

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

CACLB-053-06
High Court Misca 240 of 2005

In the matter between:

JOHN HINCHLIFFE NO
UNODA MACK

1st Applicant
2nd Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS
THE DIRECTOR ON CORRUPTION AND
ECONOMIC CRIME
THE COMMISSIONER OF BOTSWANA POLICE
FORCE
SUPERINTENDENT VICTOR MABINA
GABORONE MAGISTRATE - MR MUGONI
THE ATTORNEY GENERAL

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent

Adv. T. Beckerling S.C. with him Mr. T. Bahuma for the
Applicant

Adv. J. G. Wasserman S.C. with him Adv. Wickens for the
Respondent

J U D G M E N T

CORAM: TEBBUTT, J.P.:
 ZIETSMAN, J.A.:
 RAMODIBEDI, J.A.:

TEBBUTT, J.P.:

1. An issue in this matter which is not an appeal, but an application for an order
that this Court should hold First to Fourth Respondents in contempt of an

order made by it in previous proceedings, and certain further relief, is a point in limine taken by all the Respondents that this Court should decline to hear and adjudicate upon the application as the Court would not be sitting as a Court of Appeal but as a court of first instance. The Applicants' response to the point is that this Court should do so by virtue of the provisions of Section 7 of the Court of Appeal Act (Cap 04:01) or, alternatively, under its inherent jurisdiction.

2. The background to the application, which is all really common cause, is the following.

In July 2007, this Court heard an appeal in the matter of Daisy Loo Botswana (Pty) Ltd. vs. Gaborone City Council and Another Case No. CACLB-053-6 in which the appellant, Daisy Loo, as I shall for convenience refer to it herein, appealed against a rescission by the High Court of an order previously granted by that Court making an award in an arbitration between the above parties an order of Court. This Court on 26 July 2007 allowed the appeal and upheld the arbitrator's award in terms of which the respondent in the appeal, the Council, as I shall refer to it, was ordered to pay Daisy Loo certain sums totaling over P20 million. The Council had in fact issued a cheque to Daisy Loo for an amount of P21,434,434.46 which was, in terms of a High Court order, being held in trust in a bank account pending the outcome of the appeal.

3. One of its orders made in allowing the appeal reads as follows:

"3 (a) The respondent is to pay to Daisy Loo the sum of P21,434,434.46 together with interest thereon at the rate of 10% per annum from 24 June 2005 to 10 October 2005, together with the amount of interest accruing on the cheque for P21,434.434.46 at present deposited in an interest-bearing commercial bank account under the signatures of Messrs Attorney Unoda Mack and Moffat Lubinda.

3 (b) To give effect to the order in paragraph 3(a) above, Mr. Unoda Mack is ordered by his signature to release the proceeds in the said account to the appellant forthwith and shall use this Order as authority to the bank to do so. The certificate of the Registrar referred to in Paragraph 4 of the Order of the High Court of 7 October 2005 is hereby ordered to be dispensed with."

4. Daisy Loo was at the time under provisional judicial management and the First Applicant in the present proceedings was the provisional judicial manager, which he still is.
5. On 27 July 2007 the First Respondent ("The DPP") launched an urgent ex parte application in terms of Section 57 of the Criminal Procedure and evidence Act (Cap 08:02) for a preservation order in respect of the aforesaid amount. Newman, J. before whom the application came in the High Court declined to hear the matter on an ex parte basis. Service was then effected

on the Applicants and the matter was to be heard anew by Newman, J. on 30 July 2007. On that day, the DPP applied to withdraw the application, which Newman J. permitted, but ordered the DPP to pay costs on a punitive scale and further ordered that the DPP be prohibited from launching any further proceedings until those costs had been paid.

