IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 2864/2016

In the matter between:

JAMES VOS	**Applicant**
and	
FYNBOSLAND 304 CC	**First Respondent**
CORNELIUS ALMERO OOSTHUIZEN VAN DER WESTHUIZEN	**Second Respondent**

Heard on: 23 November 2016

Delivered on: 27 February 2017

JUDGMENT

MAGONA, AJ

Introduction:

[1] The Applicant is seeking an order against the second Respondent to be held in contempt of a court order that was granted by Savage J on 31 May 2016 (the Savage order).

[2] The Savage Order reads as follows:

> "By agreement between the parties in respect of para 1 – 4 and having heard the legal representatives for the Applicant and Respondents the following order is made.
>
> 1. This matter is postponed sine die.
>
> 2. The first Respondent will make payment of an amount of R770,000.00 (Seven Hundred and Seventy Thousand Rand) to the Applicant by no later than Thursday, 30 June 2016. Payment will be made directly into Applicant's attorney's trust account of which the details are as follows:
>
> Colin van Rensburg & Co Trust Account
>
> ABSA Bank, Tokai
>
> Account Number: 4054873920
>
> Branch Code: 0631209

3. The first Respondent will deliver the building plan for Erf 10877, Malmesbury by no later than Friday, 3 June 2016, to the offices of the Applicant's attorneys.

4. In the event that first Respondent fails to comply with its obligations herein, Applicant may proceed to either execute against first Respondent, and/or set this matter down again, on 5 days' notice, for further relief."

[3] It is the failure to comply with the above Court Order that brought about this application.

Factual Background:

[4] The relationship between the Applicant and the Respondents began when the Applicant decided to build a house for his father .The First Respondent known to the Applicant as a Developer was to build such a house on a land owned by a company known as Astra Deals 198 CC at Langeburg Ridge to the value of R780 000.

[5] The second Respondent is a sole member of the first Respondent on 22 February 2014 the Second Respondent entered into a written agreement with the

Applicant where the construction of the house by the first Respondent was detailed.

[6] This agreement was entered into with an understanding that the property was to be built on the land belonging to Astra Deals.

[7] Prior to the construction however a dispute arose between the first Respondent and Astra Deals. The nature of the issues between them has no bearing to the application before me. The dispute between Astra Deals and the first Respondent was terminated towards at the end of 2014 by way of a settlement agreement entered into between the two companies after the matter was referred for arbitration.

[8] This led to the first Respondent not being able to comply with his obligation towards the Applicant in terms of the building plan agreement. The Applicant and the first Respondent thereafter agreed to cancel the first written agreement and they then concluded a new verbal agreement. The Applicant purchased a vacant Erf in Malmesbury which was registered in his name on or about 6 November 2015 with the purpose of having his father's house built. Eventually a new building plan was drawn up which however exceeded the agreed square metres. The Applicant then agreed to pay the extra costs relating thereto.

[9] It is alleged by the Second Respondent that the building plan was eventually submitted to the municipality in December 2015 by the first Respondent prior to the closure of the municipal offices for the December holidays to January 2016. That only on 11 January 2016 the second Respondent made the payment to the municipality for the processing of the plans for its approval. On 29 January 2016 the plans were approved and ready for collection by the second Respondent. The plans were thereafter collected by the second Respondent.

[10] During February 2016 a draft building agreement was forwarded by the second Respondent to the Applicant pertaining to the construction of the house on the vacant *erf* in Malmesbury. The parties could not agree to the terms of this building contract. It is alleged by the Applicant that the terms and conditions of the new building contract were slightly changed which included some other third parties and other construction companies and the costs were escalated. This did not sit well with the Applicant as he had already experienced delays to the building of the house which he has already paid for in full.

[11] The delays and disagreement between the Applicant as well as the Second Respondent led to a dispute , this is clear on the parties conduct and communication back and forth via correspondence during this whole period between their legal representatives and at times from the communication between the Applicant and the Second Respondent directly. Eventually the

Applicant demanded repayment of his money or that he would pursue the matter to the high court.

