IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 11384/2010

In the matter between:

KENTZ OVERSEAS LTD **APPLICANT**

and

G A McGILLAN **RESPONDENT**

JUDGMENT

Date: 12 November 2011

PLOOS VAN AMSTEL, J

[1] The applicant seeks the confirmation of a rule nisi which called upon the respondent to show cause why a final order should not be granted in the following terms:

'2.1 that the respondent is directed not to defame the applicant to any party in any manner;

2.2 that the respondent is directed not to communicate in any manner whatsoever with any person employed by, contracted to or in any other manner involved with:

2.2.1 Kuwait Oil Company;

2.2.2 Fluor Corporation; or

2.2.3 any subsidiary company or division within the Fluor Corporation Group

in relation to the business affairs of the applicant, Kuwait Oil Company and / or the Fluor Corporation or any of its divisions or subsidiary companies;

2.3 that the respondent is directed not to take any action which is designed to interfere with the business relationship between the applicant on the one hand and/or the Fluor Corporation or any of its subsidiary companies and/or divisions or the Kuwait Oil Company on the other hand;

2.4 that the respondent is directed to pay the costs of the application'.

[2] Paragraphs 2.1, 2.2, 2.3 of the rule nisi were ordered to operate as an interim interdicts with immediate effect.

[3] The applicant is registered and incorporated in Jersey. It carries on business as managing consultants, which includes the business of placement of employees with construction companies. It often employs the employees itself and seconds them to construction companies. In January 2009 the applicant employed the respondent in terms of a written employment contract as a lead contracts administrator and placed him with a company called Fluor Corporation, which is a large multinational construction company involved in large construction and development projects in Kuwait. The contract was terminable upon the giving of one month's written notice by either party.

[4] The applicant terminated the respondent's employment contract in September 2010. The reasons for the termination and the validity thereof are in dispute but are not relevant for present purposes. The application for an interdict to restrain the respondent from defaming the applicant arose out of an email which the respondent addressed to Mr James Baker, who was Fluor's project manager on the project where the respondent was employed. The email was sent on 22 September 2010 and was copied to a large number of people employed by Fluor as well as to a senior employee of Kuwait Oil Company. The part of the email which contains the defamatory material complained of reads as follows:

'I don't take any advice from you or fraudulent operators like Kentz who have bribed you

and you have accepted their bribes for years. In collusion with Tom Cullen you devised this plan to ignore the serious financial irregularities at Kentz, hell they even had to fire their accountant for fraud last month. You think by getting rid of me this fraud will just smooth over, no ways, you will be investigated. Your protection racket for Kentz is over. The enticement of labour under false pretence to Kuwait is outlawed in international law, this will be investigated and action taken to close the practice.'

[5] It was not disputed that the allegations in the email concerning the applicant are defamatory. The respondent accused the applicant of being a fraudulent operator, bribing people, being a party to serious financial irregularities, being involved in a protection racket and enticing labour to Kuwait under false pretences.

[6] The first point relied on by the respondent in opposing the confirmation of the rule is that the applicant failed to show that the deponent to the founding affidavit was authorised either to bring the application or to depose to the affidavit.

[7] The founding affidavit was deposed to by Eoin Hurley, who describes himself as the chief operating officer of the Construction Business Unit of the applicant. He says he was duly authorised to depose to the affidavit and make the application on behalf of the applicant. In his answering affidavit the respondent denied that Mr Hurley was authorised to bring the application or to depose to the affidavit. He says it is significant that Mr Hurley had not attached any resolutions which would evidence his authority to act as aforesaid. He concludes with a challenge to Mr Hurley to provide such evidence in order for the court and him to be satisfied that Mr Hurley was so authorised.

[8] In Ganes and another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) Streicher JA said in paragraph 19 that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. He points out that rule 7 of the Uniform Rules provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.

[9] The application was launched by the applicant's attorney in Johannesburg, whose authority to do so has not been challenged. As Streicher JA pointed out in the Ganes case, it is not relevant whether Mr Hurly had been authorised by the applicant to depose to the affidavit. The attorney who launches the application decides which witnesses are to be used in support of the application.

