IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 15633/98

In the matter between:

HEG CONSULTING ENTERPRISES (PTY) LTD	First Applicant
MICHAEL JOHN LANE N.O.	Second Applicant
EILEEN MARGARET FEY N.O.	Third Applicant

and

JOHAN JOSEF SIEGWART	First Respondent
C & A FRIEDLANDER INCORPORATED	Second Respondent
PAUL KATZEFF	Third Respondent
THE REGISTRAR, HIGH COURT, CAPE TOWN	Fourth Respondent
THE MINISTER OF JUSTICE	Fifth Respondent

JUDGMENT DELIVERED ON 21 OCTOBER 1999

DESAI, J

This is a most unfortunate matter in that it involves unsavoury if not improper and unethical conduct on the part of a senior legal practitioner. The applicants essentially seek an order compelling first, second and third

respondents to pay, or rather repay, the amount of R1 million previously held in the trust account of second respondent in terms of two orders of this Court and, in the event of that not being done, the applicants seek a ***rule nisi*** directing the said respondents to show cause why they should not be held in contempt of court.

First applicant **("HEG")** is a property owning company incorporated in accordance with the laws of South Africa and the second and third applicants are cited in their capacities as provisional trustees in the insolvent estate of **Jürgen Harksen**. The latter are in fact certain of the said **Harksen's** creditors referred to as "**the five Hamburg creditors**".

The first respondent is **JOHAN JOSEPH SIEGWART ("Siegwart")** a Swiss citizen who also resides on the Isle of Sark and the second respondent is C & A Friedlander Inc, first respondent's erstwhile attorneys and also the attorneys for **Harksen**. The third respondent **PAUL KATZEFF** (**"Katzeff"**), is an attorney and a director of second respondent. The Registrar of this court and the Minister of Justice have been cited as the fourth and fifth respondents respectively. No relief is presently being sought against either of them.

The facts underpinning this application are largely common cause. On 23 March 1998 **Cleaver J** granted the five Hamburg creditors under Case No. 4085/98 an order for the arrest of **Siegwart** to found or confirm the jurisdiction of this court in respect of certain proceedings to be instituted in terms of section 31(2) of the Insolvency Act, No 24 of 1936. The next day, on 24 March 1998, **Cleaver J** granted under Case No. 4146/98 a similar order at the instance of **HEG**. **Siegwart** was arrested pursuant to these orders. He anticipated the return days and the matters were jointly argued before me. On the evening of 7 April 1998 I ordered **Siegwart's** release from arrest upon him furnishing security in an amount of R1 million. The R1 million was to serve as security in both proceedings and was to be paid to second respondent and held by it in trust in the name of the Registrar of this Court, pending the determination of the contemplated actions against **Siegwart** by the applicants. Draft orders were prepared and settled by the parties' legal representatives and the orders were issued on 7 and 8 April 1998. **Siegwart** paid the security and shortly thereafter left South Africa.

The orders in both Case Nos. 4146/98 and 4085/98 stipulated that the proceedings by the applicants were to be instituted within 21 days of the respective orders. There is a difference in the wording of the two orders. In the order granted under Case No. 4085/98 it is expressly stated that if the contemplated proceedings are not issued within the 21 day period, the order would lapse. There is no such provision in the other order.

Respondents contend that there was no conscious intention to include a *"self-destruct"* clause in the one order and to omit it from the other. I shall revert to this aspect in due course.

It is now not in dispute that the five Hamburg creditors in fact instituted proceedings against **Siegwart** within the 21 day period. **HEG** failed to issue its summons prior to the expiry of the 21 day period. It appears though that by agreement with **Siegwart** reached in other proceedings **HEG** issued summons against **Siegwart** on a later date.

In any event **Siegwart**, apparently unhappy with his arrest and the fact that he had been obliged to put up R1 million in order to secure his release, had instructed his attorney, **Katzeff**, to procure the release of the R1 million if the aforementioned proceedings were not timeously issued. **Katzeff** was further instructed not to notify the applicants or their legal representatives "*if this was possible"* that he was endeavouring to secure the release of the money. **Siegwart** was of the view that if notice was *"unnecessarily given to the applicants*" they would prevent him from getting the money under some pretext or the other. **Katzeff** states that he indicated to Siegwart that he would seek the advice of counsel and be guided accordingly.

