CASE NO.: A 224/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

/AE//GAMS DATA (PTY) LTD	**1st APPLICANT**
/AE//GAMS NETWORKS (PTY) LTD	**2ND APPLICANT**
PHILIPPUS BRINK VAN SCHALKWYK	**3rd APPLICANT**

and

SEBATA MUNICIPAL SOLUTION (PTY) LTD	**1st RESPONDENT**
MAXTEC LTD	**2nd RESPONDENT**
NYL-DATA COMPUTER SERVICE (PTY) LTD	**3rd RESPONDENT**

CORAM: **MULLER J**

Heard on: 12 November 2010

Delivered on: 21 January 2011

JUDGMENT

MULLER J

[1] In this matter the court was confronted with 3 separate court files with 3 different case numbers, namely:

a) Case number A 220/2009 in respect of an urgent application on Notice of Motion dated 25 June 2009 in which the applicants applied for a *fundandam jurisdictionerm*, alternatively

a *confirmandam jurisditionem* order to attach an amount of N$15 00.00 held in trust by the applicant's legal practitioners, as well as a DAT tape containing a Finstel Software System Programme to found jurisdiction in an action to be instituted by the applicants against the respondents;

b) Case number A 224/2009, also dated 25 June 2009, in respect of an application on Notice of Motion for a Rule Nisi to interdict the respondents from infringing various rights of the applicants pending the outcome of an action to be instituted by the applicants; and

c) Case number I 2738/2009 regarding the combined summons issued by the applicants against the respondents and the latter's exception to the applicants' particulars of claim, amplified by further particulars, as well as amended particulars of claim and amended further particulars.

[2] Because it was very confusing what the court had to consider, it is necessary to refer briefly to what occurred previously in respect of all these matters. For the purpose of this judgment, I shall refer to all the applicants and respondents as such and not e.g. as first, second or third applicant or the first, second and third respondent. Although in the application for leave to appeal, the respondents are the applicants, I shall continue to refer them as respondents and vice versa. In the contempt of court application only the first respondent is the single respondent.

[3] The two application referred to in a) and b) above were referred to in previous hearings as the *"attachment application"* and the *"interdict application"*, respectively. I shall continue with the same appellation for the sake of clarity. In respect of the orders granted in this application, I shall refer to it as the "attachment order" or the "interdict". In the attachment application Hinrichsen AJ granted a Rule Nisi on 26 June 2009 and in the interdict application Ndauendapo J also granted a Rule Nisi on 2 June 2009. The Rule Nisi's in respect of both applications were argued before Hinrichsen AJ on 16 July 2009

after the Rule Nisi in the attachment application had been anticipated by the respondents. Answering affidavits in respect of both applications by respondents were filed. The applicants only replied in the attachment application. On that day the learned acting judge confirmed the Rule Nisi in the attachment application and also confirmed the Rule Nisi in the interdict application. Although both orders were issued on 16 July 2009, reasons for these judgments were only delivered 15 April 2010 and are contained in two separate documents.

[4] In the meantime, the applicants (as plaintiffs), issued summons against the respondents (as defendants) on 30 July 2009. Further particulars were requested on 4 September 2009 and, after an application to compel, were provided on 25 November 2009. The respondents (as defendants) then excepted to the particulars of claim as amplified by further particulars on 31 March 2010. The applicants (as plaintiffs) amended their particulars of claim and further particulars on 28 June 2010. Without filing a new exception to these amended pleadings, the respondents (as defendants) pursued their original exception.

[5] From the letters written by the respondents and attached to the affidavits it is evident that the respondents never accepted any of the judgments by Hinrichsen AJ. This attitude led to the contempt issue, which I shall soon deal with, as well as the respondents' subsequent steps to appeal, which will also be dealt with. The respondents also filed a record of the attachment proceedings in this court in the Supreme Court.

[6] On 22 July 2009 the respondents filed a Notice of Appeal against the whole of the judgment of

Hinrichsen AJ, in regard to the attachment order in case A220/2009 in the Supreme Court of Namibia.