[12] According to the second Respondent the Applicant was being irrational and prematurely making un-substantiated accusations against the first Respondent with the threats of going to court.

[13] The Applicant launched an application in this court on 22 February 2016 where the relief sought was as follows:

> "2.1 Declaring that the demand and/or receipt by first Respondent, together with second Respondent who knowingly permitted it, of an amount of R780 000.00 (seven hundred and eighty thousand rand) from Applicant, while:
>
> 2.1.1 First Respondent was not a registered home builder, as contemplated in section 10(1) of the *Housing Consumers Protection Measures Act,* 95 of 1986 ("the Act"); and/or
>
> 2.1.2 First Respondent had not concluded an agreement with Applicant, as contemplated by the provisions of sub-sections 14(1) and (2) of the Act, read with section 13(7) of the Act;

was unlawful and/or constituted one or more criminal offences in terms of section 21(1) of the Act.

2.2 That first Respondent not be considered to be a separate juristic entity for purposes of this matter and/or that first and second Respondents be ordered to pay the amount of R780 000.00 (seven hundred and eighty thousand rand) to Applicant immediately, together with interest thereon a *tempore morae*, jointly and severally, the one paying, the other to be absolved.

2.3 The first and second Respondents hand over the approved buildings plans for Erf 10877 Malmesbury to Applicant immediately.

2.4 Alternatively to sup paragraphs 2.1 to 2.3 above, the first Respondent be ordered to:

2.4.1 comply with all requirements of the Act immediately, including but not limited to the conclusion of an agreement with Applicant, as contemplated by the provisions of section 13(1) of the Act, so that construction of a dwelling, in terms of

approved building plan, can commence and be completed on Erf 10877 Malmesbury, as soon as reasonably possible;

2.4.2 commence and complete construction of a dwelling on Erf 10877 Malmesbury, in terms of the approved building plan, as soon as reasonably possible and without delay."

[14] On 25 February 2016 by agreement between the parties, the matter was then postponed to 05 May 2016. In the meanwhile on 19 April the matter was placed on unopposed roll and on the day as it was being opposed it was then postponed to the opposed roll on 31 May 2016.

It was on the 31 May 2016 that the Savage J (Savage order) was taken by agreement between the parties. The content of this order I have mentioned somewhere in this judgment already.

[15] The Applicant alleges that Savage order was not complied with. Due to the failure by the first Respondent to comply with the Savage order, the Applicant had his attorneys sent correspondence dated 6 June 2016 reminding them to comply with the 31 May 2016 order with regard to the building plans(the municipal approved plans).

[16] Further, due to the non-payment of the money by the first Respondent in terms of the Savage order by 30 June 2016, the Applicant had a warrant of execution issued by the registrar of this court and served by the Sheriff at the registered address of the first Respondent's the sheriff was unsuccessful on 3 attempts of the service, but on the 4th attempt which was on 13 August 2016, the Sheriff learnt that the first Respondent has left the given address as informed by one Mr Fisher who was now the occupant of the First Respondent's registered address.

[17] The Sheriff had also served the warrant of execution on the sole member of the first Respondent, the second Respondent on 2 August 2016 and according to the Sheriff's return of service the following is recorded :

> "It is hereby further certified that Fynbosland 304 CC has been requested in terms of section 66(8) to declare whether he/she has any immovable property which is executable on which the following answer had been furnished: Debtor informs the Deputy that the company is dormant for the last 3 months and has no fixed assets. Company had two immovable properties and confirmed with Mr Van der Westhuizen that it has been sole."

[18] The Debtor whom the Sheriff refers to was acknowledged on the return as the Second Respondent.

[19] There were a lot of other issues that were raised by the Parties prior to the hearing of this application before me, which included an application by the Second Respondent to have the proceedings withdrawn against the Firs Respondent as it was provisionally liquidated; application to file answering papers and supplementary papers by the Second Respondent, Application to strike out by the Applicant the further affidavits filed by the Second Respondent, and a formal application brought by the Second Respondent to seeking leave to file the further affidavit.

[20] This shows the amount of animosity between these parties and I have given made my decisions on the above issues leaving me with the only issue relating to the application for contempt of court order.