In an affidavit filed by **Michael Christopher Cameron-Dow**, a director of second respondent, he states that the directors of second respondent had

impressed upon **Katzeff** to check every step taken in relation to any litigation with regard to **Harksen's** affairs with senior counsel in order to ensure that he was not professionally compromised. It seems that the directors of second respondent were somewhat sceptical of **Harksen** and his associates.

Katzeff was of the view that the proceedings contemplated in the Court orders had to be issued on or before 13 May 1998 and, on the advice of counsel, he instructed one **LISA BELINDA BERRIL** (**"Berril"**), a candidate attorney, to conduct a search in Room 1 of this Court. **Berril** states that on 14 May 1998 she spent approximately 4 hours in Room 1 checking the files for the period 7 April 1998 to 14 May 1998. She returned the next day and once again found no file wherein action had been instituted against **Siegwart** by the applicants. She explains that she did not find the summons issued by the Hamburg creditors on 12 May 1998 under Case No. 6417/98 because it was not in its place when she conducted her search nor was it in a place where she could reasonably have expected to find it in the Registrar's filing system.

Katzeff contacted **Siegwart**, informed him of the result of **Berril's** research and, on being told to secure the release of the R1 million, indicated that he

was going to seek the advice of counsel

He first raised the matter with junior counsel, **Mr Anton Katz ("Katz")**, who was of the view that it would be inappropriate to approach the Registrar for the release of the R1 million without first informing the applicants' legal representatives. **Katz** also queried the conclusion that the so-called "*self destruct"* clause expressly contained in the order obtained by the Hamburg creditors also applied by implication to the other order. **Katz** further indicated that the advice of senior counsel should be sought on these issues.

Later the same day **Katz** was at the offices of the Registrar on other business when he raised a "*hypothetical question"* with the Registrar of the circumstances in which he would release funds held as security in his name in terms of a Court order. The Registrar replied that he would not release any such money without a subsequent Court order directing him to do so. **Katz** reported this conversation to **Katzeff** and told him that he was of the view that the Registrar would not release the funds in this case.

On the morning of 15 May 1998 **Katzeff**, **Katz** and **Berril** attended a consultation with **Paul Hoffman SC ("Hoffman")**. **Hoffman** advised as

follows:

(i) He agreed with **Mr Katz** that the Registrar would not release the security without a Court order directing him to do so. However, **Hoffman** was of the view that the Registrar had the authority to grant the release of the funds without a Court order in the circumstances of this case.

(ii) **Siegwart** first had to seek the Registrar's authority for the release of the funds. The Registrar's attitude would be recorded in an affidavit in support of the application, if any, to court in which the Registrar would be the only respondent.

(iii) It was not necessary to give any notice to the applicants or their legal representatives of the intention to approach the Registrar for the release of the R1 million as both orders had "*self-destructed*" upon the expiry of the 21 day period.

(iv) Furthermore it would be unethical for **Katzeff** to inform applicants or their legal representatives of the intention to approach the Registrar in the light of **Siegwart's** express instruction that this not be done

unnecessarily.

Katzeff contends that although **Katz** initially had reservations about the need to give notice to the applicants of the approach to the Registrar, he eventually agreed with **Hoffmann's** advice that the orders had "*self-destructed"* and that there was no need to give notice to the applicants. **Katzeff** himself adopted a *"neutral stance"* and says that he would not have approached the Registrar had he not received unanimous and unequivocal advice.

Katz, it seems, deferred to **Hoffman** not only because he was the senior counsel in the matter "*but also because of the strong terms in which he expressed the advice"*. He accepts that **Katzeff's** perception that he had been persuaded by **Hoffman** was confirmed by his conduct in settling the letter to the Registrar and in him accompanying Katzeff to the Registrar's office. However, he says, he still had reservations about approaching the Registrar without notice to the applicants. Because of these reservations he told the Registrar that he should not rely on anything said by him in making his decision. These remarks to the Registrar were apparently made while **Katzeff** was temporarily absent from the room.

Despite his reservations **Katz** was party to the calculated and deliberate decision made by the **Siegwart** and his other legal representatives to approach the Registrar without any notice to the applicants.