[7] On 23 July 2009 the respondents applied to this court for leave to appeal against the interdict granted by Hinrichsen AJ in case A224/2009. On 3 September 2009 the first and third respondents also filed a Notice of Appeal in the Supreme Court against the interdict granted by Hinrichsen AJ in case A 224/2009. This application and notice of appeal was met by a Rule 30 application by the applicants craving a declaration that both the application for leave to appeal against the interdict order and the Notice of Appeal of 3 September 2009 are irregular steps that fall to be struck out.

[8] The conduct of the respondents to continue as if no court order existed, despite the fact that this court did issue an interdict on 16 June 2009, caused the applicants to launch an urgent application against the first respondent, Sebata, for committal for contempt of court on 20

August 2009. The next day Tomassi J granted a Rule Nisi, with a return day of 9 October 2009. The respondents opposed that Rule Nisi and answering and replying affidavits were filed. The respondent also filed a counter-application against the applicants. The return day of the Rule nisi had been extended on several occasions, the last extension to 12 November 2010.

[9] On 12 November 2010 the entire matter was set down for arguments. The hearing commenced with the court obtaining clarification on all the issues contained in the various court files which had been heard by different judges. There are 4 issues that were argued. They

are:

a) The exception;

b) The application for leave to appeal against the interdict;

c) The Rule 30 application; and

d) The Rule Nisi in respect of committal for contempt of court and counter-application.

Separate sets of heads of arguments were filed by both parties dealing with individual issues or more than one issue. The appellants were represented by Mr Coleman, assisted by Mr Dicks, and the respondents by Mr Corbett, assisted by Mr Silver, respectively. Oral submissions were made by Mr Coleman and Mr Corbett, respectively.

[10] Before arguments commenced, the court expressed its concern about the procedure to be followed to deal with all these issues and the sequence in which they should be argued. The court's main concern was that in the light of the prosecution of the respondents' appeal in respect of the attachment order, all the other issues might fall away if the Supreme Court should regard the above-mentioned order appealable and if the respondents should succeed on appeal. The court expressed its reservation and reluctance to make findings on issues that fall to be decided by the Supreme Court and which may at this stage be purely academic. The parties, however, insisted to argue all the issues, with Mr Corbett submitting that a finding on the respondents' exception may dissolve all the other issues, while Mr Coleman persisted that the respondents remained in contempt of the interdict granted by Hinrichsen AJ, even if the Supreme Court should find in favour of the respondents.

[11] At the conclusion of counsels' submissions the court reserved judgment on the first three issues

and extended the Rule Nisi in respect of the contempt of court order to 21 January

2011.

[12] What is not in dispute is that a Notice of Appeal to the Supreme Court against the attachment order granted by Hinrichsen AJ had been filed. Whether the Supreme Court would regard that as an order that is appealable is of not a concern of this court. The respondents have prosecuted this appeal and a record of the proceedings in this court has been filed. Copy of that record was handed to the court during argument by Mr Coleman, without objection from Mr Corbett.

[13] As mentioned, a Notice of Appeal to the Supreme Court in respect of the interdict order was filed on 3 September 2009. However, this was done in addition to their application for leave to appeal in respect of the interdict order. This is the first issue that Mr Coleman argued on the basis of irregularity in terms of the Rule 30 application. Mr Corbett's explanation for this double-barrel action is that the respondents' wanted to make sure that their appeal will be heard by the Supreme Court and to avoid that the Supreme Court may refuse to hear the appeal without leave being granted by this court, they also applied for leave. Mr Coleman submitted that this argument holds no water. According to him the respondents knew they needed leave to appeal, which he submits cannot be granted, and that they never had any intention to prosecute the appeal that they noted on 3 September 2009. He submitted that the record that had been submitted to the Supreme Court was only in respect of the other appeal, namely against the attachment order and no similar record had been filed in time in respect of the interdict. According to him that proves that the respondents had no intention to prosecute that appeal

and only took these steps as part of a design to frustrate the applicants.

