IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 55018/2011

Date: 28 February 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
....
DATE SIGNATURE

In the matter between:

DOROTHEA LOUISE VAN DYK	Applicant
and	
INGRID MARIA GROMER	First Respondent
INGRID MARIA GROMER N.O.	Second Respondent
JAN ERASMUS	Third Respondent
JAN ERASMUS N.O.	Fourth Respondent
THE MASTER OF THE HIGH COURT	Fifth Respondent

JUDGMENT

PRETORIUS J,

[1] This is an application based on an allegation of contempt of court where the applicant is seeking the following orders:

"1. *That it be declared that the first to fourth respondents (hereinafter referred to as "the respondents") are in contempt of the Court order granted on 3 November 2009 under case no. 6079/2008 (hereinafter referred to as the "November 2009 order")*

2. That the first to fourth respondents be committed to prison for such period as the honourable court may direct, or until such time as they have purged their contempt.

3. That a chartered accountant agreed to by the parties within 14 days, alternatively and in the event of no agreement being reached, as nominated by the President of the Institute of Chartered Accountants for the time being, be appointed as an independent trustee of the Leo Gromer Family Trust.

[2] On 3 November 2009 Sapire AJ made an order which, *inter alia,* provided as follows:

"4.3 First applicant [the present applicant] shall be entitled to full access to all financial records of the Leo Gromer Family Trust and of the companies in which the Trust owns shares, which shall be arranged with reasonable notice to the first respondent [who is also the current first respondent], but which will be limited to access once

every six months. Management accounts of the Trust and companies in which the Trust owns shares shall be provided to the first applicant every three months."

Background:

[3] The applicant and first respondent are sisters. Their father passed away on 8 March 2004. The interpretation of his will and the trust deed of the Leo Gromer Trust lead to a dispute between the two sisters.

[4] An application was launched by the applicant under case number 6079/08 (the first application). The applicant sought relief, inter alia, relating to the proper interpretation of the will and the trust deed.

[5] In that application the applicant sought to have Mr Ehlers removed as a trustee, which was duly done. The parties agreed that an independent Afrikaans or German speaking trustee were to be appointed in his place. A further proviso was that the applicant would resign as trustee as soon as the independent trustee had been appointed.

[6] Mr Erasmus, an Afrikaans speaking chartered accountant, was appointed as trustee in August 2010 and the applicant duly resigned as a trustee.

[7] The 3 November 2009 order provided that the applicant would be entitled to the equivalent of 25% of the net assets of the trust less R 2 million within 5 years of the date of the order. Thus the applicant will be entitled to this amount on 3 November 2014.

[8] In order to safeguard the applicant's interests the order provided that certain transactions by the Trust or companies in which the Trust owns shares were prohibited, unless the applicant consented thereto. This was ordered to prevent any irregular depletion of these entities to the detriment of the applicant.

[9] Paragraph 4.3, as set out above, was to let the applicant have access to the financial management statements of the trust and companies in question. The purpose was to monitor whether the court order was complied with regarding the property of the trusts.

Contempt of Court :

[10] In **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** in paragraph 42 the court held:

> *"[42] To sum up:*
>
> *(a) The civil contempt procedure is a valuable 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."

[11] It was made clear by the Supreme Court of Appeal that contempt of court must be proved beyond a reasonable doubt as the criminal standard of proof applies.

[12] It is undisputed that the first and third respondents were aware of the court order which had been granted by agreement on 3 November 2009.

[13] The draft order that the applicant seeks, has been mitigated by the applicant as the court is requested to declare that the first and fourth respondents did not comply with the court order granted on 3 November 2009, instead of finding that the respondents were in contempt of the court order.

[14] The respondents admit in the answering affidavit that:

"Whereas, as at the writing of this affidavit the management statements for the last three periods have as a fact not been provided, the audited annual financial statements for the period ending 28 February 2013 have been provided, and having been engaged with the audit, I have instructed that;

Management statements for the periods the 31 May 2013 and 31 August 2013 be prepared for those to be provided to the applicant as soon as they become available."