The letter to the Registrar was drafted by **Hoffman**, typed by his secretary and settled by Katz and **Katzeff**. It is on the letterhead of C & A Friedlander Inc and reads as follows:

> ***"Dear Sir***
>
> ***RELEASE OF SECURITY FURNISHED IN CASE NOS. 4146/98 AND 4085/98***
>
> ***We act for Mr J.J. Siegwart. Our client furnished an amount of R1 million as security in terms of the Orders of Court in the above matters, copies of which are annexed marked "A", "B", "C" and "D".***
>
> ***In terms of the said Orders the Applicants were required to institute proceedings (by which is meant the issue of summons or the launching of an application), within 21 days of the grant of the Orders which took place on 7 April 1998. According to our calculations the period peremptorily prescribed in the Orders of Court has elapsed.***
>
> ***Notwithstanding the lapse of the 21-day period, no process of whatsoever nature has been issued by your office against Mr. Siegwart. In this connection we have***

conducted a search of your records and would appreciate your confirmation forthwith that no process has been issued by your office at the instance of either of the Applicants against Mr. Siegwart.

In the circumstances there is <u>no basis</u> upon which the sum of R1 million should remain invested as contemplated in paragraph 3 of the Order of Court dated 24 March 1998 in Case No. 4146/98, as amended by paragraph 1 of the Order dated 7 April 1998 under Case No. 3146/98 and as contemplated by paragraph 1(iv) of the Order dated 7 April 1998 under Case No. 4085/98.

You will have noticed that the said sum is invested in your name and under your control.

We have accordingly been instructed to request that you forthwith authorise us to release all monies standing to the credit of the interest-bearing bank account to our client by reason of the failure of the Applicants to institute proceedings timeously. In this regard we respectfully refer to paragraph 2(e) of the Order of Court dated 23 March 19998, as amended by paragraph 1 of the Order of Court dated 7 April 1998 under Case No. 4085/98 and to paragraph 8 of the Order of Court dated 24 March 1998 as amended by paragraph 4 of the Order of Court given on 7 April 1998 under Case No. 4146/98 which prescribed the lapsing of the Order and accordingly <u>obligate</u> you to authorise the release of the aforesaid funds.

Yours faithfully
C & A FRIEDLANDER INC
Per

P. KATZEFF"

There is some dispute as to what was said at the Registrar's office when **Mr Katzeff** handed the letter to him. According to **Mr Hendrik Heyman**, the Registrar:

(i) **Katz** was"*at pains to point out"* that he wanted nothing to do with the matter and did not want to say anything.

(ii) **Katzeff** made certain representations, ***inter alia***, that the orders were peremptory and had peremptorily prescribed, and gave the assurance that he would re-instate the funds should it transpire that they should not have been paid out.

(iii) Had it not been for the representations and undertaking by **Mr Katzeff** he would not have signed the letter of authorisation for the release of the funds.

Katzeff contends that the averments in the Registrar's affidavit "*bear little relation to what in fact transpired"*. **Katzeff** denies that he gave the Registrar any undertaking. He says he summarized the letter before the Registrar read it himself and **Katz**, at **Katzeff's** instance, took the Registrar through the Court orders and explained the issues raised by the differences. **Katzeff** then detailed the extent of the search conducted at Room 1. The Registrar raised the issue of notice to the applicants and **Katzeff** told him what senior counsel's opinion was in this regard.

Katzeff drafted a letter which was typed by the Registrar's secretary and signed by the Registrar. The letter authorized the release of the monies standing to the credit of an interest-bearing account opened in respect of Case No. 4146/98 and 4085/98. The letter records that the Registrar has been advised that a thorough search has been conducted and that no process pursuant to the aforesaid orders had been instituted. The Registrar signed this letter.

It seems unlikely that the Registrar would readily have agreed to the release of the funds, especially in view of his earlier attitude communicated to **Katz** and the private aside to him by **Katz** that he should not rely simply upon what was being said to him. **Katzeff**, however, expressly denies that

the Registrar was pressurized or coerced to furnish the authorisation for the release of the funds. The Registrar was not a true respondent - he filed two affidavits for the applicants - and the matter has to be decided on the facts as stated by the other respondents, and the facts not in issue, in accordance with the rule in the **Plascon-Evans** case. (See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634 E to 635 C**).