[14] I have considered the arguments by both counsel in respect of the application for leave to appeal against the interdict order and the subsequent Rule 30 application of the applicants. I shall first deal with the application for leave to appeal.

Application for leave to appeal against the interdict order

[15] In his judgment in respect of the attachment order Hinrichsen AJ said the following at

p2, [5]:

"A sine qua non to the hearing of the interdict application was a judgment on the issue relating to the jurisdiction of the above Honourable Court. Accordingly, I rule that the attachment application be heard first." The issue was then argued and Hinrichsen AJ confirmed the Rule Nisi in the attachment application. Against that order the respondents appealed directly to the Supreme Court without applying for leave to appeal. A mentioned, a record of the proceedings has been filed. That record contains the reasons of Hinrichsen AJ order in respect of the attachment.

[16] A day after the respondents filed their notice to appeal in case A220/2009, they applied for leave to appeal against the interdict order in case A224/2009. The first question to consider is whether the respondents need leave from this court to appeal to the Supreme Court is. S 18(1) of the High Court Act, no. 16 of 1990, grants the Supreme Court of Namibia the right to hear appeals against judgments or orders of the High Court of Namibia. The Supreme Court Act, no. 15 of 1990 contains a similar provision in S 14(1). In *Zweni v Minister of Law and Order* 1993(1) SA 523 (A) at 536A-B, three requirements for a "judgment or order" to be appealable must exist. These requirements are:

a) The decision must be final;

b) The decision must be definitive of the rights of the parties,

c) The decision must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

Zweni's case, *supra*, has been approved in this respect by our Supreme Court in *Aussenkehr Farm (Pty) Ltd v Minister of Mines and Energy* 2005 NR 21(SC) (See also *Eric Knowds NO v Nocilaas Cornelius Josea and Another*, case no. SA 5(2008), an unreported judgment of the Supreme Court, delivered by Strydom AJA, at p7 [10]). In respect of interlocutory or cost orders made by this court, leave to appeal to the Supreme Court has to be obtained in this court. (S18 (3) of Act 16 of 1990). If this court refuses to grant leave, it can still be granted by the Supreme Court, but on petition to that court. (S 14(3) and (6) of Act 15 of 1990).

[17] In respect of the interdict order Hinrichsen AJ stated in his reasons that in its nature that order is *"interlocutory, not final"* (pl6 [11]). In considering whether to grant leave to appeal, I have taken cognizance of the fact that the question of appealability had been recognized in many cases as a

complex issue. *(Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd* 1996(3) SA 686 (A) at 690D-E). In the *Zweni* case, *supra*, Harms AJA (as he then was) analysed several previous decisions in this regard and summarised it. He also referred with approval to the case of *Van Steepen and Germs v Transvaal Provisional Administration* 1987(4) SA 569 (A). In short, Harms AJA recognised in the *Zweni* case that a ruling by a court is not appealable, but that the distinction between a "judgment" and an "order" is formalistic and outdated and should be discarded. The decision must be final in effect and comprise of the three requirements referred to earlier. *(Cronshaw, supra*, at 690F-G).

[18] The interdict was granted pending the finalisation of the action instituted by the appellants. It is not a permanent interdict and is not final. It is clearly an interim interdict by nature. The interdict does not comply with the requirements for an appealable order. In my opinion another court will not arrive at any other decision than the one of Hinrichsen AJ when he confirmed the Rule Nisi in respect of the interdict.

[19] Consequently, leave to appeal against the order of Hinrichsen AJ in case A224/2009, namely the interdict is refused. The applicants in this application for leave to appeal (the respondents) are responsible for the costs of the applicants (respondents in the application for leave to appeal).

Rule 30 application

[20] The applicants want the court to strike out the application for leave to appeal, alternatively the notice of appeal, or both. Their Rule 30 notice reads as follows:

"That the first and third respondents[7] notice of application for leave to appeal filed on 23 January (July?) 2009, alternatively the first and third appellants[7] notice of appeal filed on 3 September 2009, further alternatively both such notice of application for leave to appeal and notice of appeal be declared to constitute an irregular step, alternatively to declared to be improper as envisaged by Rule 30 of the Ruled of the Honourable Court and that same be struck out".

