CASE NO.: LC 75/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

ALEXANDER FORBES GROUP NAMIBIA (PTY) LTD
Applicant

and

HEINZ WERNER AHRENS
Respondent

CORAM: **PARKER, J**

Heard on: 2011 March 14
Delivered on: 2011 April 5

JUDGMENT

PARKER J

[1] The instant application ensues from, and it is part of, a labour matter brought on notice of motion on urgent basis to enforce a restraint of trade clause in an employment contract concluded between the applicant and the respondent. In a judgment delivered on 10 January 2011 ('the judgment') this Court granted interim interdict sought by the

applicant: Para [29] of the judgment contains the order granted ('the order'). The present application, too, has been brought on urgent basis and it seeks interim relief in the following terms:

> '(1) That the applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned and this matter is heard as one of urgency as contemplated in Labour Court Rules 6(24).
>
> (2) That a rule *nisi* issue, calling upon respondent to show cause (if any) on a date and time to be determined by the above Honourable Court handed down on 11 January 2011, why an order in the following terms should not be made final:
>
> (2.1) Declaring that the respondent is in contempt of the order of this Honourable Court handed down on 10 January 2011;
>
> (2.2) Extending the rule *nisi* granted on 10 January 2011 to the return date referred to in para (1) of this order for the respondent to purge himself of his contempt before the main application for confirmation of the rule *nisi* is heard;
>
> (2.3) Convicting the respondent for contempt of this Court;
>
> (2.4) Sentencing the respondent to a fine or such other punishment as the Court may deem fit;
>
> (2.5) Ordering the respondent to pay costs of this application on a scale as between legal practitioner and client.
>
> (3) That prayers 2.1 and 2.2 operate as interim orders with immediate effect.
>
> (4) Further and/or alternative relief.'

[2] The respondent has moved to reject the application. In doing so the respondent has raised a point in limine in which he avers that the

application is not urgent. I shall dispose of this averment immediately. The respondent relies on the principle that an applicant who has generated his or her own urgency cannot approach the Court to hear the matter on urgent basis. Speaking for myself, this 'has-generated-his-or-her-own-urgency' notion should not be applied mechanically as if it were an immutable principle that applies in all circumstances and on every set of facts imaginable under the sun.

[3] In the instant case the applicant has approached the Court for the Court to enforce its own judgment. In such a case, where there is some prima facie evidence supporting the applicant's allegation that the respondent has breached and continues to breach a valid order of the Court different considerations should apply; as they should where the applicant's basic human right guaranteed to him or her by the Namibian Constitution has been violated or is being violated or threatened (see *Paulus Tuhafeni Sheehama v Minister of Safety and Security and Others* Case No. A 22/2011 (unreported)). In that event it matters the least whether the alleged breach occurred on a Sunday and the applicant brought the application the next Friday and not on the Monday immediately following that Sunday and prays the Court to hear the matter on urgent basis. It is always in the interest of the proper administration of justice and the dignity of the Court and, indeed, of the practicalization of the notion of rule of law, which, as this Court observed in *Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 at 798H, is one of the triadic ideals which nourish the very life and soul of the Namibian nation, to hear such application as a matter or urgency, unless, of course, the delay in bringing such application is

inordinate by all reasonable account, which, I must say, is not the situation in the present proceedings. To crown it all, the intrinsic nature of the rule of law and the danger that would attend upon its collapse are encapsulated succinctly in the following passage from *Sikunda v Government of the Republic of Namibia and Another* (2) 2001 NR 86 at 92D-E, per Mainga J (as he then was):

> Judgments, orders, are but what the Courts are all about. The effectiveness of a Court lies in execution of its judgments and orders. You frustrate or disobey a Court order you strike at one of the foundations which established and founded the State of Namibia. The collapse of a rule of law in any country is the birth of anarchy. A Rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded and protected.

[4] As I see it, the thrust of the application is that the applicant seeks a specific relief that will lead to the respondent purging himself of his alleged contempt before the application for confirmation or discharge of the rule nisi in the order is heard. It would be stultifying any attempt by the applicant to move for the confirmation of the rule *nisi* if the present application is not heard as a matter of urgency and before the hearing of that 'confirmation'. Thus, on the facts and in the circumstances of this case, I think there is a case made out on the papers for the matter to be heard on urgent basis. This conclusion disposes of the respondent's preliminary objection thereanent the issue of urgency.