Though the immediate events leading to release of the security may be in dispute what happened to the money thereafter is not. After the Registrar had authorised the release of the R1 million, **Katzeff** telephoned **Siegwart** from counsel's chambers and **Siegwart**, it is alleged, instructed **Katzeff** to get second respondent to draw a cheque in favour of **Harksen's** wife, **Jeanette**, and to ensure that the R1 million in cash was handed to her for delivery to a courier, **Wolfgang Ketterer ("Ketterer")**. The funds were to be handed to **Ketterer** for repatriation to Switzerland. **Ketterer** was due to leave for Switzerland later that day and would personally hand over the money to **Siegwart**.

R1 million in cash was paid to **Jeanette Harksen** at the Nedbank, St George's Mall, Cape Town, in the presence of **Katzeff** and **Jeanette's**

attorney. **Jeanette** left the bank on her own with the cash in a briefcase and headed in the direction of Greenmarket Square where **Ketterer's** wife, **Ute**, was apparently waiting in a cafe to receive the money on behalf of her husband.

The prompt removal of the money is explained on the basis that **Siegwart** did not want the money to remain in second respondent's bank account as he was concerned that the applicants might find a way to attach it again. Why the R1 million was transferred in cash and not via swift transfer or in any other similar manner was not explained to **Katzeff** nor did he query this.

About ten days later **Katzeff** wrote to the applicants' respective attorneys informing them of the release of the security and asking for the payment of his clients' costs. This was the first knowledge the applicants had of the Registrar's decision in this regard. Their attorneys took up the matter with **Katzeff** and the Registrar and they were, ***inter alia***, informed that the five Hamburg creditors had in fact instituted proceedings timeously. In the ensuing correspondence second respondent in effect acknowledged that no basis existed for the withdrawal of the R1 million and **Siegwart** gave various undertakings to re-instate the money. He failed to do so and on or

about 5 October 1998 second respondent and **Katzeff** withdrew as his attorneys of record.

The Court orders were entirely negated without any notice to the applicants, without the leave of the court, without the orders being varied by the court and, applicants contend, without any valid cause therefor.

Mr P.B. Hodes SC, who appeared with **Mr AM Breitenbach** on behalf of second and third respondents, raised several arguments ***in limine***. In the first instance he strenuously argued that the application should be dismissed for want of urgency. It appears that the application was launched on 27 November 1998 and set down for hearing on 14 December 1998 and the material facts and circumstances were already known to the applicants some months earlier. While this is correct it is also apparent from the exchange of correspondence attached to the applicants' founding papers that there were attempts to resolve the matter and **Siegwart** undertook to re-instate the security on a number of occasions. It is also correct that there were belated attempts to properly deal with the question of urgency. On the other hand all matters of contempt are relatively urgent (See: **Uncedo Taxi Service Association v Maninjwa & Others 1998(3) SA 417 ECD 429 G-I**). Furthermore this is a continuing breach and the re-

instatement of the security is necessary for the action against **Siegwart** to proceed. Most importantly, it would hardly be proper to dismiss the matter for want of urgency after 10 days of argument for it to be re-argued before another court in due course.

The next argument raised is that the prayer in paragraph 2 of the notice of motion - the order for the payment of the R1 million within 7 days - is incompetent because it is an order ***ad pecuniam solvendam***. In support of this argument reference was made to the basic rule affirmed in **Hofmeyr v Fourie; BJBS Contractors (Pty) Ltd v Lategan 1975(2) SA 590 (C)** that the courts commit for contempt only for wilful disobedience of orders ***ad factum praestandum***. The latter case precludes a court from imprisoning a judgment debtor for contempt of court by reason of a failure to pay a judgment debt of a commercial character. **Mr Hodes** contends that the practice of committing for contempt has never been applied to a respondent's failure to comply with a judgment for the payment of money, except in matrimonial cases in which there is an order to pay maintenance and/or a contribution towards costs, and possibly in certain cases involving liability to pay costs ***de bonis propriis***. In this matter we are quite clearly not dealing with a commercial debt but with the reinstatement of a Court order - that the second and third respondents continue to hold the funds as

security, as they had been ordered to do, and for that purpose the R1 million is to be re-instated. Contempt proceedings need not necessarily be a prerequisite for such an order. In appropriate circumstances the court has the authority to make an order for the repayment of money which was removed in defiance of an order of court (See **Burger v Fraser 1907 T.S. 318**).