[21] I have already attended to the application for leave to appeal as argued and declined to grant leave to appeal. Consequently, there is no need deal with it in terms of Rule 30. In respect of the notice of appeal this court has no authority to struck it or deal with it otherwise. It is a notice to the Supreme Court and only that court can attend to it. An application in terms of

Rule 30 of this Court's Rule is bad in law in respect of proceedings in and before the Supreme Court.

[22] The appellants' contention concerning the motive of the respondents in bringing an application for leave to appeal and thereafter filing a notice of appeal in the Supreme Court, as well as that it is evident that the respondents have no intention to proceed with he latter, may have merit. However, in the light of what has been stated above, regarding this court's jurisdiction in respect of a notice of appeal to the Supreme Court, the application for leave is not an irregular step. This court has already dealt with it and has refused to grant such leave.

[23] The application in terms of Rule 30 is therefore refused. In the light of my decision to grant leave,

no order of costs is made in respect of the Rule 30 application.

Rule Nisi - Contempt of Court

[24] The court has to consider whether to confirm or discharge the Rule Nisi in the contempt application granted on 21 August 2009 and extended until November 2010. Although there is only one respondent in this matter, Sebata, I shall refer to the parties as applicants and respondent.

[25] It is common cause that the applicants obtained a Rule Nisi in respect of the interdict against all respondents in that application, including the respondent Sebata, on 2 July 2009.
That Rule Nisi was confirmed on 16 July 2009. There can also be no doubt that the respondent and its legal representatives were aware of these court orders. That Rule Nisi is an order of this court and has not been set aside.

[26] The interdict was obtained as a result of a dispute between the parties concerning the purported cancelation of a sole distribution agreement regarding the sale of certain software in Namibia to clients of the applicants. As a further result of the respondent's attitude that it was entitled to cancel the agreement and indeed did so, it proceeded to canvass and service the clients of the applicants. The applicants averred that the respondent could not unilaterally cancel the agreement, while being in breach of it and continuing to canvass their clients. The purpose of the interdict was to maintain the *status quo* pending the outcome of the action to be instituted (at that time). The respondents' legal

representatives were warned that they are disobeying the interdict order of this court by failing to comply with it. The respondent, apparently on the advice of the legal representatives, attempted to excuse its conduct because an appeal has been noted against the interdict. This advice was based on provisions in the South African Rules, which do not apply here. Again the respondent was informed that the interdict remains valid and should be complied with, but the respondent did not heed that warning.

[27] Despite the interdict and objections contained in several letters written by the applicants to the respondents, the latter persisted to contravene the interdict and continued to infringe the rights of the applicants. There is no doubt that it did so not only with the knowledge of the respondents' legal representatives, but also with the latter's' active participation. Examples of the respondents conduct are contained in annexures to the applicants' founding affidavit. There were also active approaches by the respondent through its employees to clients of the applicants. The applicants also averred that the respondent misrepresented the factual and legal positions to certain clients (local authorities and municipalities).

[28] There can be no doubt that the respondent deliberately ignored the interdict and continued to approach and canvas the applicants' clients. Applicant has 45 municipalities and local authorities in Namibia and two electively companies, namely Cenored and Nored, as clients. The letters written by the respondent to some of these clients and attached to the founding affidavit in respect of the contempt application bear this out. Although the respondent denies in its answering affidavit to that application that it did not ignore the interdict, its actions indicate the contrary. The respondent

attempts to hide behind advice received from its legal representatives to the effect that by its noting of an appeal against the interdict was suspended. That advice was clearly wrong. However, the respondent denies that it was *mala fide* or acted in wilful disregard of the court order. The respondent avers that it was *bona fide* and acted reasonably.