[21] The notice to the application before me reads as follows:

1. "The first Respondent, together with second Respondent (in his capacity as sole member of first Respondent), be held to be in contempt of the Court Order of this honourable Court, dated 31 May 2016.

2. This this honourable Court impose an appropriate penalty for the abovementioned contempt for the Court Order of this honourable Court, dated 31 May 2016.

3. That second Respondent be held jointly and severally liable, together with first Respondent, the one paying, the other to be absolved for:

3.1 Payment to Applicant of the amount of R770 000.00 (seven hundred and seventy thousand rand) to Applicant; and

3.2 Applicant's costs;

which amounts are payable by first Respondent in terms of the Court Order of this honourable Court, dated 31 May 2016.

4. That the following immovable properties of first Respondent be declared executable:

4.1 Erf 7144 Langebaan
In the Saldanha Bay Municipality
Division Malmesbury, Western Cape Province
In extent: 817 (eight hundred and seventeen) square metres
Held by deed of transfer number T28186/2013

4.2 Erf 7110 Langebaan
Division Malmesbury, Western Cape Province
In extent: 759 (seven hundred and fifty nine) square metres

Held by deed of transfer number T34960/2013."

[22] That after a Win-deeds search from the internet, the Applicant found that the Respondent owns 2 immovable vacant Erven in Saldanha Bay municipality Erf 7144 and Erf 7110.

[23] I am now to look at the Applicant's main issues in this application.

The Applicant's Contentions:

[24] Mr van Rensburg argued for the Applicant that the second Respondent abused the first Respondent as a shield to prevent an order against him to pay the money in terms of the Savage Order.

[25] The Applicant claims further that the Second Respondent as a sole member should be held jointly and severally liable in terms of the Savage order based on the following:

1. That the Applicant has since discovered that the Second Respondent contravened with the provisions of the Housing Consumers Protection Measures Act[1] (the Act), by taking money and entering into a building contract with him to build the house whilst the Second

[1] Act 95 of 1986

Respondent was well aware that they were not registered as Homebuilders in terms of the Act.

[26] That the Second Respondent agreed on behalf of the first Respondent to the Savage order with the full knowledge that the first Respondent remained dormant as he stated later on to the Sheriff in August 2016 that the First Respondent was dormant for 3 months already.

[27] That the Second Respondent must have known about the First Respondent's financial challenges and the inability to satisfy the judgment in terms of the Savage Order but took the order anyway.

[28] That after a visit by the Sheriff to execute a warrant in August 2016 in order execute a warrant to pay the amount as per Savage Order, the second Respondent concealed the fact that the First Respondent still owned the immovable properties whose total value is R400 000, to avoid having the first Respondent pay for the amount claimed by the Applicant in terms of the Savage Order.

[29] That after all the above the second Respondent as a sole member passed a resolution on 26 September 2016 authorizing the winding up of the first Respondent. Such led to the staying of these proceedings against the first Respondent.

Second Respondent's Contentions

[30] Mr Felix for the Second Respondent argued that the Savage Order is not denied but it was taken against the First Respondent who has since been placed under liquidation due to its inability to pay its debts.

[31] That in actual fact payment obligations which are a sum of money are orders *ad pecuniam solvendam* and are unenforceable by way of a committal for Contempt proceedings.

[32] That the First Respondent through its agent the Second Respondent partly complied with the Savage Order and delivered the approved building plans, that those approved by the Municipality are collectable from the Municipal office.

[33] That in any event, the First Respondent is not before the court but the Second Respondent who cannot be held liable by the Savage Order where he does not feature in it.

[34] As to the immovable properties belonging to the First Respondent their total value amounts to R900 000 and would have extinguished the Applicant's debt. That the first Respondent had creditors to the value of R2 000 000 all this information was not hidden but unfortunately none of these could bear fruit in that

the properties were not sellable and neither creditors paid the first Respondent what was due to it, which led to the liquidation application.

[35] That there are no facts alleged in the founding papers of this particular application to support the allegations that the Second Respondent was reckless and or grossly negligent in his conduct as the sole member of the First Applicant to be held jointly and severally liable with the First Respondent to the Applicant. The Second Respondent actually acted with due care.

