REPORTABLE

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 21080/08

In the matter between:

JOHANNES FREDERICK KLOPPER, N.O. **Applicant**
in his capacity as the duly appointed liquidator of

THE GREEN MEDICINE COMPANY (PTY.) LTD.
(In Liquidation)

and

THE MASTER OF THE HIGH COURT **Respondent**

JUDGMENT DELIVERED THIS 19TH DAY OF FEBRUARY, 2010.

THRING, J.:

The essential facts of this matter up to the 13th June, 2008 have already been summarised in this Court's judgment of that date, and I need not repeat them. On that day this Court, otherwise comprised, made an order against the Master in case no. 2475/2008, she being the respondent in that case, as she is in the present matter. This was the order:

"1. The decision of the respondent taken on the 18th June, 2007 not to tax the applicant's remuneration otherwise than according to Tariff B of the Second Schedule to the Insolvency Act, No. 24 of 1936, read with form CN104 of the Companies Act, No. 61 of 1973, is set aside.

2. The matter is referred back to the respondent for her reconsideration, bearing in mind what has been said in this judgment, it being found that in terms of section 384(2) of the Companies Act, good cause exists for remuneration to be awarded to the applicant in excess of the amount arrived at solely by applying the provisions of the said tariff.

3. No order is made as to the costs of this application."

In the body of its judgment the Court made the following findings, *inter alia:*

"....we find that, in all the relevant circumstances, to be reasonable the applicant's total remuneration must substantially exceed the sum of R331,479.15 before VAT to which the Master seeks to limit it in terms of the applicable tariff."

"....on an overall view of the matter we are satisfied that reasonable remuneration for the applicant will be considerably

> in excess of the aggregate sum which the Master has hitherto been prepared to allow, based on the application of the tariff."
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> "We find that the reasons stated by the Master for her decision amount to a misdirection and indicate that she was materially influenced by an error of law, that she took into account irrelevant considerations and that she did not consider relevant considerations. She also seems to have acted arbitrarily, her decision was proportionately unreasonable and the exercise of her discretion was not according to law."
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> .

On the 27th November, 2009, when the present application first came before us, we enquired from counsel appearing for the Master whether there was anything in this Court's aforesaid order or judgment which the Master had been unable to understand. We were informed that there was not. At our request, the Master was personally present in Court on that day. She in fact gave instructions to her counsel from time to time during the course of argument.

The matter had been referred back to the Master in 2008 for her reconsideration in terms of the order to which I have adverted above.

On the 16th October, 2008 she wrote a letter to the applicant's attorneys. It opens with these words:

> "Your letter dated 30 September 2008 refers.
>
> INTRODUCTION
>
> This letter contains the Master's decision on the interpretation of the judgement by Thring, J on 13 June 2008."

Why any "interpretation" of my judgment should have been necessary escapes me, especially in the averred absence of any inability on the part of the Master to understand it. I would have thought that no more was required of the Master in the circumstances than that she read the judgment and order and simply comply with the contents thereof. However, be that as it may, she appears to have laboured under the impression that she enjoyed the right to "interpret" the judgment in some way, whatever that term may have been intended to mean. If by it she sought to convey that she had an option to disobey or disregard this Court's order or judgment, or any part of either, she was, of course, grievously mistaken.

The Master's letter of the 16th October, 2008 purports to contain her decision, after having reconsidered the remuneration due to the

applicant. The letter also contains a number of what she calls "findings". Astonishingly, the last of these reads:

> "The Liquidator (sic) fee of R377 886,23 is reasonable in this circumstances" (sic).

The sum of R377,886.23 to which she refers here is arrived at by adding VAT at 14% to the sum of R331,479.15. The latter is the precise sum which the Master had allowed in her first determination of the applicant's remuneration, made on the 18th June, 2007 by applying the tariff referred to in the order, and which this Court had subsequently reviewed and expressly set aside as misdirected and substantially inadequate on the 13th June, 2008. Of the aforesaid sum of R331,479.15 net of VAT, R23,257.13 (also net of VAT) had been allowed by the Master in respect of the applicant's second liquidation and distribution account, whilst the balance, being the sum of R308,222.02 (net of VAT) had been allowed in respect of the applicant's first liquidation and distribution account. In other words, notwithstanding the clear findings and unambiguous directions of this Court, explicitly set out in its judgment and order and admittedly understood by the Master, she has now seen fit once again to disallow the applicant any remuneration in excess of that arrived at by applying the tariff.