6. On 31 July 2007, the proceeds of the account mentioned in order 3(a) above were transferred into a trust account operated by the Second Applicant. The amount was by then, because of the accrual of interest, P25,240.163.43.
7. On the same day, i.e. 31 July 2007, the Fourth Respondent, Superintendent Victor Mabina of the Botswana Police Force applied in the Gaborone Magistrate's Court in terms of Sections 57 and 51 of the Criminal Procedure and Evidence Act that the proceeds in the said trust account be frozen as they were required, he said, as an exhibit in a pending criminal trial involving Daisy Loo and its erstwhile managing director, one Moemedi Dijeng.
8. On 1 August 2007 the present Applicants launched an application in the High Court as a matter of urgency claiming
 - (a) that the DPP and the Director on Corruption and Economic Crime (the Second Respondent in these proceedings) be

held in contempt of the aforesaid orders of this Court of 26 July 2007;

(b) that the DPP and the said Director be permanently restrained from taking any steps in any court in Botswana the effect of which was to defy this Court's order of 26 July 2007;

(c) that the order of the Magistrate of 31 July 2007 be set aside.

9. The matter was heard by Gaongalelwe, J. who on 21 August 2007 struck out the application as being a nullity in that (a) it was not urgent and (b) the requisite statutory notice required in terms of Section 4 of the State Proceedings (Civil Actions by or against Government or Public Officers) Act (Cap 10:01) had not been given to the Respondents. He stated that the Applicants were at liberty to reinstate the application, if so advised, provided the necessary statutory requirements were met.

10. On 23 August 2007 the Applicant's attorneys gave the Attorney-General, representing the Respondents, notice in terms of Section 4 of the said State Proceedings Act of the Applicants' intention to institute the same application following the expiration of a month from the notice.

11. On the next day, i.e. 24 August 2007, the Applicants' attorneys wrote to the Attorney-General and referred to the statutory notice of the previous day.

They informed the Attorney-General that they were instructed to join as Respondents to those already cited, viz. the DPP and the Director on Corruption and Economic Crime, the Commissioner of the Botswana Police Force and Superintendent Mabina, alleging that he, by his actions in obtaining from the Magistrate the order freezing the trust account into which the amount of P25,240,163.43 had been paid, was also in contempt of this Court's order.

12. In the same letter the Applicants' attorneys said this:

"We have furthermore been instructed to launch an additional application in the Court of Appeal in respect of those allegations of which you are aware, relating to contempt of that Court's order dated 26 July 2007. This step is being taken in case the High Court decides it is without jurisdiction to determine a contempt of Court of Appeal orders".

13. On 12 November 2007, the Applicants launched the present application in this Court. Captioned "Application for Declaratory Orders (invoking Section 7 of the Court of Appeal Act, Cap 04:01)" the Applicants claimed in the application the same relief claimed in the application before Gaongalelwe, J. in the High Court. It is, I think, necessary to cite it in full. It reads that the Applicants would claim the following orders:

- “1. That First, Second, Third and/or Fourth Respondent be held in contempt of the Order of this Honourable Court dated 26 July 2007, in particular paragraph 3 thereof;
 2. That First, Second, Third and/or Fourth Respondent be permanently restrained from taking any steps in any court in Botswana, the effect of which is to defy the Order of this Honourable Court dated 26 July 2007 especially paragraph 3 thereof;
 3. That the Order of Fifth Respondent dated 31 July 2007 be set aside;
 4. That First, Second, Third and/or Fourth Respondent pay the costs of this application on a punitive scale as between attorney and own client.”
14. The Respondents have all opposed the application and at the hearing of it in this Court they raised two points in limine viz. that this Court lacks jurisdiction to hear the application in that
 - (i) Section 7 of the Court of Appeal Act does not confer jurisdiction to this Court to hear and determine the matter; and
 - (ii) that the statutory notice given by the Applicants was defective.

15. The Court decided that it would hear and decide first whether the point in limine in regard to its hearing the application should be sustained or not, for if it was sustained the application would fall away. After hearing Counsel on both sides, the Court held that the point in limine should be upheld and stated that it would give its reasons for so doing in due course. In the light thereof, it is not necessary for the Court to pronounce on the second point raised. These are the Court's reasons.

16. Section 7 of the Court of Appeal Act provides as follows:

"For all purposes of and incidental to the hearing and determination of any appeal, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction, conferred by this Act or the constitution, the power, authority and jurisdiction vested in the High Court."