Respondents' counsel also contended that the orders sought in paragraphs 2 and 3.1 of the notice of motion should be refused as applicants are seeking to prosecute what is essentially an illiquid claim for damages by way of motion proceedings, something which is not permissible at all. It was argued that applicants' cause of action is essentially that on 15 May 1998 first, second and third respondents wrongfully and intentionally, in breach of the Court orders, procured from the Registrar the release of the R1 million paid by **Siegwart**. In the circumstances respondents' counsel submitted that the applicants are in essence seeking an award for damages for a delict. This submission is devoid of any merit. Applicants are simply not seeking to recover damages. They are seeking the reinstatement of the security from which the claim for damages may be satisfied. Such contempt proceedings are an accepted manner of coercing compliance with a Court order. (See: **Uncedo**,***supra,* at 429 E - F**).

The next, and final, argument raised ***in limine*** by respondents relates to the ***locus standi*** of the applicants. According to their counsel none of the applicants has standing to sue in this matter. With regard to **HEG** (first applicant) it was contended that it is implicit in paragraph 8 of the Court order that the R1 million security would serve to found jurisdiction in proceedings brought by **HEG** against **Siegwart** if, and only if, **HEG** brought these proceedings within the 21 day period. Upon the expiry of the 21 day period **HEG** ceased to have any legally cognisable interest in the R1 million. This conclusion is incorrect. The order did not automatically lapse. (See **Himmelsein v Super Rich CC & Another 1998(1) SA 929 WLD 932 E - 933 D**). **Siegwart** in any event expressly agreed to the late issue of the summons. This is not in dispute. The fact that second and third respondents were not party to the agreement cannot, and does not, affect **HEG's *locus standi*** herein. The agreement with **Siegwart** also did not result in the applicants abandoning their claims against the other respondents as is suggested by their counsel.

The ***locus standi*** of the five Hamburg creditors, who issued their summons timeously, is challenged on the basis that they failed to obtain the authority in terms of section 18(3) of the Insolvency Act, which is a prerequisite for

proceedings by creditors in terms of section 32 thereof. It appears that the order of **Cleaver J** in fact authorised the proceedings in terms of section 18(3). I do not, however, have to decide this issue. The respondents cannot ignore a Court order because the basis upon which it was obtained may be open to attack. The order stands. Until it is set aside or varied upon a proper application to this court it remains valid and is enforceable. (See: **In re Honeyborne 1876 Buchanan 145 at 150**; **Maseko v Maseko 1992 (3) SA 190 W at 201 D**).

It is common cause that in procuring from the Registrar the release of the R1 million security paid by **Siegwart, Katzeff** acted in breach of the order of this court dated 8 April 1998 in that the five Hamburg creditors had in fact issued summons on 12 May 1998. As he was aware of the order and disobeyed it or neglected to comply with it, the ***onus*** is on the respondent to rebut the inference that he wilfully disobeyed or neglected to comply with the order. (See: **Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd** and other related cases **1985(4) SA 809 (A) at 836 D - E**). **Mr Hodes** submitted that this ***onus*** need not be discharged on a balance of probabilities (as was previously the case) in the light of the fundamental rights in section 35(h), (i) and (j) of the Constitution of the Republic of South Africa, 1996. As contempt of court constitutes a criminal offence the guilt of

the offender must be proved beyond a reasonable doubt (See: **Uncedo,*supra*, at 425 D - 428 E**) and a respondent can defend himself by satisfying the court that there is a reasonable possibility that he did not act wilfully or ***mala fide***. (See **S v Fouche 1974(1) SA 96 A at 101H - 102A**).

Though I have some reservations whether **Mr Hodes** is correct with regard to the standard of proof to be applied in proceedings of this nature, I shall adopt the standard he suggests for the purposes of this matter.

It is settled law that intention in the form of ***dolus eventualis*** is sufficient for criminal contempt of court. This form of intention *"is sufficient if the accused subjectively foresaw the possibility of his act being in contempt of court and he was reckless as to the result."* (See: **S v Van Niekerk 1970(3) SA 657 TPD at 657 G**).