[5] Thus, the issue at hand in these proceedings is that the applicant has brought contempt proceedings and seeks the relief set out in the

notice of motion. This form of contempt is usually referred to as 'civil contempt' because it is usually only dealt with by civil law (Snyman, *Criminal Law*, 3rd edn: p 317, and the cases there cited). And it has been said that for this form of contempt to be criminal there must be present some element which cannot be waived by the party whose rights are affected by the disobedience of the Court's order, e.g. where the case is not concerned with the derogation of a civil litigant's rights under an order made in civil proceedings but with an act in derogation of the court's dignity. (*Cape Times v Union Trades Directories & Others* 1956 (1) SA 105 (N) at 121G-122A)

[6] In the instant matter, the alleged contempt is undoubtedly 'civil contempt'; and I accept the submission by Mr Tötemeyer SC, counsel for the respondent, that the form of contempt in the instant case can only be committed intentionally (*Snyman*, ibid., p 312). In this regard, as respects civil contempt; the intention is constituted by the wilful breach, without more, of an order of court obtained in a civil proceedings; and 'wilful' means 'not casual or accidental or otherwise unintentional'. (*Cape Times v Union Trades Directories & Others* supra at 120A-B)

[7] From the aforegoing, the next level of the enquiry should be to consider whether the applicant has placed sufficient evidence before the Court which leads to the strong inference that the respondent has breached the order. If there is no such prima facie evidence, that is the end of the matter. But if there is such evidence the issue to consider next is whether the breach is wilful; that is, not casual or accidental or

otherwise unintentional (*Cape Times v Union Trades Directories & Others* ibid.)

[8] I find that on the papers the applicant has put forth evidence which constitutes breach, and continued breach, of the order. Irrespective of what the respondent's counsel has submitted beautifully and forcefully on behalf of the respondent, I gain the irrefragable impression from the respondent's own answering affidavit that the submission by counsel is not enough, with the greatest deference to counsel, to cover the respondent's real intentions, which is that, according to him the order was wrongly sought and wrongly granted, and so he will not obey it. The respondent says:

> 'The applicant, as it did in the founding papers in the main application, simply relies on unfounded allegations, speculation and conjecture to vilify me. The applicant's case cannot be sustained on such bases.'

[9] If one reads the above-quoted statement between the lines, as I have done, what emerges indubitably is that the respondent is saying: this Court was wrong in accepting 'the unfounded allegations, speculation and conjecture' by the applicant, and the Court was accordingly wrong in granting the order. In sum, according to the respondent, the order is wrong and he has no intention of obeying it – albeit, not in so many words, as I say. My impression is confirmed in no mean measure by what Mr. Jan Hermanus Olivier states – *wittingly or unwittingly* – in his confirmatory affidavit which forms part of the

respondent's papers. (Italicized for emphasis) Mr. Jan Hermanus Olivier says:

> I also first wanted to digest the judgment thoroughly and also wanted to obtain the views of Advocate Barnard who was Respondent's Counsel at the time, to enable me to provide our views on the judgment and order to Respondent simultaneously with conveying the news of the order to him.

What is so difficult in the judgment that needed thorough digestion of; what is so complex with the formulation of the order that required unravelling by an Advocate; and why was it necessary for both Advocate Barnard and Mr. Olivier to formulate their views on the judgment? Mr. Olivier does not say in his affidavit.

[10] Be that as it may, the application was fully argued by both counsel and a full judgment was delivered, containing reasoning and conclusions that led to the granting of the order. In this regard, I accept the submission of Mr. Corbett, counsel for the applicant, that the respondent understood the order; the respondent knew what was expected of him that would amount to obeying the order; but the respondent chose not to obey the order for the reason I have set out previously. Accordingly, on the papers, I find that prima facie there are substantial, as opposed to wild and generalized, allegations tending to show that the respondent has breached, and continues to breach, the order. And for what I have found previously of the attitude of the respondent towards the order, it is with firm confidence that I find that the respondent's breach of the order is wilful, in the sense that it is not casual or accidental or otherwise

unintentional. Whereupon, I hold that the applicant has made out a case for the grant of the relief in the notice of motion.

[11] In the result I make the following order:

(1) That the applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned and this matter is heard as one of urgency.

(2) That a rule *nisi* issue, calling upon respondent to show cause (if any) at 10H00 on Friday, 8 April 2011 why an order in the following terms should not be made final:

(2.1) declaring that the respondent is in contempt of the order of this Court granted on 10 January 2011;

(2.2) extending the rule *nisi* granted on 10 January 2011 to 8 April 2011 for the respondent to purge himself of his contempt before the main application for confirmation of the rule *nisi* is heard;

(2.3) convicting the respondent for contempt of this Court;

(2.4) sentencing the respondent to a fine or such other punishment as the Court may deem fit;

(2.5) ordering the respondent to pay costs of this application on a scale as between legal practitioner and client.

(3) That prayers 2.1 and 2.2 operate as interim orders with immediate effect.

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PARKER J

COUNSEL ON BEHALF OF APPLICANT:	Adv. A Corbett
	Adv. R Maasdorp
Instructed by:	LorentzAngula Inc.
COUNSEL ON BEHALF OF RESPONDENT:	Adv. R Tötemeyer SC
	Adv. D Obbes
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