

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

16426/2007

DATE:

26 MAY 2008

5 In the matter between:

LOUIS PATRICK SLINGER

Applicant

and

THE GEORGE TAXI ASSOCIATION

1st Respondent

KENNETH CLEMENT PETERSEN

2nd Respondent

10 MOSES JOHANNES WILDERMANS PLUS

ONE OTHER

3rd Respondent

JUDGMENT

15

DAVIS, J

This is an application whereby applicant seeks to have respondents declared in contempt of this Court. This long running saga began with an order granted by Ndita, J on 7 February 2007 in which, *inter alia*, the second and third respondents were ordered to provide applicant with first respondent's financial statements, whether audited or not, for the previous three years within 30 days of the granting of the order together with the minutes of meetings held in the name of first

/ds

respondent from 18 December 2004 to the date of the order. A further order was granted by Traverso, DJP on 4 September 2007 in which again respondents were ordered to comply with the Ndita, J order of 7 February 2007.

5

Needless to say little appeared to be done in that there had only been partial compliance with these orders. The matter was then heard by the Court on 14 December 2007. On that date a further order was made, in terms of which the respondents were ordered to provide the applicant with the minutes of all the meetings held and conducted in the name of first respondent from 18 December 2004 to date and all of first respondent's financial statements, whether audited or not, for the period between 28 February 2006 to 7 February 2007.

15

Once again it was alleged by applicant that there was only partial compliance with this order. Pursuant to these allegations of non-compliance, applicant has brought on the application to hold the respondents in contempt of court.

20

There have been numerous hearings and further discussions in chambers pursuant to this dispute, almost all of which represented an attempt by this Court to settle this dispute without the necessity of a hearing regarding contempt proceedings. However, applicant has continued to persist in his contentions

25

that respondents have failed to comply with the orders to which I have made reference and, in particular, the order of this Court of 14 December 2007. It has therefore become necessary for this Court to decide this matter and to bring it to a measure of 5 finality.

There are two sets of arguments which have raged between the parties, one dealing with the minutes to which I have made reference and the other dealing with the question of the financial 10 statements. I shall deal first with the minutes.

Mr Zazeraz, who appeared on behalf of the applicant, made much of correspondence which had been generated by the erstwhile attorney acting on behalf of the respondents, in particular of 17 15 January 2007 when the attorney, Mr Geduld, wrote to the applicant's attorneys and said;

“We have once again consulted with our client and we are of the opinion this matter should be settled between the parties to curtail costs. Our 20 client proposes the following All minutes of meetings on any event available for perusal.”

Mr Zazeraz contended that respondents have been unable to 25 explain this statement by their attorney, who acted for them at

that time. Accordingly, an inference must be drawn in favour of a conclusion that the minutes were available and that respondents have steadfastly refused to make them accessible to applicant, court orders notwithstanding. Mr Zazeraz fortified his argument by reference to an explanation proffered by respondents, namely that the association, being first respondent, suffered the theft of its computer on 17 November 2005 and that all the minutes which were on the hard drive of the computer are no longer available to the respondents to make accessible to applicant.

10

Mr Zazeraz focused on a variety of different explanations proffered by respondents with regard to the theft of the computer. In the first place respondents had contended that there had been a housebreaking during which the computer had been stolen; secondly the computer had been destroyed and for this reason there was no manner of accessing the data stored on the computer. Furthermore he submitted that there was no evidence the respondents had stirred themselves to deal with the alleged housebreaking. In addition, the complaint which had been lodged with the South African Police Services, dealing with this matter, had emanated from applicant. There was no indication in the report lodged with the police that a computer had been stolen.

20

Turning to the question of the financial statements, respondents' defence was in essence that throughout 2006 first respondent

25

had been involved in very little economic activity, obviating the need for accounts to be prepared. No bank statements were available because any cash that was received from members by the association was kept by the association's treasurer.

5

In Mr Zazeraz's view, this explanation stands to be rejected. To the extent that there was no proof from the bank to support respondent's version, Mr Zazeraz submitted that, as there had been bank accounts prior to 2006, the very least that respondent could have done was to have provided this Court with a letter or affidavit from the bank to indicate that no bank account existed in the name of first respondent for the period in question.

Mr Tsegarie, who appeared on behalf of the respondent, submitted that there was sufficient correspondence generated by the respondents to indicate that they had made every effort to obtain an affidavit from Mr Geduld explaining the statement contained in his letter of 17 January 2007. At the hearing, Mr Tsegarie handed up to this Court a letter from the Cape Law Society, dated 13 May 2008, which made it clear that enquiries had been made to the Law Society as to Mr Geduld's refusal to depose to an affidavit on behalf of applicant.