[29] As a result of the respondent's conduct the applicants applied for the committal of the respondent for contempt of court on 20 August 2009. The respondent was apparently legally represented in court on 21 August 2009 when the order was granted. The following order was granted:

" **It is ordered:**

1. That the forms and service provided for in the Rules of Court is dispensed and that this matter is heard as urgent application as contemplated in Rule 6 (12) of the Rules of Court.

2. That a rule nisi issue calling upon first respondent to show cause (if any) on Friday, 9th October 2009 at 10h00 why an order in the following terms should not be granted.

2.1. Declaring that the respondent is in contempt of the order of this Honourable Court handed down on 16 July 2009;

2.2. Convicting the respondent of contempt of Court;

2.3. Sentencing the respondent to a fine of N$1 million or such other punishment as the Court may deem fit;

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

3. That prayer 2.1 operates as an interim order with immediate effect."

[30] Long after the interdict was finally granted on 16 July 2009 and after the contempt of court order of 21 August 2009 on September 2009, the respondent's own legal practitioners, Moss Cohen, wrote a letter to the Aranos Village Council, one of the applicants' clients, to provide it with an *"up-to-date overview of the disputes that our client has with Ae-Gams and more particularly the legal status of the various proceedings that are pending in the High Court of Namibia and Supreme Court of Namibia."* The letter then proceeded to list each application to and order made by the High Court. Although mention is made of the applicants' application to hold the respondent in contempt, the respondent failed to mention that a Rule Nisi in respect of the contempt application had in fact been issued on 21 August 2009. There cannot be any doubt that the respondents' legal representatives, while carefully listing all court proceedings with the purpose of providing a full *"up-to-date overview"* of all the proceedings, deliberately left this important court order out. The question is: Why was the existence of that order not conveyed to the client? Later in the same letter the writer for a second time referred to the contempt application and that a counter-application had been filed to seek a declaratory order to the effect that the agreement had in fact been cancelled. Again no mention was made of the Rule Nisi in respect of the contempt order issued a month earlier. Again the defence seems to be that the respondents' legal representatives, including counsel (and even senior counsel), advised the respondent that the effect of the notice of appeal was to stay the interdict.

[31] Before dealing with the factual situation it is necessary to look at the applicable law pertaining to proceeding pertaining to a committal for contempt of court.

[32] *"The object of proceedings that are concerned with the unlawful and intentional refusal or failure is the imposition of a penalty in order to vindicate the court's honour consequent upon the disregard of its order and/or to compel performance in accordance with the order."*

(Herbstein and van Winsen - The Civil Practice of the High Courts of South Africa, vol. 2, at 1100). This disobedience of a court's order constitutes a criminal offence, because of the deliberate and intentional violation of the court's dignity, repute or authority. *(Fakie N.O. v CC11 Systems* 2006 (4) SA 326 (SCA) at 333D-E [10]). The form of the punishment for disobeying a court order in civil proceedings may take the form of committal to gaol, a suspended sentence or the imposition of a fine. *(Herbstein and van Winsen*, *supra*, at 1101).

[33] In contempt proceedings the *onus* rests on the applicant to set out the grounds of contempt. The applicant has to prove the existence of the court order, service thereof and that to prove the respondent failed to comply with it. The applicant has to prove wilful or reckless disregard of the order of court. *(Clement v Clement* 1961 (3) SA 861 (T) at 866A; *Haddow v Haddow* 1974 (2) SA 181 (R) at 182H). Unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt; it must be wilful and *mala fide*. *(Fakie*, *supra*, at 333). In the *Fakie* case, Cameron JA, held that the contempt procedure survives constitutional scrutiny and he approved what Pickering J held in *Uncedo Taxi Service Association v Maninewa* 1998 (3) SA 417 (E) at 425-6, namely that contempt proceedings brought by notice of motion does not entail unconstitutional unfairness. The decision of Camaron JA in the *Fakie* case brought a change to the common law in the sense that a respondent no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but has to provide evidence

to establish reasonable doubt. *(Herbstein and van Winsen, supra*, at 1104; *Fakie NO, supra* 334H -335A [12]. Cameron JA carefully considered the standard of proof in committal for contempt cases and what the approach of a court should be. He concluded his analysis of what the law in this regard should be and summarised it. I respectfully agree with Cameron JA's statements as set out in [41] and [42] on 344 E - 345A of the *Fakie* case, where he stated the following:

> *"[41] Finally, as pointed out earlier (in para [23]), this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in Burchell (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt.*
>
> *[42] To sum up:*
>
> *a) The civil contempt procedure is a valuation and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*

b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as

are appropriate to motion proceedings.

c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

d) But, once the applicant has proved the order, service or notice and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[34] Our law is clear that a litigant cannot act against an existing court order or an Act. This is commonly referred to as the doctrine of *"dirty hands"* or *"clean hands"*. This doctrine has been considered in old English cases and the ratio is *"purge first and argue later"*. In the context of an existing law or court order it means that until such time as that law or court order had been set aside it must be complied with. It is irrelevant that the law or court order may be unconstitutional or wrong.

[35] In respect of a law or statute, the House of Lords in the case of *F Hoffman - La Rocheche and Co AG and Others v Secretary of State for Trade and Industry* [1975] AC 295 (HC) B, (also reported in [1974] 2 All ER 1128), Lord Denning MR said the following at 322B:

"They argue that the law is invalid, but unless and until these courts declare it to be so, they must

obey it. They cannot stipulate for an undertaking as the price of their obedience. They must obey and argue afterwards."

This principle was followed and upheld in *Associated Newspapers of Zimbabwe (Pty) Ltd v Minister for Information and Publicity in the President's Office and Others* 2004 (2) SA 602 (ZS). Chidyansibu CJ, writing for the Zimbabwean Supreme Court, stated the following at 610 A-D:

"This Court is a court of law and as such cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for the registration and thus avoid compliance with the law it objects to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this court with clean hands on the same papers." The court also approved of the doctrine of clean hands in respect of a law in *Petrus Shaanika and 13 Others v The Windhoek City Police and 3 Others*, an unreported judgment in case A249/2009, delivered on 28 October 2010.

[36] The same principle applies in respect of a court order, as in this matter. In *Hamutenya v Hamutenya* 2005 NR 76 (HC) at 78C-79A. Maritz J, as he then was, expressed himself as in respect of disobedience of a court order and also quoted with approval what this court said in this regard in the *Sikunda* matter, as well as other South African cases:

"In pressing the point in limine on behalf of the respondent, Mr Boesak reminded the court of the dire consequences to the administration of justice and the maintenance of order in society

of orders of court are disregarded with impunity. Recognising the considerations of public policy which underline the need to respect and comply with orders of that kind, the court said in Sikunda v Government of the Republic of Namibia and Another 2001 (2) NR 86 (HC) at 92D-E:

> *'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 to anarchy. A rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded.'*

Authority for this approach is also to be found in a case both parties drew the court's attention to. In Kotze v Kotze 1953 (2) SA 184 (C) Herbstein J said at 187F:

> *'The matter is one of public policy which requires that there shall be obedience to orders of court and that people should not be allowed to take the law into their own hands.'*

It is for these reasons that Froneman J pointed out in Bezuidenhout v Patensie Sitrus Beherend Bpk 2001 (2) SA 224 (E) at 229B-D:

> *'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 (W) at 494A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (Hadkinson v Hadkinson [1952] 2 all ER 567 (CA); Byliefeldt v Redpath 1982 (1) SA 702 (A) at 714).'*

These propositions apply with equal force to orders relating to the custody and control of minor children. This much was recognised by Herbstein J in Kotze's case supra at 187D-E: 'A similar question has recently been dealt with in England in the of Hadkinson v Hadkinson 1952 (2) All ER 567 Romer LJ gave the main

judgment and inter alia said: "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it, unless and until that order is discharged." He went on to say that two consequences flow from that obligation:

> *"The first is that anyone who disobeys an order of court is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such person will be entertained unless he has purged himself of his contempt."*

[37] This court confirmed a Rule Nisi on 16 July 2009 in terms whereof the respondents (and others) were interdicted to refrain from certain acts. They did not despite several warnings by the applicants that they were in contempt of court and continued with the conduct that the court order forbids. This led to the applicants' application for committal for contempt of court and the Rule Nisi that was issued in that regard on 21 August 2009. However, despite that order the respondent still continued with the same contempt and as pointed out before, the respondents' legal representatives purported to put the record straight on 16 September 2009, but withheld important information, i.e. the order of 21 August 2009.