The subjective state of mind of a party in the position of **Katzeff** is seldom capable of direct proof and subjective foresight, like any other factual issue, can be proved by inferences drawn from the respondents' conduct and from the circumstances in which the breach of the order was committed. (See: **S v Dladla 1980(1) SA (1) A at 4 A; LAWSA First Re-issue, Vol. 6, para 90**). Once it is demonstrated that the respondent foresaw the risk of the

order being breached ***dolus eventualis*** applies and the ***onus*** rests on the respondent to negative the inference of ***dolus eventualis***. (See **Martin v French Hairdressing Saloon Ltd 1950(4) SA 325 - 329 E - F**)

It can be argued that **Katzeff** clearly intended to breach the Court order but, as **Mr R.S.Van Riet S.C**, who appeared on behalf of **HEG**, points out, what is more certain is that it cannot be said that Katzeff discharged any ***onus*** of demonstrating that he did not subjectively foresee the possibility of a breach of the Court order. Certain of the admitted facts and circumstances support this conclusion.

Within a short period after the strongly fought Court orders were obtained a line was simply drawn through them without notice to any of the applicants or to the Court. No notice was given to the applicants with the specific intention of precluding them from using the due process of law to prevent the payment of the monies to the first respondent. **Katzeff** resorted to self-help and knew that if any of the orders had not lapsed for whatever reason, the result would be irreversible.

Katzeff made arrangements for the urgent withdrawal of and the conversion of the monies into cash - R1 million in R200,00 notes - so that it

could be dissipated easily as a matter of urgency. He was obviously concerned that the applicants could employ court process to prevent the money being paid out. His conduct indicates foresight that one or both of the orders were still valid.

Hoffman had instructed them to go through all the files opened in the relevant period. **Katzeff** was, in effect, advised by **Berril** that this could not be done as a number of files could not be located or were missing. **Hoffman** was not told about this and the Registrar was informed that a thorough search had been conducted. **Katzeff** must necessarily have foreseen the possibility that summons had been issued as attorneys practising in this Court are aware of the state of the Registrar's office. He was invited to deal with this proposition but failed to so.

The difference between the two Court orders is self-evident. Clause 2(e) of the order in Case No. 4085/98 contains a self-destruct clause. The Court order in Case No. 4148/98 does not. Effect must be given to the clear difference in the wording and clear meaning of the clauses. In his letter to the Registrar, **Katzeff** states in terms that the time periods prescribed by the Court order are peremptory and that the orders prescribe the lapsing of such orders obliging the Registrar to authorise the release of the funds.

Both statements are clearly wrong as I have already indicated. **Katzeff** recognised this and alleges that the position was corrected by **Katz** who explained to the Registrar the issues raised by the differences in the Court order. The Registrar, of course, denies this was done. Despite being invited to do so, neither **Katz** nor **Katzeff** have stated what precisely was said to the Registrar that persuaded him to change his mind.

Katzeff places considerable reliance upon the advice of counsel in seeking to justify his course of action. He told **Siegwart** that he would be guided by the advice of counsel yet does not accept **Katz's** view. The meeting the next morning with **Hoffman** was clearly designed to obtain contrary advice which would suit his client's purposes. In anticipation of **Hoffman's** favourable advice, **Katzeff**, it seems, had already made the arrangements for the withdrawal of the money.

The latter aspect warrants some consideration. On 14 May 1998 **Katzeff** was concerned that **Katz** and **Hoffman** appeared not to be ***ad idem*** in regard to the issues raised by **Siegwart's** instructions and a meeting was arranged with **Hoffman** and **Katz** for the morning of 15 May 1998 in order to resolve the matter. The meeting took place and resulted in the visit to the Registrar who authorised the release of the security. In his opposing

affidavit **Katzeff** describes what happened next as follows:

> ***"After the Registrar had seized the letter authorising the release of the R1 million, I telephoned first respondent for instructions as to the manner in which I should deal with the money. The first respondent instructed me to cause the second respondent to issue a cheque for R1 million in favour of Jeanette and to ensure that the bank had sufficient cash so that Jeanette could encash the cheque later that day."***

