REPORTABLE

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/221

DATE: 03/11/2010

In the matter between:

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| DLAMINI, EUNICE NTHABISENG | Applicant |
| and | |
| DLAMINI MULANGAPHUMA MATHOPO | |
| MOSHIMANE INC | First Respondent |
| MULANGAPHUMA MULALO VELE | Second Respondent |
| MATHOPO BUHLEBUYEZA LERATO | Third Respondent |
| MOSHIMANE NEO PRISCILLA | Fourth Respondent |

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J U D G M E N T

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MOKGOATLHENG J:

(1) After hearing argument, I dismissed this application with costs and advised that the reasons for my order would be furnished on request. These then are the reasons predicating the order made on the 5 May 2010.

(2) The applicant seeks an order declaring that the respondents are in contempt of a court order in that, they have failed to comply fully with the said order granted on 4 June 2009.

(3) The applicant contends that the respondents as attorneys, fully understand and are aware of the court order and what their obligations in terms thereof are, but have *wilfully and mala fide* refused to comply therewith, with the settlement intention to undermine the authority of the court and to violate its dignity.

FACTUAL MATRIX

(4) The application is predicated on the settlement agreement made an order of court, the salient clauses whereof are the following:

*(a) Clause 4 which provides:*

*All the shareholders of the first respondent shall invoice for the work done on all matters up to and including 22 May 2009 including all the time currently loaded on Lawplan up to this date:*

*(b) Clause 5;*

*The shareholders of the first respondent shall be entitled to make representations to the expert and shall have a reasonable opportunity of responding to representations made by each other;*

*(c) Clause 6;*

*The first respondent shall make available all information in relation to the evaluation including*

*financial information to the applicant in order to prepare her representations to the expert.*

*(d) Clause 8;*

*The second, third and fourth respondents shall sign all documents necessary to give effect to a change to the applicant's name by deleting the reference to "Dlamini" and to lodge same with the Registrar of Companies within 2 days of signature of this agreement.*

*(e) Clause 18;*

*The shareholders of the first respondent as at date hereof shall share equally (meaning each shall be entitled to a quarter) in respect of any invoice rendered to clients as at date hereof and which has not been paid. The first respondent shall make payment to the applicant to her pro rata share of the invoice immediately upon receipt of payment from the client into the applicant's Nedbank account known to the first respondent. The first respondent shall make available to the applicant on a monthly basis all documents reasonably necessary to determine whether clients have paid;*

*(f) and Clause 20;*

*The first respondent shall facilitate the release of the applicant as a surety and a principal debtor of the loan facility under the loan agreement concluded with Business Partners subject to Business Partners internal process.*

THE ALLEGED NON COMPLIANCE BY THE RESPONDENTS

(5) The applicant alleges that the respondents have not complied fully with *clause 4* of the settlement agreement in that they have failed to invoice for the work done on all matters up to and including 22 May 2009, as they have only furnished her with five invoices rendered to clients for the said period.

(6) The applicant's further contention is that, there are invoices which the respondents are either withholding or have not issued. Further, the respondents have refused to provide her with information to enable her to satisfy herself that they have complied fully with *clause 4* despite being called upon to do so in a letter dated 31 August 2009.

(7) The applicant alleges that the respondents were obliged to provide her with:

(a) the first respondent's financial records including but not limited to bank statements;

(b) a list of outstanding fees due on the date on which the settlement agreement was concluded;

(c) a list of fees received in respect of work done up to and including the date of the settlement agreement;

(d) all invoices issued for the period up to and including the date on which the settlement agreement was concluded;

(e) the age analysis for all work in progress up to and including the date on which the settlement agreement was concluded; and

(f) the full records of all work in progress up to and including the date on which the settlement agreement was concluded.

(8) The applicant contends that the respondents have not provided her with "*all information in relation to the evaluation including financial information*" as they are obliged to do in terms of *clause 6*, to enable her to prepare and make representations to the appointed expert as contemplated in *clause 5.* Consequently, applicant states, she has not been able to make representations to the appointed expert nor has she been able to respond to the representations made by the respondents as contemplated in *clause 5*.