[38] The respondent attempted to hide behind the guise of legal advice for its conduct. That excuse is seems very lame to me. Even before the Rule Nisi in the contempt application and before the 3rd September 2009 notice of appeal, the respondent infringed the very rights that the interdict forbid. The respondent should have waited for the Supreme Court to set the interdict aside before it could do anything that it was interdicted not to do. They should have *"purged first and argue later"*. The respondents' lawyers should have known that in Namibia a notice of appeal or an

application for leave does not entitle a respondent to ignore or infringe the prohibition contained in an interdict. Although the respondents clearly disagreed with the interdict granted and the order issued by Hinrichsen AJ, they could not just ignore it. It does not matter whether the law or order is unconstitutional or wrong, a respondent or a person who is prohibited by it, must obey it.

[39] The Respondent based its arguments on the *Fakie* - case and more specifically that as a result of the advice it received from its legal practitioners it was not *mala fide* and did not wilfully ignore the interdict. The respondent submitted that it acted *bona fide* and reasonable. Consequently, it submitted that the court should not have granted the Rule Nisi on 21 August

2009.

[40] Acting on legal advice may render conduct excusable. This excuse can only go so far as the stage when the client should reasonably understood that it should not act on such advice. In respect of acting on legal advice, courts have in the past concluded that it may be unreasonable to rely on such advice and refused to regard it as an excuse for conduct. In *HEG Consulting Enterprises (Pty) Ltd v Siegwart* 2000 (1) SA 507 (CPD) the court did not uphold reliance upon a defence of "legal advice" to disprove "willingness". The court held that *Katzeft* (the third respondent) had not discharged his *onus* showing that he was entitled to take the advice at face value. (See also *S v Abrahams* 1983 (1) SA 137 (A) at 146 H). In *Culverwell v Beira* 1992 (4) SA 490 (W) the court held, at 493I - 494A, that it is no excuse if an order was wrongly granted; it must still be obeyed until set aside.

[41] The non-compliance of the respondent may be apportioned into two periods; one before the Rule Nisi in respect of the contempt of court and one thereafter. After the interdict order was granted on 16 July 2009 and before the Rule Nisi of 21 August 2009 the respondent approached several clients of the applicants, issued a newsletter of which the contents also did not comply with the interdict and further canvassed the appellants' clients. The applicants' legal advisers warned the respondent that it did not obey the interdict. In its answering affidavit to the contempt application the respondent blamed the legal advice, which it accepted and averred that it acted *bona fide* and not *mala fide* or wilful. The second stage concerns the respondent's action after the contempt Rule Nisi.

[42] There can be no doubt that the allegation of bona fides, etc do not avail the respondent in respect of the second stage. After that hearing the court issued a Rule Nisi. A prima facie case had been made out and the applicants had discharged the *onus* of proving the interdict, service and disobedience with the court order (interdict). Despite the court order of 21 August 2009 the respondent continued to approach the appellants' clients as the letter of 16 September 2009 clearly indicates. Not only did it do so, the important issue of the Rule Nisi of 21 August was deliberately not mentioned. The respondent's only motive was to keep that information from the reader of the letter, namely a client of the applicants. At that stage the respondent knew about the order. Its legal representatives still continued to act on its behalf in respect of disobedience of not only the interdict, but also the Rule Nisi of 21 August 2009. The respondent has in my view not discharged the *onus* to show that it could *bona fide* and reasonably accept the legal advice anymore. Once the court has issued the Rule Nisi the picture has changed. The respondent wrongly refused an order of court and persisted in its actions. It is also

significant that except for claming to be *bona fide*, etc, no evidence has been provided by the respondent to prove what is required in terms of the *Fakie* case, *supra*.