17. The crucial words in the section are the opening ones i.e.

"For all purposes of and incidental to the hearing and determination of any appeal"

Mr. Beckerling, for the Applicants, submitted that a contempt of this Court by a refusal to obey an order made by it was a matter "incidental" to the hearing and determination of the appeal. It was, he submitted, "incidental" to the determination of an appeal as being a matter

connected with, related to, associated with or liable to arise as a consequence of the determination of an appeal. I am unable to agree.

18. Contempt of Court can occur in facie curiae or ex facie curiae. In this case, the Court is concerned with contempt ex facie curiae in that what the Respondents were alleged to have done was a willful and mala fide failure to comply with an order of court, or what has been defined by some authorities as civil contempt of court (see e.g. Herbstein and van Winsen: Civil Practice of the Superior Courts of South Africa, 4th Ed. p 815, S vs. Beyers 1968 (3) SA 70 (A.D.)). It is in my view obvious that this can in no way be described as incidental to a "hearing" of an appeal. It has nothing to do with such hearing. Nor, in my opinion, can it be incidental to the "determination" of an appeal. The ordinary common meaning of the word "determination" is "the settlement of a suit or controversy by the authoritative decision of a judge or arbiter; a decision so made (Shorter Oxford Dictionary s.v. "determination"). As Mr. Beckerling, in his heads of argument, has stated "an appeal is determined by the delivery of a judgment and orders". I agree with him. When a Court has given its judgment in an appeal, it has "determined" that appeal. In a case before the Chancery Division in England, an appeal in an income tax matter was brought in terms of the relevant statute before an appeal body of tax commissioners who, in due course, gave their decision. A dispute arose as to whether the appeal had been determined. Browne-

Wilkinson, J. before whom the matter came in the Chancery Division held that:

“I therefore can find no reason for departing from the ordinary meaning of the words ‘determination of the appeal’. The appeals were determined when the commissioners gave their decision on all outstanding issues on 23rd February 1973” (see Hallamshire Industrial Finance Trust Ltd. V Inland Revenue Commissioners 1979 (2) All E.R. 433 at 439 F).

I do not agree with Mr. Beckerling, that a failure or refusal to comply with the court’s order in an appeal is incidental to the “determination” of that appeal i.e. of the decision by the court as to the outcome of the appeal and any order made to give effect to that decision. It is an entirely new matter, separate from and extraneous to the appeal.

19. The Applicants, however, contend in the alternative that this Court has, as part of its inherent jurisdiction, the power to deal with a contempt of it by a refusal or failure by a party to comply with an order made by it.

20. In advancing this contention, Mr. Beckerling submitted that a court whose dignity or authority has allegedly been violated by contempt may take action by bringing the person before it who has allegedly committed the contempt and hear the case, even after it has delivered judgment. He cited as

authority for this submission the South African Appellate Division case of In re Mackenzie 1933 A.D. 367. In that case, a newspaper published an anonymous letter protesting against a decision of the Appellate Division, stating it had given an absurd judgment and insinuating ulterior and personal motives for the judgment. The court mero motu ordered that editor of the newspaper to show cause why he should not be committed for contempt and on the return day ordered him to publish an apology and to pay a fine of £50.

21. That case, however, falls within the class of case where contempt is constituted by conduct which is disrespectful to the court such as willful insult to the court, or is calculated to bring the administration of justice into contempt. It falls within the purview of what has been characterized as criminal contempt. It is akin to contempt in facie curiae but it can occur ex facie curiae (see Herbestein and van Winsen loc. cit)

22. Although the Appeal Court in South Africa took the action it did, I have grave doubts as to whether this Court should do the same. Should contempt of a similar nature occur, or even if there is contempt of it committed in facie curiae it would seem to me that it should not adopt a prosecutorial role and then sit both as a court of first and last resort, denying any person, adjudged by it to be guilty of contempt, a right of appeal from its decision. The alleged contempt being of a criminal ilk, the mechanism of the State can be invoked

to bring the alleged offender before the appropriate forum i.e. the High Court. He would then have a right of appeal, if desired, to this Court constituted by a panel of its Judges other than those against whom the contempt has allegedly been committed. It is, however, unnecessary to come to any firm conclusion in this aspect which can remain open for future consideration in an appropriate case.