Issues

[36] Whether the Savage Order is enforceable by way of contempt proceedings; if so.

[37] Whether the Second Respondent can be held liable jointly and severally to the payment of money created by the order.

Legal Principles

[38] It is trite that whenever an Applicant proves that a Respondent had disobeyed an order of court which was brought to his notice. Then both wilfulness and *mala fides* will be inferred. *See Clement v Clement 1961 (3) SA 861 (T) at p 865H – 866A.*

[39] The onus will then be on the Respondent to rebut the inference of *mala fides* or wilfulness on a balance of probabilities, thus if a Respondent proves that while he was in breach of the order, his conduct was *bona fide*, he will not be held to have been in contempt of court because disclosure must not only be wilful but also *mala fides.*

Enforcement of Court orders

[40] 173 of the Constitution, which provides: "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[41] This is what this Court has said about the inherent power: "[T]he power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction."[2]

Interpretation of Court orders

[2] South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) (South African Broadcasting Corp) at para 90.

[42] In *Plaaslike Oorgansraad van Bronkerspruit v Senekal*[3] , the Supreme Court of Appeal in dealing with issue of interpreting a judgment quoted with approval from what was said in *Administrator, Cape and Another v Mtshwagela and Others*,[4] where it was said that: "The Court's intension is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasoning for giving it must be read as a whole order to ascertain its intention. If on such reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading to the Court's granting the judgment or order may be investigated and regarded in order to clarify it."

[43] In *Firestone South Africa (Pty) Ltd v Genticuro*,[5] the Court held that in dealing with ambiguities in an order of Court, the order and the Court's reasoning must be read as a whole, without reference to extrinsic evidence. It is only if the uncertainty persists after reading the whole of the judgment that regard may be had to extrinsic circumstances in seeking to determine the intension of the Court.5.

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[3] (2001) 22 ILJ 602 (SCA)
[4] 1990 (1) SA 705 (A) at 715 F-I.
[5] 1977 (4) SA 298(A)

ANALYSIS

Contempt of court order in general

[44] It is trite that whenever an applicant proves that a Respondent had disobeyed an order of court which was brought to his notice then both wilfulness and *mala fides* will be inferred.

[45] The onus is then on the Respondent to rebut the inference of *mala fides* or wilfulness on a balance of probabilities, thus if a Respondent proves that while he was in breach of the order his conduct was *bona fide*, he will be held to have been in contempt of court because disclosure must not only be wilful but also *mala fides.*

[46] Contempt proceedings are to be punishing disobedience so as to enforce an order of court.

[47] Mr Van Rensburg argument was based on facts related to the reason why they approached the court in the first place for an order in terms of the notice of motion dated 19 February 2016 (the main application) which I have cited above.

[48] In my view all the issues in that application were resolved between the parties when they reached an agreement which was made an order of court, the Savage order and any failure to comply should be dealt by way of enforcement against the relevant party. I state this with reasons to follow further below.

Interpretation of the Savage Order

[49] It is trite law that the rules applicable to the interpretation of documents are applicable to the interpretation of a judgment or order of court. The test in this regard is well established.

[50] In my view this matter has to be dealt with on the basis of the contempt of the court order which had to be complied with. In my understanding the notice of application to this application before me is clear that a contempt order is sought against the Second Respondent too.

[51] Trollip JA described the test as follows in *Firestone South Africa (Pty) Ltd v Gentiruco A G*: 'First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also 1 Prayer 1.4 of the Notice of Motion reads: '1.4 Interest which accrues shall be interest at the rate referred to in 1.3 above calculated daily and compounded daily from the 24th March 2006 to date of payment.' Firestone South Africa (Pty) Ltd v Gentiruco A G 1977 (4) SA 298 (A) at 304D-H. 5 apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smartt and Another, 1928 A.D. 82 at p. 87; West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., 1926 A.D. 173 at p. 188.* Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the

judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it (cf. *Postmasburg Motors (Edms.) Bpk. v Peens en Andere, 1970 (2) S.A. 35 (N.C.) at p. 39F-H).* Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. *See Garlick's case, supra, 1928 A.D. at p. 87, read with Delmas Milling Co. Ltd. v Du Plessis, 1955 (3) S.A. 447 (A.D.) at pp. 454F-455A; Thomson v Belco (Pvt.) Ltd. and Another, 1960 (3) S.A. 809 (D).*' [6] my emphasis.