[42] Returning to the first stage, namely the period between 16 July and 21 August 2009, the defence of bona fides, because of respondent's reliance on legal advice might have had some merit, was it not for persistence with the same attitude as was revealed in second stage. That conduct indicates in my view that the respondent was wilful and mala fide during the first stage also. The respondent's attempt to hide behind the so called "legal advice" is merely a guise. The respondent did not intend to abide by the court's order. It never had the intention to comply with the interdict and its clear disregard of the Rule Nisi in respect of contempt is an illustration of this attitude that was disclosed by its letters to the clients of the applicants.

[44] In the circumstances the Rule Nisi granted on 21 August, as extended, is confirmed.

[45] Simultaneously with its answering affidavit the respondent also filed a counter-application based on the cancelation of the contract between the parties. The respondent prays for a declaratory order to the effect that the contract had been cancelled. It is obvious that the court cannot make such an order at this stage as it would require a decision on the merits of the litigation instituted after the attachment order was made. No decision will consequently be made in respect of the counter-application, which appears to be nothing more than a smoke screen in the light of the respondent's contempt of the orders of this court.

Exception

[46] In the light of the court's decision to confirm the Rule Nisi issued on 21 August 2009, the respondent is in contempt of court. As long as that order is not complied with the respondent's hands are dirty and no legal proceedings can be conducted by the respondent in this court. The respondent is either a crucial or only relevant defendant in the exception. The exception can therefore also not be entertained by this court at this stage.

[47] Even if the court is wrong in respect of the aforegoing, the exception cannot be entertained because it is purely academic at this stage in the light of the respondents' (who are the exciplints in the main action) notice of appeal against the attachment order.

[48] Although I refused to grant leave to appeal against the interdict, there is still a pending appeal against the order of Hinrichsen AJ regarding the attachment. If that appeal should succeed and the judgment of Hinrichsen AJ in case A220/2009 is set aside, the effect is that applicants did not have jurisdiction to sue the respondents and the litigation instituted by the applicants (as plaintiffs) against the respondents (as defendants) will also be set aside (or withdrawn) because of lack of jurisdiction. Consequently, the exception also falls away.

[49] In my opinion a decision on the exception would be purely academical at this stage.

"The court will not decide issues which are academic, abstract or hypothetical". (Eric Knowds N.O. v Nicolaas Cornelius Josea and Another, supra, at p9, [13], *Mushwena v Government of Namibia and Another* (2), 2004, NR 94 (HC) at 102H-I, [12]).

[50] Consequently, no decision is made at this stage in respect of the respondents' (defendants') exception to the applicants' (plaintiffs') particulars of claim, supported by further particulars, including costs. The exception will be struck from the roll.

[50] In the result the following orders are made:

1. The application for leave to appeal against the order of Hinrichsen AJ in case A224/2009 is refused with costs, such costs, including the costs of one intructing and two instructed counsel, have to be paid by the respondents, jointly and separately, the one paying the other to be absolved;

2. The Rule 30 application is dismissed and no order of costs is made;

3. The Rule Nisi granted on 21 August 2009, as extended, is confirmed. The costs to be paid by the respondent, *Sebata*, includes the costs of one instructing and two instructed counsel.

4. The exception by the respondents (as defendants) against the applicants' (as plaintiffs') amended particulars of claim, as amplified by amended further particulars, in case I2738/2009 is struck from the roll and no order as to costs is made.

MULLER J

ON BEHALF OF THE APPLICANTS:	**Adv. Coleman**
Assisted by:	**Adv. Dicks**
Instructed by:	**ELLIS & PARTNERS**
ON BEHALF OF THE RESPONDENTS:	**Adv. Corbett**
Assisted by:	**Mr. Silver**
Instructed by:	**FISHER, QUARMBY & PFEIFER**