He conceded that, during the period under which the first respondent was under the control of second and third

respondents the only minute of an executive meeting which had been provided to applicants was that of 24 September 2007. He submitted that the failure to provide minutes from November 2006 and for the calendar year 2007 was attributable to ambiguity in the order which had been granted, in that the very nature of the dispute was focused on events that had taken place prior to the election of the present office bearer of first respondent; hence there was only a dispute regarding documents generated prior to 2007. To the extent that there was non compliance with this aspect of the order, it was attributable to ambiguity rather than any wilful misconduct.

In Fakie N.O. v CCII Assistance (Pty) Ltd 2006(4) SA 326 (SCA) the Supreme Court of Appeal provided a most instructive judgment which guides the courts of this country in dealing with the question of a civil contempt order. In the first place, the Court confirmed that, for civil contempt proceedings, the applicant had to prove the existence of the order, service thereof and non-compliance. Respondent bore an evidentiary burden in relation to wilful and *ma la fide* conduct. Ultimately the Court must decide, beyond a reasonable doubt, that the respondent has been wilful and *ma la fide*; failure by respondent to advance evidence that established a reasonable doubt as to whether any compliance has been wilful and *ma la fide* will justify a finding of contempt (para 42).

Cameron, JA examined conflicting affidavits in dealing with the question as to whether, in that dispute, there had been contempt on the part of the appellant which justified the conclusion that the appellant had acted in a wilful and *male fide* manner. He

5 concluded;

10 "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 the Court heard oral evidence on the factual disputes between the parties it might accept the Auditor General's version or at least found that there was reasonable doubt as to whether the delay in complying with the order of Hartzenberg, J were wilful and *male fide*." (para

64)

15 The present dispute also has to be decided on the papers, without the benefit of oral evidence. In my view, it cannot be said that the absence of minutes as at November 2006 constitutes wilful and *male fide* conduct on the part of the respondents. I cannot discount the version that they have put up, in that I am not persuaded by Mr Zazeraz's creative attempt

25 regarding a variety of versions relating to the computer and the

theft thereof to find against respondents. True, there is some difference in the versions based upon the computer being destroyed and then having been stolen. It is clear that a housebreaking took place. Some attempt to steal from the premises occurred. It cannot, on these papers, be concluded that no theft of a computer took place. It certainly cannot be concluded that failure to produce minutes that might have been lost amounts to wilful and *male fide* conduct. The fact that attempts were made to procure an explanation from Mr Geduld only adds to that justification.

I am also prepared to accept that there may have been some ambiguity with regard to the order insofar as minutes of 2007 are concerned although for reasons that will become apparent presently I am not prepared to leave the matter there.

Turning to the financial statements I consider that there has been a blatant disregard of the Court orders, to the extent that the least one could have expected from the respondents, after the sheer weight of demand and litigation was that it, to provide evidence from the applicable bank that there had been no bank statements for the period under review. To the extent, given all the opportunity that I had given to the parties to settle this matter, that evidence was the least that could have been expected from respondents to show that no financial activity took

place in 2006. Simply to continue to insist that no activity took place when applicant has provided at least some existence of members subscriptions having been paid is an act in contempt of three court orders granted and during which period the Courts have shown extraordinary patience in seeking to ensure compliance therewith.

The question arises as to an appropriate order under these circumstances. On the basis of what I have already said there has been an attempt, or at least a plausible version at explaining why substantial compliance with the order have been undertaken. To impose a harsh sanction on the breaches would be disproportional to the misconduct.

For these reasons the following order is made:

1. The FIRST, SECOND AND THIRD RESPONDENTS ARE FOUND TO BE IN CONTEMPT OF THE ORDER OF COURT OF 14 DECEMBER 2007.

20

2. A FINE OF R500 (FIVE HUNDRED RAND) WILL BE IMPOSED on the three respondents individually, suspended on condition that the respondents produce;

a. An explanation from the applicable banking institution of first respondent as to whether any banking accounts were opened or operated during the period of 2006;

5

b. The complete minutes of all meetings which were held, or in terms of which the Association is constitutionally bound to convene such meetings for the period November 2006 to December 2007. In the event that no such minutes can be made available, a proper and full explanation on affidavit must be provided.

10

c. The respondents have six weeks from the date of this order to so comply.

15

3. The financial and organisational state of first respondent is hereby referred to the Provincial Registrar of Taxis Association who is instructed to produce a report within three months of this court order and to provide such report to this Court, which will then determine any further course of conduct which may be applicable to the dispute.

20

4. There is no order as to costs, save for today's hearing, being 26 May 2008 in which respondents jointly and severally, each to pay the other to be absorbed, are ordered to pay applicant's costs.



DAVIS, J