In her letter of the 16th October, 2008 she makes various statements and allegations which may have been intended to be understood as reasons for her latest decision. Whether or not they are so intended, they mostly impinge upon the merits of this Court's aforesaid judgment and order. There can, of course, be no justification for her, in effect, to have flouted the clear directory terms of the judgment and order. She was legally bound to reconsider the applicant's remuneration in the light of the Court's findings that "....good cause exists for remuneration to be awarded to the applicant in excess of the amount arrived at solely by applying the provisions of the said tariff", and that ".....reasonable remuneration for the applicant will be considerably in excess of the aggregate sum which the Master has hitherto been prepared to allow, based on the application of the tariff", and that "... to be reasonable the applicant's total remuneration must substantially exceed the sum of R331,479.15 before VAT to which the Master seeks to limit it in terms of the applicable tariff."

The Master seems to think that these findings of the Court are now open for debate and reconsideration in this Court. She is mistaken. They are not. This Court is not sitting to consider on appeal or review the correctness or otherwise of its own earlier judgment and order. See

Administrator, Cape and Another v. Ntshwagela and Others, 1990 (1) SA 705 (AD) at 716 B-C. The Master did not oppose the earlier review of her first decision, which took place in this Court in May and June, 2008. The Court has duly pronounced on that matter, and it is now closed. The time for debate thereof is long past. So, for that matter, is the time for appeal. If the Master disagreed with the order, her remedy was to seek leave to appeal against it. She did not do so. In the circumstances, after the Court had given judgment and made its order, it remained only for the Master to comply with them. In failing to do so, and, indeed, in contravening the order, it would seem calculatedly and deliberately, the Master has acted with gross impropriety and, in fact, unlawfully. A half-hearted attempt was made on behalf of the Master to argue that the applicant had in some way waived compliance with the order of the 13th June, 2008. The argument is risible and does not even begin to stand up to scrutiny: not only is no foundation whatsoever laid for it in the papers; it is extremely doubtful whether it even lay within the applicant's power to afford the Master a dispensation from complying with the order. In the circumstances, the Master's latest decision cannot be permitted to stand and it, too, like her first decision, must be set aside on review as being tainted with illegality.

On the 25th November, 2009, in the matter of H. Cilliers v. P. Masinga, case number not known, a Judge sitting in the North Gauteng Division of this Court was reported in the press as saying:

> "If our courts do not act swiftly and strictly to stop the wilful disregard of court orders, the rule of law will be undermined and South Africa will, in my view, be entering the realms of a constitutional crisis..... The only institution that stands between anarchy and the normal citizen is the courts. The courts have a duty to protect normal, honest citizens and should not hesitate to do so."

I could not agree more, with respect. To the north of here there is at least one unfortunate country where, in recent times, the contemptuous disregard by organs of government of Court orders which they find unpalatable has become prevalent, and, indeed, almost the order of the day. The resultant crumbling of the rule of law in that country and the concomitant economic, political and other miseries in which it has been plunged, require no elaboration from me. It is devoutly to be wished that this country will not be tempted to follow suit. However, the conduct of the Master in this matter may possibly, and very regrettably, be seen as a misguided step in that direction.

We gave serious consideration to issuing a mandamus against the Master. Had that been necessary, it would have been most unfortunate,

as it would have impinged unfavourably on her image and standing in the public eye. She is an important functionary of this Court. The performance of a multitude of onerous tasks in various areas of the administration of justice falls to her, including the administration of the estates of deceased persons, the liquidation of companies and close corporations and the sequestration of insolvent estates. She is expected to carry out these duties properly, competently, efficiently, responsibly and with the necessary diligence. Above all, it is her duty to comply promptly and to the letter with any order which this Court may see fit to make, whether she likes it or not. Her conduct and the attitude which she has adopted and displayed in this matter are disappointing, to say the very least, and are completely unacceptable.