During the hearing of this matter counsel for the applicants produced an affidavit from a bank official to the effect that **Katzeff** had telephoned Nedbank on 14 May 1998 to make arrangements for the encashment of the cheque. In other words the arrangements for the encashment of the cheque were made before the Registrar consented to the release of the security and also before the meeting in **Hoffman's** chambers. This is now common cause. **Katzeff's** explanation is that after **Berril** reported the results of her search to him, he contacted **Siegwart** who instructed him that, if the money was to be released, it should be converted into cash as soon as possible. This instruction was given on 14 May 1998. **Katzeff** says in a further affidavit that he did not deal with **Siegwart's** earlier instructions in his opposing affidavit because he did not consider it germane and apologises to the court for creating *"the impression that the date on which (he) received the instructions from **Siegwart** to pay out the*

money in cash was 15 May 1998."

I fail to understand how this discrepancy arises. It seems likely that in describing the events as he did **Katzeff** was endeavouring to avoid any suggestion that his approach to the Registrar was a premeditated attempt to subvert the Court order. Furthermore **Katzeff** declined to indicate whether he had told counsel about the fact that arrangements had been put in place with the effect that, should the Registrar agree to release the funds, the wife of **Jürgen Harksen** would receive the R1 million in cash and the money would be irretrievably lost. It must be accepted that he did not do so.

Katzeff also fails to explain why he did not initially disclose to the applicants that the money was handed to **Jeanette Harksen**. This fact only emerged when certain documents were discovered in other court proceedings. The transfer of the money by courier to Switzerland in South African currency also does not make much sense. There are more efficient methods of transferring money legitimately.

Katzeff maintains that the crucial factor in him deciding to approach the Registrar was the "unanimous and unequivocal" advice which he had

received from counsel. **Katzeff** is an attorney subject to the ethical code of conduct of his profession and it is not open to him to simply state that he was guided by the opinion of counsel. **Katzeff** and his firm, second respondent, were entrusted with the duty imposed in terms of the Court orders.

Katzeff, an obviously experienced attorney, knew that, in terms of the ethical rules of his profession, the interests of his client were, ***inter alia***, subject to his duty to the Court and any undertakings given by him in the course of his professional work.

In any event the advice given by counsel was not unanimous and unequivocal. **Katz** was against the approach to the Registrar without notice to the applicants and, it seems, uncertain as to the interpretation of the Court orders. He did not give the same, or any, subsequent advice. He had previously voiced his opinion against it, he later said nothing. It may be that he carried out certain instructions such as helping to draft the letter to the Registrar but this does not mean agreement with the opinion expressed by **Hoffman**. His conduct thereafter in fact indicates the contrary.

Mr T.A. Barnard, who appeared on behalf of second and third applicants,

argued that **Katzeff's** actions constituted a carefully orchestrated plan to bypass, in an improper and unethical manner, the factual and legal obstacles in the way of the funds being released. It is perhaps an unduly harsh view of **Katzeff's** conduct but it is not without merit, especially if one looks at the decision not to give notice to any of the other parties to the Court orders of the approach to the Registrar and the decision not to go to Court. As **Mr Barnard** correctly points out a phone call to any of the applicants' attorneys or counsel would have alerted **Katzeff** to the fact that summons had been timeously issued. He elected not to make the phone call because of **Siegwart's** instructions. Quite clearly **Katzeff** was concerned about the legal and ethical implications of **Siegwart's** instructions. In the circumstances he should have foreseen the real possibility that he should give notice. His actions in seeking counsel's opinion indicates that he believed that his client's instructions ran contrary to his obligations and ethics. When **Katzeff** initially discussed his instructions with senior and junior counsel, we are not told what advice was given. The advice of the same counsel was sought for a second time on the same issue. **Katz** then advised that notice should be given to the applicants. The advice of senior counsel, **Hoffman**, was thereafter sought and **Hoffman** expressed a contrary opinion based on his view that the orders had "*self-destructed*" and the ethical implications of not carrying out

Siegwart's instructions.