(9) The applicant further alleges that the respondents:

(a) have not as obliged in terms of *clause 8* taken the necessary steps to delete reference to her surname "*Dlamini*" from the first respondent's trading name "*Dm5*";

(b) have failed to comply with *clause 9* in that they have failed or refused to "*hand over all the files and documentation*" relating to the clients referred to therein, and by withholding arch lever files containing documents and information relating to one of the clients referred to in *clause 9* without any factual or legal basis to do so;

(c) have not complied with the provisions of *clause 18* in that they have refused to make available to her on a monthly basis all documents reasonably

necessary to enable her to determine whether clients have paid;

(d) have only furnished her with bank statements for May 2009 and have since refused to provide her with bank statements for the period commencing June 2009 to date; and

(e) have not complied with *clause 20* in that they have failed to take any steps to release her as surety and principal debtor in respect of the loan taken by the first respondent from Business Partners.

(10) The applicant submits that in terms of *clause 18,* she is entitled to documents such as the first respondent's monthly bank statements, management accounts and invoices issued to clients.

THE RESPONDENTS ALLEGED COMPLIANCE WITH THE ORDER

(11) The respondents allege that they have to date, fully complied with the terms of the settlement agreement, consequently, they are not in contempt of the court order as alleged or at all.

The respondents allege that they complied with the court order in the following manner:

(a) they have made available to the applicant, the age analysis and Work In Progress reports, from which the applicant is able to establish which clients have been invoiced and whether these have paid;

(b) they have furnished the applicant's attorneys with copies of all invoices issued, and have ensured

whenever payment was received, that the applicant is notified. Further, the applicant was provided with all documents reasonably necessary to enable her to determine whether clients have paid;

(c) they have invoiced clients in respect of the work done up to 22 May 2009 in matters which were ripe for billing, and have remitted to the applicant, her share in respect of the paid invoices.

(d) the applicant is aware that a substantial number of matters listed in her attorney's letter dated 31 August 2009, were either invoiced prior to 22 May 2009 in instances were the projects were completed, and in other matters that no invoices could be rendered to clients since a fixed fee was agreed to regardless of the number of hours spend on those matters;

(e) they have complied with *clause 8* in that the applicant's surname "*Dlamini*" has been removed from the first respondent's name. In any event, it was never agreed that the first respondent's trading name was to be changed as well;

(f) they have complied with *clause 9* in that the applicant's attorney collected all the clients files referred to, consequently, there are no files in their possession neither the two specific files of the clients mentioned in that clause;

(g) they have complied with *clause 8 and 18* in that the applicant's attorney and financial advisor were provided with all information and/or documents necessary to enable her to make representations to the appointed expert. In any event, they have not made any

representation to the expert as contemplated in *clause 5*; and

(h) they have facilitated the applicant's release as surety in terms of *clause 20* by fully co-operating with Business Partners and making available all documents required by them to consider the applicant's release as a surety.

THE APPLICABLE LEGAL PRINCIPLES

(12) The case of *FAKIE NO v CCII SYSTEMS (PTY) LTD 2006 (4) SA 326* is the *locus classicus* of the principles applicable in contempt of court proceedings, and I intend referring to same copiously in determining whether the applicant has discharged the onus reposing on her and whether the respondents were indeed in contempt of the court order as alleged. In *Fakie NO supra* it was held:

*"Contempt of Court*

*[6]It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating he dignity, repute or authority. Since the rule of law……requires that the dignity, and authority of the courts, as well as their capacity to carry out their functions, should always be maintained……the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of courts and detracts from the rule of law……...*

*[9]The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids*

*the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*

*[10]These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent……."*

*…….in the interest of justice, courts have been at pains not*

*to permit unvirtuous respondents to shelter behind patently*

*implausible affidavit or bald denials…..…..There has to be a bona*

*fide dispute of fact on a material matter……*

*[42]……..*

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

*(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."*

(13) To determine the question whether the applicant has proved beyond reasonable doubt that the respondents have failed to comply fully with the

court order, the applicant has to show that the respondents failure was wilful and *mala fide*.