23.A contempt which consists of a failure or refusal to obey a court's order stands on an entirely different basis. It involves a frustration of the right of a successful litigant to obtain satisfaction of an order granted in his favour, and as pointed out by Herbstein and van Winsen op.cit, p 817, the object of contempt proceedings in such a case is to compel the performance of the court's order. (see also Protea Holdings v Wriwt and Another 1978 (3) SA 865 (W) at 868 B. This can be done by way of criminal proceedings but the more usual way is for the aggrieved party to do so by bringing an application by way of notice for contempt. That is what has happened in this case.

24.It must be immediately remarked that this Court is a Court of Appeal; it is not a court of first instance. That said, the Court should not sit as a court of first instance in a matter such as the present. It is argued that it is the appropriate forum to deal with an alleged contempt of one of its own orders. I do not think it is. This Court is the highest court in the country

and the last component of its judicial system. It is the final resort for any person who seeks justice for any wrong done to him or her or for interference with, denial of, or violation of any of his or her rights, whether private or under the constitution. It is, therefore, essential that it should not compromise its status or prejudice its ability to fulfil its role as such last bastion of justice in the country in any manner. By this Court's sitting as a court of first instance, it can also not sit on appeal of any decision given by it in that capacity, thereby denying anyone affected by its judgment the right of appeal against that decision or judgment.

25. The South African Constitutional Court, which is also the highest court and the court of last resort for litigants in that country has expressed itself in these terms:

"It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances, the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."

(see Bruce and Another v. Fleecytex, Johannesburg and Others 1998 (2) SA 1143 (CC) at 1148 D-E)

It has also said that –

“..... jurisprudential policy dictates that this Court should ordinarily not deal with matters as both a court of first instance and as one of last resort.”

(see Transvaal Agricultural Union v Minister of Land Affairs 1997 (2) SA 621 (CC) at 628 E).

I respectfully agree with those dicta. That the same court should not sit both as a court of first instance and a court of last resort is undoubtedly a basic and essential tenet of jurisprudential policy and should be applied by this Court.

26. The Applicants submit that this is not an ordinary matter but is indeed an extraordinary one. It is not. It is an ordinary application albeit that a question of contempt of court is involved.

27. In an application disputed facts may arise which may have to be resolved by resorting to the hearing of oral evidence. In casu, that is the position. And in his argument, Mr. Beckerling remarked that the Court should bring the alleged offending party before it “and ask why he did it”. Apart from those instances where in terms of the Court of Appeal Act, the Court may on rare

occasions hear additional or new evidence during an appeal, it is not the function of this Court to hear oral evidence.

28. A further, and important, consideration is that should this Court agree to hear matters as a court of first instance, even only in contempt proceedings, it may well open the floodgates to similar applications in the future, thereby completely negating its primary role and function namely that of a court of appeal.

29. The Applicants are not remediless. They still have their application in the High Court, of which they gave notice to the Respondents on 23 August 2007.

30. It is for the above reasons that the Court upheld the Respondents' point in limine and made the following ruling:

1. The point in limine that this Court should decline to hear and adjudicate upon the application brought before it in these proceedings viz. Case No. CACLB-053-06 is upheld.

2. The Court finds that it should so decline in that:

- 2.1 It is not empowered by Section 7 of the Court of Appeal Act (Cap 04:01) to hear and adjudicate upon an application brought before it for the relief claimed;

2.2 It should not, by reason of any inherent jurisdiction it possesses, hear and adjudicate upon the present application as a court of first instance.

3. The Applicants are ordered to pay the Respondent's costs of the application, including the costs attendant upon the employment of two Counsel.

Delivered in open court at Lobatse this 30th day of January 2008.

P. H. TEBBUTT
Judge President

I agree

N. W. ZIETSMAN
Judge of Appeal

I agree

M. M. RAMODIBEDI
Judge of Appeal