Citation Number: [2021] EWHC 556 (Comm)

Case No: CL-2019-000045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, Holborn
London, WC2A 2LL

5th February 2021

Before:

MR JUSTICE JACOBS

- -

Between:

IFACO FEED COMPANY S.A.

Claimant/ Respondent

-and-

(1) SOCIETE DE DISTRIBUTION NOUVELLE D'AFRIQUE (SODINAF) S.A.R.L.

(2) FABRICE SIAKA

Defendants/ Applicants

- -

JULIUS NKAFU (instructed by **Harding Mitchell**) for the **Applicant**
RALPH MORLEY (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

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Approved Judgment

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MR JUSTICE JACOBS:

1. The applicants ("Sodinaf" and "Mr. Siaka") apply to set aside or discharge a committal order which was made by Phillips J as long ago as 5 September 2019. That committal order was made pursuant to an application on that day where the claimant Ifaco Feed Company SA ("Ifaco") was represented by Mr Morley who appears today. The order committed Mr Siaka to prison for a period of two years.

2. The background to the committal application was an arbitration award which had been obtained by the Ifaco against Sodinaf in GAFTA arbitration proceedings in the sum of €4.75 million. That award was and remains unsatisfied. The award then led to an order of Phillips J against Sodinaf for disclosure of assets made in May 2019. Mr Siaka is the chief executive officer of Sodinaf and is the principal and owner behind the company.

3. The order which Ifaco obtained required that disclosure to be given in a relatively short period of time supported by an affidavit. However, the affidavit was not provided, and it is that which led to the application which came before Phillips J.

4. There were then some further proceedings between the parties. Sodinaf began proceedings in Cameroon, in relation which Ifaco commenced antisuit proceedings in England, which relief was broadly agreed to by consent between the parties, as recorded in the order of Butcher J dated 29 April 2020. Accordingly those Cameroonian proceedings were effectively stopped. At the same time as the anti-suit injunction proceedings were underway, there was an application by Sodinaf and Mr Siaka to set aside or discharge the order of Phillips J. That application was made on 23 April 2020. By that time, the applicants were represented by English solicitors, and the application is supported by a witness statement of Miss Corinne Elle Atangane. At the time the application was made, there had still been no provision of any affidavit in accordance with Phillips J's disclosure order.

5. The application was responded to by Mr Perrott of Ifaco's solicitors, HFW. His fourth witness statement goes into some detail as to the history of the proceedings, including the history of service. That witness statement was served on 22 January 2021. Again, at that time there had been no attempt to comply with the original order for disclosure of assets which had led to the committal.

6. However, matters moved on, at least to some degree, yesterday because Mr Siaka did provide a witness statement - albeit not an affidavit - which set out his assets. This was not a document which complied with the order for disclosure which had been made in May 2019 for a variety of reasons. Principally, there was no disclosure of the assets of Sodinaf. It was the company's assets which were the subject of the disclosure order. It is possible that the disclosure which has been given by Mr Siaka encompasses some of the assets of Sodinaf, but that is not clear on the information which has been given. It is also clear that there are other assets of the company which have not been disclosed in Mr Siaka's witness statement. It is apparent from certain statements which have been made in criminal proceedings in Switzerland that the company has at least one potentially significant asset which does not appear on the list which Mr Siaka has provided.

7. All of that means that the case for discharging the injunction cannot, as things currently stand, be based on the proposition that the applicants' contempt has been purged. There have been indications in the correspondence that the applicants do wish to purge their

contempt and do wish - albeit belatedly - to provide the information which the court ordered as long ago as May 2019. If and when that is done, then it is open to the applicants (Mr Siaka being the applicant whom the committal order directly affects) to make another application based upon the proposition that the contempt has been purged. The judge hearing any such application will have to consider the impact of compliance - if that is what has happened - on the two-year sentence which was imposed by Phillips J. However, that particular stage has not yet been reached. If, therefore, I were to dismiss the present application by rejecting the other grounds which have been be advanced, then it is open to the applicants to make an application at a later stage on the basis of having provided the requisite affidavit which was ordered in May 2019. I say nothing about the prospects of that application being successful in whole or in part.