[15] This is a clear admission that the respondents knew that they had not complied with the court order. On 17 January 2014 management financial statements for L Gromer, IG Boerdery, In die Kom and Leo Gromer Trust were provided for the periods May, August

and November 2013. This in spite of the application having been instituted at the end of June 2013. It took almost 7 months for the respondents to provide these statements, in spite of their knowledge of the pending litigation and the court order.

[16] It is evident that from 28 June 2010 there had been queries by the applicant regarding a R12 million loan to the first respondent by the Trust. This had not been resolved at a meeting of the trustees held on 2 February 2011. It seems that it has still not been resolved and the information is still outstanding.

[17] The court has to decide whether the first and third respondents acted *mala fide* or is in wilful disregard of the court order. The wording of 4.3 of the order, which is relevant in this application is:

> *"Management accounts of the trust and companies in which the trust owns shares* ***shall*** *be provided to the first applicant every three months."*

[18] Although Mr Davis, for the respondents, argued that it was either impractical or impossible to grant these quarterly financial management statements, such statements were provided to the applicant on 17 January 2014, putting paid to this argument. The first respondent had been aware of the order since November 2009 and failed to comply

with the provisions of the order. It is also of importance to note that the order by Sapire J on 3 November 2009 was made:

> *"In full and final settlement and by agreement between the parties, the following court order is granted:"*

[19] At that stage it was agreed by the parties that the management accounts of the trust and the companies in which the trust owns shares shall be provided to the first applicant every three months. There can be no doubt that at the time the first respondent was a party to the court order and did not raise any objections to providing quarterly statements. She cannot in this application, contend that it was impossible to comply with the order as she was a party to the order.

[20] The first respondent admitted it as set out above. She deposed to the answering affidavit on 2 August 2013, where she admitted that she was in arrears with her obligations to provide quarterly statements. Nevertheless she waited until 17 January 2014, a further five months, before providing the management statements. The inference the court makes is that she did not regard it serious to disobey a court order.

[21] This court finds that the order and non-compliance have been proved beyond a reasonable doubt. Therefor the onus shifts to the respondents to prove that their non-compliance was not wilful and mala fide.

[22] Mr Davis's argument, on behalf of the respondents that the applicant's disgruntlement at not receiving 50% of her father's estate, lead to this application is spurious. He argued that her insistence on management accounts where it was impractical or impossible to provide such statements should not be entertained. The first respondent's explanation:

> *"Management Accounts were never prepared for either the Trust or In-Die-Kom Landgoed (Pty) Ltd simply because firstly it was impractical and unnecessary, and secondly because the rental paid were reflected in both the Management Statements of the two operating companies L Gromer (Pty) Ltd and IG Boerdery (Pty) Ltd, and ultimately in the annual financial statements of not only those companies but also that of the Trust and In-Die-Kom Landgoed (Pty) Ltd."*

cannot be true, as this was not raised when the court order was made on 3 November 2009 and did not seem to be a problem when the order was made with full knowledge of the first respondent.

[23] The interpretation of the court order by the respondents can never be correct as the wording of paragraph 4.3 is extremely clear. It can never be read that these statements should be made available only if they are in existence. There is no such an indication at all in the court order and no such intention can be gleaned from the order.

[24] It is further important to note that the first respondent sets out in her answering affidavit that she would purge this lack of compliance with the court order – thereby acknowledging that she was in default. Nevertheless she takes a further 5 months to do so.

[25] I cannot find that this application by the applicant to access the quarterly financial management accounts is frivolous as stated by the respondents. There is a court order, which the respondents failed to comply with, which resulted in the launching of this application.