Counsel's opinion, it appears, was being sought in a search for ways of escaping the effect of the Court orders. It is not open to a party, in interpreting a Court order, to do so. (See: **In re Comions & Another 1911 (RD at 468 - 471**). **Hoffman's** opinion, in any event was surprising, and wrong, especially with regard to the approach to the Registrar in the absence of other interested parties. **Katz** did not share his view and **Katzeff** should have foreseen the possibility that it might not be correct. The inference is irresistible that in the facts and circumstances of this matter that any senior attorney in the position of **Katzeff** must have foreseen that his actions may possibly result in the breach of the Court orders. **Katzeff** accordingly foresaw the possibility of the consequence and was reconciled to it.

Katzeff, as indicated above, relies upon a defence of "*legal advice"* to disprove "*wilfulness*" on his part. This defence requires a proper setting out of the circumstances under which the advice was given. It is incumbent upon a party relying upon such defence to " *. . . testify in regard to all the circumstances relevant to the giving of such advice."* (See: **S v Abrahams 1983(1) SA 139 A at 146 H**). In motion proceedings this means

that all the relevant circumstances have to be set out on affidavit.

Hoffman's advice was predicated on certain incorrect facts, for instance he did not know that the visit to the Registrar was not a mere precursor to a Court application. He did not know that a thorough search could not be conducted in Room 1 as a number of the files were missing. He did not know that the monies would be irretrievably lost within hours of the Registrar's consent, that the Registrar would authorise payment without recourse to a Court and that the money would be handed to **Jeanette Harksen** in cash. In the absence of any indication that **Hoffman** was aware of the aforementioned facts, **Katzeff** has not discharged the ***onus*** of showing that he was entitled, if at all, to take the advice at face value. The respondents have simply failed to properly explain the circumstances relevant to the giving of the legal advice.

At the commencement of these proceedings counsel for the applicants offered to have the matter referred to oral evidence without the necessity for argument. This offer was rejected by the respondents. At a very late stage **Mr Hodes** asked, in the alternative, that this Court direct that **Katzeff**, **Hoffman** and **Katz** be called to testify. I do not think it necessary and appropriate to do so.

The applicants have successfully demonstrated that **Katzeff** wilfully breached a Court order. Insofar as second respondent is concerned there is no suggestion that any other director or employee acted improperly. There liability arises vicariously. **Katzeff** is an officer of this Court and as such he is obliged to maintain the highest standards of honesty and integrity. His role in this matter, especially the manner and haste in which the R1 million was encashed and dissipated thereby rendering the Court orders completely and irreversibly nugatory appears to fall short of that standard. I intend to reflect my disapproval with an appropriate costs order. The circumstances of this matter are in any event such that a special costs order is warranted.

In any event I make the following order:

1. First, second and third respondents, jointly and severally, alternatively one or more of them severally, are ordered, within 30 days of the date of this order, to pay the amount of R1 million into the trust account of the second respondent, previously held in the name of the fourth respondent in terms of and for the purpose set out in paragraph 3.2 of this Court's order dated 7 April 1998 in Case No.

4146/1998 and paragraph 2(iv) of this Court's order in Case No. 4085/1998 dated 8 April 1998;

2. Failing compliance with the above order, the first, second and third respondents jointly and severally, alternatively one or more of them severally, are ordered to show cause at 10h00 on 8 December 1999 why:

2.1 The Sheriff of this Court should not be authorised and directed to:

(a) Attach property of either or all of such respondents sufficient in value to, upon a sale thereof, generate sufficient funds to give effect to the order in paragraph 1 hereof;

(b) Sell, where necessary, such property in terms of the applicable provisions of rules 45 and/or 46 of the Uniform Rules of Court;

(c) From the proceeds of such sale, and/or from any funds

attached or paid to him, pay into the trust account as envisaged by paragraph 2 above, the amount of R1 million, and deal with the balance of the funds remaining after payment of R1 million (if any) in the manner as this Court may direct;

2.2 Each of first, second and third respondents should not be held guilty of contempt of court and why this Court should not impose an appropriate sanction upon each and/or all of them.

3. Upon the payment of the said R1 million to the said trust account of second respondent in terms of this order no party to this order, or any other person, shall be entitled to deal with such funds, in any manner whatsoever, save in terms of an Order of this Court obtained on prior written notice to all parties hereto.

4. First, second and third respondents, jointly and severally, are ordered to pay the costs of this application on the attorney and client scale.

5. The Registrar of this Court is directed to forward a copy of this judgment to the Law Society of the Cape of Good Hope.

DESAI, J