8. That means that I must turn to the variety of points which were raised by Mr Nkafu - who has appeared for the applicants in this hearing - in support of the argument that the order should, notwithstanding any failure to purge the contempt, be set aside or discharged.

9. The arguments advanced concern essentially two aspects of the hearing which took place before Phillips J. The first aspect concerns issues relating to the alleged inadequacies of service and notice of the hearing, and Phillips J's decision to proceed in the absence of Mr Siaka. For various reasons, it is submitted that that process should not have been followed and that the order should be set aside or varied for that reason alone.

10. The second aspect is a separate argument which is that Ifaco and Mr. Siaka on behalf of Sodinaf had in fact come to an agreement prior to the hearing before Phillips J. The effect of that agreement is said to be that the proceedings before Phillips J should not have been continued. At the very least, it is said, Phillips J should have been told that the parties were in agreement in substance on the proposition that the hearing should not continue.

11. I turn to the first aspect of those arguments, which concerns various points raised about personal service and related matters. Phillips J in his judgment recognised that Mr Siaka had not been personally served with either the order or the application for committal. One issue which he needed to consider and which he considered at the outset of his judgment was whether or not personal service should be dispensed with. His conclusion in paragraph 5 of his judgment recognised that personal service had not taken place.

12. He was aware - and I have been shown the transcript of the argument before him - that there had been a meeting on 20 August 2019 between Mr Siaka and representatives of Ifaco, and Phillips J raised questions in argument as to why personal service had not taken place at that meeting. Mr Morley made various submissions to him. The judge was also aware of the fact that that very morning (5 September 2019) there had been a meeting between Mr Siaka and representatives of Ifaco. He was told that at that meeting the documents relating to the committal application had indeed been handed to Mr Siaka, but Mr Morley accepted in argument before Phillips J that that handing over of documents at that stage would be too late to constitute a personal service. So the judge had to consider whether or not it was appropriate to dispense with personal service both of the original order or the application.

13. He decided to dispense with service, and he said in paragraph 7 of his judgment - reflecting what he had also said in paragraph 5 - that he was in no doubt that Mr Siaka had been notified both of the order (including its terms) and the application

itself. He said in paragraph 5 that he was in no doubt that various letters and emails had come to the attention of Mr Siaka.

14. It is now suggested by Mr Siaka that the judge should not have proceeded in that way, and that the true position was that whilst Mr Siaka was aware of the original order, he was not aware of the application to commit.

15. Mr Perrott addressed that particular point in paragraph 45 of his witness statement, and he identified in some detail the steps which had been taken in order to bring the application to the attention of Mr Siaka. He exhibited a very large number of documents, and I can summarise paragraph 45 by saying that Mr Siaka received a large number of emails - as did others within the company or its advisors - which gave notice of the application and its consequences.

16. I have been shown some of that underlying material in the course of argument today, and I have no doubt that Phillips J was fully entitled to take the view, as he expressed in paragraphs 5 and 7 of his judgment, that Mr Siaka knew of the application that was being made. In fact, there was additional evidence in the form of an email dated 5 September itself, in which a representative of the claimant referred to the meeting which had taken place that very morning with Mr Siaka and in which Mr Siaka acknowledged that he had previously received the documentation. So in my judgment there is no substance in the argument which is relied upon in support of the case that the order should be discharged or set aside because of lack of notice of the original application.

17. A related point is taken, which is that the judge should not have proceeded to determine the application in the absence of Mr Siaka. The judge fully considered the question of proceeding in Mr. Siaka's absence in paragraph 10 of his judgment, and considered all the relevant circumstances in accordance with prior authority.