[26] The first respondent admitted:

> *"However from an account point of view and having undertaken to provide management accounts in terms of the Order, this was as a fact impossibility firstly because of the resignation of Shultz and Harris (both chartered accountants) as trustees and secondly because of the breakdown of our familial relationship, and those functions had fallen in arrears."*

[27] Mr Erasmus was appointed as trustee and it is not explained how the resignation of Schultz and Harris is relevant. The breakdown of the family relationship was a fact in 2009 when the order was granted by agreement. This cannot be a reason not to comply with the court order as the three financial management statements were provided on 17 January 2014 more than 4 years after the court order

had been granted. The defence of impossibility cannot be upheld and raising such a defence does justify the inference of *mala fides*.

[28] The assertion by the first respondent that:

> *"the immediate absolute compliance with the order was a physical impossibility and that in accordance with the guidance received from Erasmus and having pro-actively initiated an updating of all the financial affairs and financial statements of the farming enterprise comprising the companies and the Trust, as at the writing of this affidavit the applicant is, but for the actual financial records kept at the administrative offices in possession of as much financial data as we are."*

cannot be true, as the first respondent herself distinguishes between management accounts and financial statements. According to her understanding management accounts provide timely and statistical information required by managers to make day to day and short term decisions. This shows that the management accounts were available to enable the managers of the enterprises to make day to day decisions.

[29] Financial statements according to the first respondent are:

> *"Financial Statements on the other hand comprises a statement of financial position (assets, liabilities and ownership equity), a statement of comprehensive income (income, expenses, profits, sales and the various expenses incurred during the particular period) and generally a cash flow statement."*

[30] There can be no doubt that she knew exactly that the court order provided for management accounts. This court therefor makes the inference that she wilfully decided not to comply with this provision of the order by Sapire J.

[31] Mr Erasmus was aware of the state of affairs since August 2010, when he was appointed as trustee and as a trustee he must have been and should have been aware of the non-compliance by the trust of the court order.

[32] The court has to agree with Mr Vorster, counsel for the applicant, that the fact that the audit of the companies impacted on the ability to provide quarterly management accounts is fallacious. The fact that these statements were provided in January 2014 puts paid to the first respondent's assertion in this regard. The court infers *mala fides* on the part of the respondents due to these actions by the first and third respondents.

[33] The court takes cognisance of the point raised by Ms Gromer, the first respondent, that she had not received any of the correspondence addressed to Mr Erasmus prior to 21 Augustus 2012. Both Ms Gromer and Mr Erasmus failed to address this after they had been invited by the applicant to file further affidavits declaring that the first respondent was not aware of the correspondence between the

applicant and Mr Erasmus. The only inference this court can draw is that the correspondence was forwarded to Ms Gromer and/or she and Mr Erasmus had discussed the contents of these e-mails. This indicates *mala fides* on the part of the respondents as they do not take the matter any further where they were expressly challenged to do so.

[34] Mr Erasmus was appointed as trustee on 25 August 2010. It is abundantly clear from Ms Gromer's affidavit that Mr Erasmus had known from the date of his appointment what the state of affairs was:

> *"I accept now, with the benefit of hindsight and the guidance that I have automatically received from Mr Erasmus that it was my duty and obligation to have acted proactively as far as these things were concerned."*

[35] Mr Erasmus does not deal at all with the *"legal advice"* he had obtained. In **S v Abrahams 1983 (1) SA 137 (A)** at 146 D – H van Winsen AJA found:

> *"In dealing with this plea TINDALL ACJ stated in the course of his judgment in that case at 711 that if an accused wished the Court to have regard to this advice as a mitigating factor, then it could be expected of him to produce the advice if it was in writing. In addition the Court would require to be satisfied that the advice was given on a full and true statement of the facts. In the absence of such safeguards the fact of the advice having been given was held to be of no avail as a mitigating factor.*

These remarks are pertinent to the present enquiry, more particularly as the attorney on whose advice the appellant claimed to have relied was not called to testify in regard to all the circumstances relevant to the giving of such advice."