(14) In *Fakie NO supra* it was further held:

> *[55]"That conflicting affidavits are not a suitable means of determining disputes of fact has been a doctrine of this court for more than 80 years…….in the interest of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit or bald denials…….There has to be a bona fide dispute of fact on a material matter. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denial that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers……...*
>
> > *however robust a court may be inclined to be a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence".(*my emphasis)

(15) In *Fakie NO supra* the court set out the approach in resolving such a matter where there is a dispute of fact in the affidavits:

> *"[63] In the light of the proper approach to deciding factual disputes in motion proceedings…….. The accepted approach requires that, subject to 'robust' elimination of denials and 'fictitious' disputes, the Court must decide the matter on the facts stated by the respondent, together with those the*

*applicant avers and the respondent does not deny. On that approach, since the Auditor-General's version cannot legitimately be 'robusted' away, his factual assertions, including those regarding his state of mind, must be accepted as established. The proven facts thus establish more than just a reasonable doubt, but a factual picture that entails acceptance of the Auditor-General's version, though that is incidental to the form of the proceedings before us.*

*[64] To summarise: On the accepted test for fact-finding in motion proceedings, it is impossible to reject the Auditor-General's version as 'fictitious' or as clearly uncreditworthy. There is a real possibility that, if a court heard oral evidence on the factual disputes between the parties, it* (16)

How is the factual dispute to be resolved? The applicant did not ask for matter to be referred to oral evidence or for the respondent to be cross examined. Had this happened, perhaps the disputed facts would have been determined in a live contest resulting in a trial of issues, instead the applicant chose to argue on her papers and the respondents papers that the requisites of contempt of court had been fulfilled

*might accept the Auditor-General's version, or at least find that there was reasonable doubt as to whether the delay in complying with the orders of Hartzenberg J was wilful and mala fide. CCII therefore failed to prove that the default was wilful and mala fide."*

## THE ANALYSIS OF EVIDENCE

(16) How is the factual dispute to be resolved? The applicant did not ask for matter to be referred to oral evidence or for the respondent to be cross examined. Had this happened, perhaps disputed facts would have been determined in a live contest resulting in a trial of issues, instead the applicant chose to argue on her papers and the respondents papers that the requisites of contempt of court had been fulfilled.

(17) Can the respondents version be rejected on the affidavits as '*fictitious*' or as demonstrably uncreditworthy? In my view, clearly not. The respondents give details of their efforts to comply with the court order. And, throughout, they assert the good faith of their efforts.

(18) The settlement agreement is certainly not a model of elegant lucidity and clarity, it suffers from an ambiguity of expression, consequently, the parties accord it different interpretation, which in turn obviously gives rise to discordant views regarding non-compliance, partial compliance, or indeed full compliance with the court order viewed from the parties individual perspectives.

(19) The terms of the settlement agreement lacks definitive specificity. For instance the concept of work done as at 22 May 2009 is not defined, the applicant's accusation that the respondents have not fully complied with *clause 4*, in that they have not rendered invoices on all matters the respondents interpretative perspective to that is "*the first respondents practice is mainly project based and accordingly invoices are rendered to clients once certain milestones are achieved,*" consequently, although work could have been performed in certain of these project based matters as at the 22 May 2009, the fact that such work does not coincide with "*achieved milestones,*" the respective individual clients are not invoiced because "*these matters are not ripe for billing*." In other matters, "*fixed fees*" were agreed to regardless of hours spent on those matters" or the accumulated value of the work in progress performed in those specific matters which had not as at 22 May 2009 been finalised and invoiced. From the aforegoing it is patent that the parties accord different interpretations to the clause having

regard to the parties different views regarding the required requisites of compliance with *clause 4.*

(20) In *clause 18* all the documents reasonably necessary to be made available by the first respondent to the applicant on a monthly basis to determine whether clients have paid are not defined, consequently, according to the applicant's interpretation, the respondents "*have not provided her with information to enable her to satisfy herself that they have complied with clause 4,"* or "*all information in relation to the evaluation including financial information*" as obliged in terms of clause 6 to enable her to prepare and make representations to the expert as contemplated in *clause 5*, consequently she has not made representations to the appointed expert.