[52] It is unclear why the Savage order was taken to bind only the First Respondent and not also the Second Respondent jointly and severally if that was the intent, as both were cited as Respondents in the main application. In any case the parties reached an agreement and took an order binding only the First Respondent.

[6] Van Rensburg & another NNO v Naidoo & others NNO; Naidoo & others NNO v Van Rensburg NO & others 2011 (4) SA 149 (SCA) para 42.

[53] The issue before me is not to amend the court order where it would possibly reflect what the true intention of the parties was but to simply enforce the order by way of contempt proceedings.

[54] In order to ascertain if there was contempt the interpretation of the order is necessary. Having regard to the above rule of interpretation. In my view there is no ambiguity, no absurdity, neither inconsistency with the Savage order regarding which party was expected to pay the money and perform in this instance.

[55] It bears to mention that all the relevant clauses of the order, the First Respondent is the only party mentioned as being the liable party. Nowhere does it bind the Second Respondent jointly and severally and such cannot simply be read in.

[56] I find that the order was made as against only the First Respondent as that is clear from the literal reading and meaning of the words used in the Savage order which remains unambiguous.

[57] Therefore as stated above, the Savage order is unambiguous as to which party was due to be held liable, and no other party can simply be read in to be added so they may be jointly and severally liable when nowhere was that part of the order.

Is the Savage Order enforceable by way of a committal for contempt ?

[58] I have indicated before that contempt proceedings are to punish disobedience so as to enforce an order of court.

[59] Orders *ad pecuniam solvendam* (for the payment of a sum of money) or *ad factum praestandum* (for the performance of a specific act) depending on the nature of the order, enforcement for non-compliance may take the form of execution or contempt proceedings respectively. See Thutha v Thutha [7]

[60] It is the Savage order that has been laid as the basis of this application in that not only is it against the first Respondent (who has since been liquidated) but against the second Respondent.

[61] In my view this matter has to be dealt with on the basis of the court order which had to be obeyed. It is unclear why the Applicant took to an order binding only the First Respondent and not the Second Respondent also, where both were cited as respondents in the main application. In any case the parties reached an agreement and took an order thereof.

[62] The nature of the order not only relates to the First Respondent but is with regard to the payment of money an order *pecuniam solvendam* which in my view is unenforceable by committal and contempt proceedings. The first Respondent in any respect is no longer a party to these proceedings.

[7] 2008 (3) SA 494 (TkH)

[63] Having also made a finding above this court is left with no party liable before it, but also the nature of the claim before it is unenforceable by any of contempt proccedings.

[64] In view of the conclusion I have arrived at, I do not consider it necessary to deal with the factual issues or with the merits of the other points raised as set out above by Mr Van Rensburg relating to liability of Directors to their companies and lifting of the corporate veil, I can make one comment the law was on point. For the above reasons therefore I believe the application should be dismissed on the ground that the terms of the Savage Order dated 31 May 2016 are incapable of enforcement.

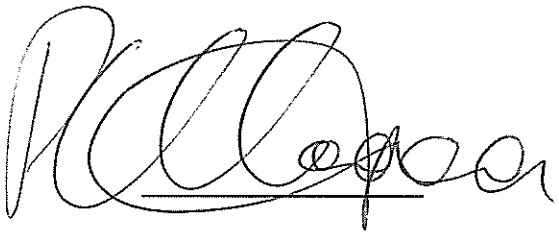
[65] I turn now to look at the issue of costs.

Costs:

[66] Costs are discretionary to a presiding officer, in these circumstances I am of the view that the costs of this application should follow the cause. There are however no grounds for a punitive cost order as was argued by Mr Felix.

In the circumstances the following order must follow:

1. The application is dismissed with costs



MAGONA, AJ