18. Given that Mr Siaka was aware through numerous communications of the hearing that was to take place on 5 September 2019, the judge was fully entitled to proceed in his absence. None of those points in my view justify the order which is currently sought on the present application.

19. A further point is that the judge should not have proceeded to sentence but should have paused for thought, given that he had just dealt with the substance of the committal application.

20. There is authority which indicates that judges on committal applications should indeed pause for thought, and that is what Phillips J did. He took the view, as he set out in paragraphs 17 and 18 of his judgment, that Mr Siaka had not engaged with the proceedings and that there was no real likelihood of such engagement and therefore no purpose in deferring sentence. That approach was fully in accordance with the discretion which he had, and again provides no basis to set aside the order which he made.

21. The judge's view as to disengagement is borne out by events as they then transpired. The order which Phillips J had made was, on the evidence before me, then served on Mr Siaka. Mr Siaka did not then respond by saying, for example, that he was very sorry, or by producing a compliant affidavit, or even saying that he was unaware of the committal application which had taken place. Instead, there was litigation in Cameroon leading to the anti-suit injunction proceedings which I have described and in due course

to the present application in April 2020 to set aside Phillips J's order. There was, however, still no compliance with the requirement to serve an affidavit.

22. The substance of the applicants' second argument is that Mr Siaka was proceeding on the basis that the parties had reached a settlement agreement, or at least an agreement that proceedings such as the English proceedings would not be pursued by Ifaco. Mr Nkafu puts the point in various ways. Primarily, however, he says that the judge was proceeding in ignorance of the circumstances in which that agreement had been reached. Had he been told what had happened, then he would have taken a different view, in particular as to whether to proceed in the absence of Mr Siaka and possibly in relation to his other decision-making.

23. I have looked carefully at the contemporaneous documents relating to the alleged agreement. It is clear - as the judge was aware from the submissions made to him at the September 2019 hearing- that some discussions had taken place involving Ifaco and Mr Siaka. But there is nothing in the documents which suggests that there had been any agreement reached prior to the contempt hearing on 5 September 2019. Nor is there anything in the documents which indicates that any such agreement, even if it had been made, extended to an agreement that the contempt proceedings would not be pursued or indeed that litigation generally would not be pursued. In fact, it seems to me that the documents are inconsistent with all of those suggestions and with the submission that Mr Siaka did not attend court because of a genuine belief that matters had now been concluded with Ifaco.

24. The sequence of events is broadly as follows. On 20 August 2019, there was a meeting between the parties. Mr Nkafu's submission is that it was as a result of that meeting that Mr Siaka believed that agreement had been reached. However, an email was sent by Mr Siaka on 22 August 2019, after the date when the alleged agreement was reached, and this clearly shows that at that point no such agreement had been reached. Mr Siaka identifies in his email that he is reiterating his commitment to finding a solution. He made a suggestion as to how the claimant could reimburse itself from a timber operation of one of his companies. But there is no suggestion that any agreement had been reached, and there is no signed document - or even unsigned document - recording an agreement at that stage.

25. Subsequently on 29 August 2019 there is document which appears to be a signed agreement between the parties. But it is clear from the correspondence that, as at 29 August 2019, the document - which was headed "Memorandum of Understanding" in French - had only been signed by the claimant. The correspondence shows that it had not been signed at that stage by Mr Siaka. It was only signed later, at a time subsequent to the hearing before Phillips J and the order which was made on that occasion. It was only signed after the claimant had in fact withdrawn its consent to the proposed agreement. When it was signed, it was not signed in a clean fashion by Mr Siaka, because he made a material change to the terms.

26. If one was approaching this as a matter of English law, Mr Siaka's later signature would be treated as a counter-offer which was not accepted by the claimant. In fact, the agreement is governed by Swiss law, and the evidence of Swiss law is that even if the agreement was in some way binding, it would not prevent Ifaco from attempting to enforce the award.