(21) The respondents allege that all the necessary financial information was furnished to the applicants attorney and financial advisor. It is patent that the parties are not at *ad idem* regarding the interpretation of what constitutes the "*documents reasonably necessary"* or what constitutes "*adequate information sufficient*" to determine and satisfy the applicant that the respondents have complied fully with *clause 4* in relation to the matters raised in her attorney's letter dated the 31 August 2009.

(22) It is patent that documents and information were exchanged between the parties, from the applicant's interpretative perspective it is the deficiency and adequacy thereof which determines that the respondents have not complied with the court order, whilst in contradistinction, from the respondent's perspective, it is the sufficiency of the documentation and information requested which was furnished which is regarded as necessary and reasonable and evidences the respondents compliance with *clause 4, 6 and 18*.

(23) The applicant does not contend that the respondents have not completely complied with the court order, she alleges that the respondents have not complied fully with the court order. This concession in my view evidences a modicum of good faith on behalf the respondents conduct, consequently, this shows that there is *bona fide* factual dispute on a material matter having regard to the parties' versions.

(24) The respondents did not lie supine after the settlement agreement was made an order of court, they communicated with the applicant's representatives, supplied documents, and gave the details of the documents. The respondents *bona fide* performed in terms of their interpretation of the settlement agreement and in good faith thought they were complying with the court order. There could be gaps and insufficiencies in the account tendered from the applicant's perspective, despite this the respondents version cannot be rejected as fictitious or as so implausible as to warrant their dismissal without recourse to oral evidence.

(25) The settlement agreement from the respondents interpretation thereof and given its ambiguity of expression and lack of definitive lucidity and clarity, and the respondents rational comprehension thereof, their version cannot and it is not capable of being rejected on the papers as fictitious or palpably not creditworthy without them being afforded an oral hearing.

(26) The onus the applicant is enjoined to discharge is proof beyond reasonable doubt. Can it be cogently argued that on applicant's version a party which partially complies with a court order is wilfully mala fide having regard to the "*onerous onus*" the applicant is charged to discharge? Can a party which asserts that it has fully complied with a court order, in that according to its

*bona fide* interpretation it performed in terms of settlement agreement, be said to be in contempt of the court order, or differently stated, can its version be rejected as fictitious, far fetched, or untenable when there is a concession by the applicant that the respondents have partially complied with the court order.

(27) The applicant contends that despite the respondents deleting her surname from the first respondent's registered name, they have not fully complied with *clause 8.* Applicant's counsel in support of this contention, referred me to the decision of *Grütter v Lombard and Another 2007 (4) SA 89 SCA.* That decision in my view is distinguishable on the facts and law from the present matter. In that matter the Supreme Court of Appeal found that "*the evidence establishes clearly Gürtter and Lombard were not in partnership…….. that "the material facts are not in dispute and disclose none of the features of a partnership……..that Grütter and Lombard each pursued his own practice independently of the other…….and in the absence of a relationship of partnership the name under which they practised was not an asset that fell to be utilised and disposed of in accordance with partnership principles.*"

(28) *The Supreme Court of Appeal further held that the limited purpose of the agreement of sharing facilities and expenses and to pursue their respective practices under their joint names, that agreement having come to an end, the question is whether Lombard is entitled to use Grütters name in the description of his practice without his consent."*

(29) The Court correctly found that Grütter had a protectable right of identity and personality to his name and that the use thereof for commercial purposes without his consent constituted a violation to Grütter's personality rights entitling him to protection in terms of *actio injuriarum* because Lombard misrepresented to the public that Grütter was professionally associated with Lombard and Grobbler. (the attorney who later went into partnership with Lombard after the dissolution of the afore referred to association).

(30) In the present matter it is common cause that the first respondent is a juristic person, a limited liability company of attorneys, incorporated and registered as such in terms of the *Companies Act 61 of 1973* and empowered to carry on its professional practice by reason of *section 23(1) of the Attorneys Act 53 of 1979*, under the first respondent's registered name "*Dm5*" in terms of the *Companies Act 61 of 1973* as; "*the enterprise's shortened name*".

