chance to purge the contempt.

[51] **Corbett J. A.** in **S v Rabie 1975 (4) S.A. 855 (A) at 866 B** had this to say in relation to the court meting out the appropriate sentence in criminal proceedings, such standards equally applies in civil matters:

“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.”

[52] In the light **His Lordship Corbett’s dictum** and Mr. Flynn’s submission I am inclined to grant respondents a chance to purge their contempt.

[53] In the foregoing I enter the following orders in favour of applicant:

1. Applicant’s application is upheld.
2. 1st and 2nd respondents are ordered to purge their contempt of court conduct within 60 days from date of delivery of this judgment failing which a warrant of committal is hereby issued for the 2nd respondent to be arrested and committed to goal until such time that respondents have purged their contempt fully.

M. DLAMINI

JUDGE

For Applicant : **Mr. M. P. Simelane**

For Respondents : **Advocate Flynn instructed by Cloet**