27. So the upshot is that, as at 29 August 2019, there was no signed agreement between the parties. Even if there were an agreement itself, Swiss law would not prevent Ifaco from attempting to enforce the award. There is nothing in the agreement which contains an obligation that all proceedings are to be put on hold.

28. The position then moved on in some correspondence on email on 5 September 2019 (the day of the hearing before Phillips J). I should explain at this point that the email address which Mr Siaka was using and from which he was sending and receiving emails is the same address as the address which HFW used to serve the application papers.

29. On that day, Mr Siaka asked the claimant to insert a clause providing "to suspend any legal action and proceedings against Sodinaf and me personally during performance of the memorandum". So the position at that stage in the afternoon of 5 September 2019 - subsequent to the hearing before Phillips J - was that Mr Siaka was asking for a term which would provide him with that protection, but there is no suggestion that any term had yet been agreed. That request was made after he had been told by Ifaco that the terms of the draft memorandum of understanding which they had signed were non-negotiable.

30. In fact, Ifaco replied later that evening indicating that they would send a redrafted agreement to Mr Siaka. It is not entirely clear whether, at that point, Ifaco had in mind agreement to the proposed term or precisely what the revised draft would contain. However, none of this seems to me to matter; because it all happened after the hearing before Phillips J had taken place.

31. Matters then moved on again. On 9 September 2019, Ifaco took the position - which they expressed in correspondence - that they were not willing to agree any changes and that they preferred to withdraw the memorandum of understanding. At that point in time, Mr Siaka had not himself signed it. He did sign it thereafter; but as I have indicated, he signed it with a material change, so that the parties were not *ad idem* on all terms, and it was signed after Ifaco had said that it was wished to withdraw the memorandum of understanding.

32. Against that background, it does not seem to me that there was anything which was not disclosed to Phillips J or that would have affected his decision as to how to proceed. There were, at best, inchoate without prejudice discussions involving no agreement prior to the 5 September hearing: ie no agreement whereby the claimant agreed not to pursue the application or indeed proceedings generally.

33. It is also important to note that the hearing before Phillips J was an *inter partes* hearing. Mr Siaka had received notice of it, albeit he had not been personally served and that service was dispensed with. There is in those circumstances, strictly speaking, no obligation of full and frank disclosure, although I do accept that if the factual position is that there had indeed been an agreement between the parties, that would have been relevant to the judge's decision to proceed in the absence of Mr Siaka and should therefore have been disclosed. However, since there was no agreement, there was no reason to disclose anything to the judge, leaving aside the difficulties confronting a party in circumstances where the relevant discussions which are not yet concluded are themselves without prejudice and should not be referred to before the court.

34. The upshot of all of that is that there is no basis in the documentation for Mr Nkafu's submission that Mr Siaka was unaware of the committal hearing, or that there was a settlement of any kind at the time of the hearing, or that there was an agreement not to pursue the application or proceedings generally. Therefore, there is no factual basis for the argument that Mr Siaka did not attend court in the genuine belief that the matter had been concluded or that anything was not disclosed to the judge. The claimant was fully entitled to proceed with the hearing before Phillips J of which due notice had been given, even if inchoate settlement discussions were ongoing.

35. It follows from what I have said that I do not consider that there is any substance to any of the points which have been raised by the applicants in support of the argument for the setting aside or variation of the order. As I indicated earlier, the applicants may possibly be in a better position to achieve a measure of relief if he were to provide, promptly, the affidavit which should have been provided a very long time ago.

36. If there are genuine difficulties in providing the relevant information in the form of an affidavit - which is not necessarily the easiest thing to do at the time of the current pandemic - then it is open to Mr Siaka to provide the relevant information by way of a witness statement and to explain any difficulties in providing the material in a different form. A judge may, upon a further application to vary or discharge, be sympathetic in the event that information is provided promptly but it is not quite in the requisite form (ie, not in the form of an affidavit, rather than a witness statement). For those reasons, I dismiss the application.

This judgment has been approved by Jacobs J.