(31) The applicant states that the first respondent's trading name "*Dm5"* was derived from the first letters of the founding shareholder's surnames, that "*D*" represents her surname. The applicant agrees with the respondents that when the two former founding shareholders Malongete and Murray resigned as shareholders and directors the first respondent's trading name was never changed.

(32) *Clause 8* alludes only to a change of the applicant's registered name, and that the reference to her surname "*Dlamini*" be deleted. *Clause 8* does not refer to a change and or deletion of the alphabet "*D*" in the first respondent's trading name "*Dm5*". It is obvious that the manner in which *clause 8* is

couched, it was never in the contemplation of the parties to change the first respondent's trading registered name. In my view such deletion cannot be reasonably inferred or implied from the terms of *clause 8,* neither was it contemplated that a change of the first respondent's incorporated and registered name also included or referred to the registered trading name "*Dm5*".

(33) *Clause 8*, does not encompass an express term postulating a change of both the first respondent's incorporated name, or its registered trading name, neither does it postulate a tacit or implied term from which it can be in referred that the parties in addition also contemplated changing the registered trading name "*Dm5".*

See *City of Cape Town CCMC Administration v Bourbon-Leftley NNO 2006 (3) SA 488 SCA at 494F* and *Voges 1994 (3) SA 130 (A) at 136H-137D. Botha v Coopers & Lybrand 2002 (5) 2002 (5) SA 347 (SCA) as paras [22]-[25] and in Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2005 (60 SA 1 (SCA) ([2004] 1 Alll SA 1) at paras [50]-[52].Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 9A) at 532H) 533B.*

(34) In fact to demonstrate that there is a clear distinction between the first respondent's registered name and its registered trading name, its incorporated name after the deletion of "*Dlamini*" the applicant's surname in compliance with *clause 8*, is Mathopo Moshimane and Mulangaphuma incorporated. The registered name comprises three shareholders and directors in contradistinction to Dlamini, Malungaphuma, Mathopo, Moshimane, Malongete Murray as it was at the first respondent's inception. Consequent, to the resignation of the Malongete, and Murray, the registered trading name still endured irrespective of the fact that the number of share holders and directors was less than the five as at its incorporation.

(35) The applicant does not claim exclusive right to the use of the alphabet "*D*" which right in my view she does not have. It is trite that an individual's right to identity and personality may be infringed if it is used for commercial purposes without the individual's consent. In this matter, the applicant cannot be heard to argue that the first respondent's trading name *Dm5* is used without her consent when she as an attorney elected not to pertinently contract the alphabet "*D"* out of and from the first respondent's trading name, more especially when *clause 14* provides:

*"The second, third and fourth respondents hereby confirm that no assets of Dm5 Investments have been transferred to another entity and agree to transfer their shareholding in Dm5 Investment Company (Pty) Ltd to the applicant and the applicant shall within 2 days of signature of this agreement take all steps necessary to effect the change of the name of the company. Such change of name shall not be confusing similar to the current name of the company."*

(36) It is patently clear that the applicant is fully aware and conscious of the fact that the epithet "*Dm5*" exists in different guises in relation to the first respondent's registered trading name and its investment company Dm5 Investment (Pty) Ltd.

(37) In the premises it is my considered view that the respondents have discharged their evidential burden, consequently the applicant has not succeeded in proving contempt of court beyond reasonable doubt.

## THE ORDER

(38) The application is dismissed with costs.

Dated at Johannesburg on the 2nd November 2010.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 5TH MAY 2009

DATE OF JUDGMENT: 3RD NOVEMBER 2010

ON BEHALF OF THE APPLICANT: MR TSAWAWA

INSTRUCTED BY: DLAMINI INCORPORATED

TELEPHONE NUMBER:(011) 783-2599

ON BEHALF OF THE RESPONDENT: MR MATHOPO

INSTRUCTED BY: DLAMINI MATHOPO MOSHIMANE

TELEPHONE NUMBER:(011) 333-1512/3