Fortunately a mandamus was not necessary. At the suggestion of the Court, the parties agreed on the 27th November, 2009 in terms of sec. 19 bis of the Supreme Court Act, No. 59 of 1959 to the appointment of a referee, to whom the question was referred for enquiry and report as to what, in terms of the provisions of sec. 384(1) and (2) of the Companies Act, No. 61 of 1973, would constitute reasonable remuneration for the applicant's services as liquidator in this matter. The referee, Mr.

Muller, has completed his enquiry and furnished the Court with his report, the contents of which we accept and adopt without modification. His conclusion is that, over and above the sum of R308,222.02 before VAT which the Master has hitherto been prepared to allow the applicant on his first liquidation and distribution account, he is entitled as reasonable remuneration in respect of his second liquidation and distribution account to an additional sum of R120,000 before the addition of VAT. After the addition of VAT the applicant's additional remuneration will amount to the sum of R136,800. We find accordingly, and we wish to express our indebtedness to Mr. Muller for the very competent and expeditious manner in which he has performed his functions as referee.

As is apparent from what I have already said, we disapprove strongly of the attitude which the Master has adopted in this matter, both towards the Court and towards the applicant. It ought not to have been necessary for the applicant to bring this application. After not having bothered to oppose the first review of her decision in 2008 the Master treated the order which the Court made in that matter with what appears to me to be something very closely approaching contempt. Her opposing papers in the present matter were delivered some three weeks out of time.

The explanation proffered by her for this delay is flimsy and inadequate But this technical shortcoming pales into insignificance when it is compared to the attitude which she adopted to this Court's judgment and order, about which I think that I have said enough already. I do not think that I do her an injustice if I describe her attitude to both these regrettable pieces of litigation as "cavalier".

Moreover, in her letter of the 16th October, 2008, to which I have referred, she launched what appears to have been a personal, gratuitous and completely unjustified attack on the applicant's competence as a liquidator. This is what she said:

> "Mr. Klopper who is an Insolvency Practitioner for 25 years and claim (sic) that this estate was complex should undergo a competency based assessment."

No foundation whatsoever appears anywhere in the papers for this scurrilous innuendo. It was utterly uncalled for and borders on the defamatory.

As a mark of our disapproval of her conduct we propose, mero motu, to make a punitive costs order against the Master.

For these reasons, the following order is made:

1. The report of the referee, Mr. I.J. Muller, S.C. dated the 18th January, 2010 is adopted in terms of sec. 19 bis (1) of the Supreme Court Act, No. 59 of 1959.

2. The decision of the respondent taken on or about the 16th October, 2008 not to tax the applicant's remuneration otherwise than according to Tariff B of the Second Schedule to the Insolvency Act, No. 24 of 1936, read with form CN104 of the Companies Act, No. 61 of 1973, is set aside, and in its place is substituted the following decision:

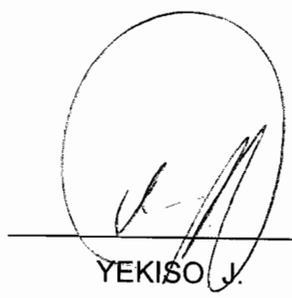
> "The applicant, Mr. J. F. Klopper, is entitled, as reasonable remuneration for his services as the liquidator of Green Medical Co. (Pty.) Ltd. (in liquidation) to the aggregate sum of R428,222.02, to which must be added VAT at 14%."

3. By agreement, the remuneration due to the referee is reflected in his tax invoice number 01/01/10 dated the 18th January, 2010.

4. The respondent is ordered to pay the costs of this application on the scale as between attorney and client, such costs to include the aforesaid remuneration of the referee and of the 27th November, 2009.

THRING, J.

I agree.



YEKISO, J.