



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 365 of 2007

SAFEPAK LIMITEDPLAINTIFF

VERSUS

MALPLAST INDUSTRIES LIMITED.....DEFENDANT

R U L I N G

Safepak Limited the Plaintiff/Applicant herein moved the court by its Notice of Motion dated 3rd March 2008 THAT:-

1. ***an order for committal for contempt of court be made and issued against Bijesh Shah a Director of Malplast Industries Limited for disobedience of the court order made by this Honourable court on 30th November 2007.***
2. ***pending the hearing of this application for committal and/or the Respondent purging their contempt to the satisfaction of the court, the Respondent ought not to be heard by the court in these proceedings.***
3. ***.....”***

That Application was based on six (6) grounds the ones most relevant to the orders herein sought being that the Respondent has failed to comply with the orders made on the 30th November 2007 in that Malplast Industries and its director Mr. Bijesh Shah have continued selling offering for sale, distributing, marketing bottles or other products manufactured from the reproduction, imitation or infringement of Industrial Design as No.385; the Respondent Mr. Bijesh Shah being fully aware of the orders referred hereinabove has in flagrant disobedience thereof and with intention continued selling, offering for sale, distributing, marketing bottles or other products manufactures (manufactured?) from the reproduction, imitation or infringement of industrial Design as No.385 and that the Respondent’s conduct is contemptuous of this court and the Respondent ought not be heard in these proceedings unless and until he purges his contempt. There is filed in support of the Application an Affidavit by Tushan Shah the managing Director of the Applicant. This is to the effect that he purchased two plastic bottles at the Nakumatt Supermarket village market branch on 10th February 2008 that looked like those of the Applicant’s design. On the 26th February 2008 a truck registration number SK 2014c arrived at the Applicant’s warehouse to load goods and in it the deponent noticed there was a consignment of goods consisting of various juice drinks bottled in plastic bottles which were same as those produced using industrial design No.385. He noticed that the bottles in which was a ready to drink juice called “**Boom**” seemed to be the same as the one in which “**Highlands toto**” was bottled.

There is also filed an Affidavit in reply and opposition to the application and sworn by Bijesh Shah the person sought to be committed for contempt. In it he swears that since 30th November 2007 when the order in question was given by the court the Defendant/Respondent has never sold, offered for sale, distributed marketed bottles or other products manufactured from reproduction, imitation, or infringement of the industrial design No.385 in breach or in flagrant disobedience of the court order. He states that whatever bottles the Applicant complains of were manufactured and sold before the court order and as the same are in the hands of third parties he has no control over them. He deposes that he is a law abiding citizen and will not engage in the breach of lawful court orders. He also refers to the Affidavit of Kirtik Karsandas Padia the Director of a third party company whose goods were bottled in the industrial designed bottles. In support of his position that any bottles now being complained of were manufactured and sold before the court order of the 30th November 2007.

Prayer 2 of the application was abandoned at the commencement of the hearing of the application.

At the hearing of the application oral submissions were made by counsel appearing in support of their respective divergent positions. They were largely in support of what is stated above with the addition of reference to and reliance on case law on this subject of contempt of court. In considering this matter I have addressed my mind to the standard of proof required in contempt cases. The relevant order of the court of the 30th November 2007 reads:-

That the Defendant be and is hereby restrained pending the

Hearing and determination of this suit from doing whether by itself, its officers, servants or agents or any of them or otherwise howsoever the following acts or any of them that is to say:

- (a) Infringing the Industrial Design registered as Number 385;**
- (b) Manufacturing, importing or exporting, selling, offering for sale, distributing, marketing bottles or other products manufactured from the reproduction, imitation or infringement of the Industrial Design registered as No.385;**
- (c) Parting with possession, power custody (other than to the plaintiff or its agents) of or in any way altering, defacing or destroying products or moulds which infringe Industrial Design registered as Number 385;**
- (d) Parting with possession, power custody (other than to the plaintiff or its agents) of all moulds documents, files, invoices, receipts, articles or equipment relating to the importation, purchase, manufacture, sale or sale of supply or the infringing bottles, moulds and other products."**

So that the present application succeeds it must be proven that the alleged contempnor has done one or all the events listed in the above order. The managing director of the Applicant bought some bottles in a particular supermarket that looked like the ones that are protected by the industrial Design. He also saw others in a truck that also seemed like the subject bottles. How then are these bottles traceable to the Defendant/Respondent herein? What proof is given? It is submitted for the Plaintiff/Applicant that the simplest thing to do to show that the bottles in the market were supplied before the court order of the 30th November 2007 was to produce records showing that batches were produced before the said date. It is not enough to rely on third parties was the further submission for the Plaintiff/Applicant. It was submitted that the invoices and delivery notes produced prove nothing least of all that the bottles in the supermarket and in the transporting truck were manufactured before the court order and in so far as the Defendant did not produce records/documents showing the period of manufacture of those bottles, then he has not proved that he is not in contempt.

But whose duty is it to prove that the Respondent is indeed in contempt? In the case of **W. WATSON & SONS LTD –VS- GARBER [1962]** 106 SO Jo 631 it was held that before the court

would exercise its very special jurisdiction to punish for breach of an order, it was essential that proper proof of a breach be given. It has been held that the breach must be proved beyond all reasonable doubt. In the instant case it was submitted for the Respondent that no evidence was produced to prove that contempt had been committed and that it was not enough to bring circumstantial evidence and upon it ask the court to commit for contempt. The burden of proof is on the Applicant to clearly show that the Respondent was in contempt. And that is the position in **RE BRAMBLEVALE LTD 1970] Ch.128 at page 137** where Lord Denning MR. said.

“A contempt of court is an offence of a Criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that when a man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given then his lies can be thrown into the scale against him. But there must be some other evidence.”

In our court of Appeal Civil Application No.39/1990 REFRIGERATOR & KITCHEN UTENSIL LIMITED –VS- GULABCHAND POPATLAL SHAH & OTHERS **approving the standard of proof in contempt cases as set out in the case of GATHARIA MITIKA & others –vs- BAHARINI FARM LIMITED CIVIL APP NO. 24/1995** GATHARIA MITIKA & others –vs- BAHARINI FARM LIMITED CIVIL APP NO. 24/1995. Their Lordships held that in cases of alleged, contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof on a balance of probabilities but not as

high as proof beyond reasonable doubt. The charge must be proved beyond peradventure. In the instant case what we have is the possibility that the bottles bought at the supermarket and those in the truck could have been manufactured and sold by the Respondent after the court order. No cogent proof was advanced. One could also say as indeed the Respondent states that those bottles were sold before the court order. These are indeed two equally likely possibilities but the court cannot be satisfied that, in the absence of cogent evidence, any particular position above is the correct one and be so satisfied beyond reasonable doubt. That would be conjecture rather than inference – surmise rather than proof. The position is that where there are two equally consistent possibilities open to the court as in this case, it is not right to hold that the offence is proved beyond reasonable doubt. And for the above reasons I must hold which I hereby do that contempt of court even if indeed committed is not proved in this case and must dismiss the application with costs which I do.

DATED and DELIVERED IN NAIROBI THIS 22nd DAY OF May 2008.

In the presence of

Mr. Somane holding brief for Miss Malik for the Applicant

Mr. Werimo holding brief for Rimui for the Respondent

P. M. MWILU

JUDGE

22·05.2008.