[36] Although Abrahams was a criminal case these principles should be applicable in this instance as well, The principles must be equally applied in civil matters. Mr Erasmus became a trustee through the provisions of the court order and therefor he stepped into the shoes of the trustee, which would make the court order applicable on him as well. He cannot escape the consequences of not complying with the court order. He does not attach an affidavit by the person whom he allegedly obtained legal advise from.

[37] In **Twentieth Century Fox Film Corporation and others v Playboy Films (Pty) Ltd and another 1978 (3) SA 202** King AJ found on p 203 C - D:

"A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a court would have difficulty in ensuring that an order ad factum praestandum against a company is enforced by a punitive order,"

[38] These principles should equally be applied to a trustee of a trust for the same reasons as enunciated by King AJ above and Mr Erasmus cannot escape his culpability.

[39] The fact that Mr Erasmus indicated to Mr Harris, on behalf of the applicant, when further enquiries were made as to when the statements would be available that:

> *"Ek verstaan nie regtig hoekom Doris nou, nadat sy hoe lank geneem het om op my vorige navrae te reageer, van mening is dat sy spertye vir die lewer van verdere inligting kan stel nie.* ***Wat my aanbetref is dit 'n geval van die stert wat die hond wil swaai."*** (Court's emphasis)

[40] The court has to agree that Mr Erasmus can no longer be regarded as independent if he had made these disparaging remarks regarding the applicant and it is understandable that she does not trust him to look after her interests.

[41] This statement by Mr Erasmus was made in October 2011 where no statements had been forthcoming for 2009, 2010 and August 2011 and Mr Harris the previous trustee, on behalf of the plaintiff, enquired about the compliance with the court order.

[42] If I have regard to the Fakie case (*supra)*, I find that contempt of court has been proved beyond a reasoable doubt. However, Mr Vorster, for the applicant, indicated that the applicant is seeking a declarator as set out in the draft order which was provided to the court. In these circumstances a declarator will be granted instead of making an order as set out in prayer 1 of the notice of motion.

[43] It has been conceded by the respondents that an independent additional trustee should be appointed. Therefor I will not deal with the facts leading to the request for an additional trustee to be appointed.

[44] The respondents had abandoned the counterclaim and I will not deal with it at all.

[45] In this instance, where the court finds that a court order had been wilfully and with *mala fides* disregarded, a punitive cost order should follow to indicate the court's displeasure at parties not complying with a court order. However, in this instance, if I grant a cost order against the second and fourth respondents, the applicant, as being entitled to 25% of the trust, will be burdened by paying 25% of the respondent's costs. Such an order will be untenable under these circumstances.

[46] I make the following order:

1 It is declared that the first to fourth respondents did not comply with the Court order granted on 3 November 2009 under case no. 6079/2008 until 17 January 2014 when management statements for the periods May, August and November 2013 were provided to the applicant;

2 No order is made in respect of prayer 2 of the application, but leave is granted to the applicant to renew the application by supplementing the papers should the said respondents commit further acts or omissions in contempt of the said order;

3 A chartered accountant agreed to by the parties within 14 days, alternatively and in the event of no agreement being reached, as nominated by the President of the Institute of Chartered Accountants for the time being, be appointed as an independent trustee of the Leo Gromer Family Trust;

4 The costs of this application are to be paid by the first and third respondents in their personal capacities, jointly and severally on the attorney and client scale. The one to pay, the other to be absolved;

5 The first and second respondent’s counter-application is dismissed;

6 The costs of the first respondent's counter-application is to be paid by the first respondent in her personal capacity.

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Judge C Pretorius

Case number	: 55018/2011
Heard on	: 3 February 2014
For the Applicant / Plaintiff	: Adv SM Maritz
Instructed by	: Mills & Groenewald
For the Respondent	: Adv JE Ferreira
Instructed by	: HW Smith & Marais
Date of Judgment	: 28 February 2013