[10] The second point relied upon by the respondent is that the launching of the application was an abuse of the process of the court. He says he had made a tender, with prejudice, in the light of which the relief sought became unnecessary. The point is the following. On 22 September 2010 an email was sent to the respondent in which an employee of the applicant stated the following:

> 'We have been made aware of Email and SMS correspondence that has been sent by you since your departure from the State of Kuwait. The Company views the content of the correspondence and the fact that they have been public as being defamatory and as a consequence we require that you unconditionally withdraw the accusations made in the correspondence in so far as they may relate to Kentz Group, its subsidiary in the State of Kuwait and its Officers. We also require a written undertaking on your part that you will cease and desist from future correspondence of this type to our client. Failure to act on this request will result in the company taking legal action against you without any further notice.'

The respondent points out that the founding affidavit was deposed to on the following day, on 23 September 2010, that the application papers were issued by the registrar on 24 September 2010 and that the rule nisi together with the interim order was granted on 27 September 2010. The tender on which the respondent relies is dated 13 October 2010. It was telefaxed to the applicant's attorney, presumably on that day. The relevant part of it reads as follows:

6. 'Without conceding that there is any urgency or basis for the application as sought and, reserving the right to argue urgency and the merits (should the need arise), our instructions are to make the following proposal in order to avoid taking up unnecessary time in the urgent court or any other court for that matter: -

6.1 That our client's undertakings, as set out below, be agreed to, alternatively be made

an order of court:-

6.1.1 Our client will not communicate in any manner whatsoever with any person/s employed by or contracted to in any manner involved with the Kuwait Oil Company, Fluor Corporation and any other subsidiary group or division within the Fluor Corporation Group, in specific relation to the business affairs of the applicant, Kuwait Oil Company and/or Fluor Corporation or any of its divisions or subsidiary companies;

6.1.2 our client will not take any action which will in any way interfere with the business relationship between the applicant on the one hand and/or Fluor Corporation or any of its subsidiary companies and/or divisions or the Kuwait Oil Company on the other hand.

7. The aforesaid undertaking does not encompass a tender for costs because, notwithstanding the aforesaid proposal, our client believes that your client was not entitled to have brought this application.'

[11] There are two obvious shortcomings in the tender. Firstly, there was no tender with regard to paragraph 2.1 of the notice of motion, in other words a tender or undertaking that the respondent would not defame the applicant. Secondly, the tender expressly did not include the costs of the application, which in itself would have entitled the applicant to persist with the application and seek an order for costs. There is no basis for the contention that the application was an abuse of the process of the court, or that the tender protects the respondent in any way.

[12] The third point relied on by the respondent is his assertion that the allegations in the offending email are true and in the public interest, alternatively that they constituted fair comment. He tried to demonstrate the truth of the allegations regarding fraud by referring to discrepancies between his letter of appointment and his employment contract. This evidence does not establish fraud. In any event, if one reads his allegations of fraud in the emails in context it seems clear that he was not referring to his employment contract. He was referring to fraud in connection with the applicant's operations. He has provided no evidence to establish the truth of this. The same goes for his allegations of bribery, serious financial irregularities, a

protection racket and the enticement of labour under false pretences. Not only has he not established the truth of the allegations, he has made no case whatsoever to show that the publication of the allegations was in the public interest.

[13] In January 2011 the respondent, in spite of the interim order, defamed the applicant again in an email to a friend, in which he referred to the 'fraud being conducted by Kentz', and in an email to another senior employee of Kuwait Oil Company. He has also insisted in his answering affidavit that the allegations in his emails are true. I am satisfied that the applicant is entitled to interdictory relief.

[14] I however do not think that the whole of the rule nisi should be confirmed. Paragraph 2.2 does not seem to me to refer to unlawful conduct. It seeks to prevent the respondent from communicating with any person employed by any of the companies referred to in relation to their business affairs. That will also cover communications which are perfectly lawful. I think the applicant's rights will be adequately protected if paragraphs 2.1 and 2.3 are confirmed. I prefer to change the wording slightly.

[15] I accordingly make the following order:

(i) The respondent is interdicted from defaming the applicant;
(ii) The respondent is interdicted from interfering unlawfully with the business relationship between the applicant and Fluor Corporation or any of its subsidiary companies or divisions, or Kuwait Oil Company;
(iii) The respondent is ordered to pay the costs of the application, including all the costs which have been reserved;
(iv) The remainder of the rule nisi is discharged.

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PLOOS VAN AMSTEL J

Appearances:

For the Applicant	**:**	P J Wallis
Instructed by	**:**	Van Heerden Attorneys Durban
For the Respondent	**:**	Mr K Ioulianou
Instructed by	**:**	Cowen-Harper Attorneys Durban
Date of Hearing	**:**	8 November 2011
Date of Judgment	**:**	12November 2011