

SOUTH AFRICA / JUDGMENT

Murray NO v King (5984/2013) [2013] ZAGPPHC 68 (22 February 2013)

[2013] ZAGPPHC 68**COURT**

North Gauteng High Court, Pretoria

BEFORE

Pretorius

CASE / FILE NUMBER

5984/2013

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(NORTH****GAUTENG HIGH COURT)****Case****number: 5984/2013****Date:**

22 February 2013

In

the matter between:

CLOETE

MURRAY N.O.

.....Applicant

and

DAVID

CUNNINGHAM KING.....Respondent

JUDGMENT**PRETORIUS J.**

- [1] In this urgent application the court is requested to declare the respondent to be in contempt of the preservation order granted by the Deputy Judge President, Mr Justice van der Merwe on 14 November 2012 under case number 6554/2012. Secondly the court is requested to direct the respondent to purge such contempt within 24 hours of service of the court order. Should the respondent fail to purge his contempt it is requested that the respondent be committed to prison, alternatively that a fine be imposed on him and the Sheriff of this court be directed to take all and any steps necessary to:

“-remove the vehicles referred to in paragraphs 3.3 to 3.5 of the notice of motion;

-obtain access to the respondent's home for the purpose of enabling the applicant to inspect the wine collection and the assets which were attached in terms of the order so that they can be valued; and

-search for and locate any books or document relating to the affairs of Talacar Holdings (Pty) Ltd (“Talacaf”) and Gaius Atticus (Pty) Lts (“Gaius Atticus”) in the possession or under the control of the respondent, including, in particular, all bank statements and formal company documents (including, but not limited to, minutes of meetings, shareholder registers and financial statements). ”

[2] The respondent was obliged to file answering papers, if any, by 12h00 on 5 February 2013. The respondent's attorney addressed a fax to the applicant's attorney on 5 February 2013, which was delivered on 7 February 2013. The respondent's attorney invited the applicant to remove the application from the roll and submit the matter to mediation.

The applicant's attorney replied that the respondent is obliged to record his defence in an answering affidavit. On 6 February 2013 the respondent's attorney forwarded a draft notice of motion and an unsigned affidavit in a counter application for the stay of the urgent application in terms of section 6 of the Arbitration Act, 42 of 1965 and a referral to mediation of the disputes. The respondent relied on paragraph 2.23 of the preservation order when requesting a stay of the present application.

Urgency:

[3] The respondent's counsel argued that the matter is not urgent and that the applicant had created his own urgency. In *Victoria Park Ratepayers Association v Greyvenouw CC* [2004] 3 AIISA 623 (SE) it was held by Plaskett AJ at paragraph [27]:

“I would add that it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: ail matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow.”

(Court's emphasis)

[4] In *Protea Holdings Ltd and Wright* 1978 (3) SA 865 it was held by Nestadt J at 868 A-B

“It becomes necessary, therefore, that this provides a convenient stage, to deal briefly with the nature of contempt proceedings of this kind. The object of this type of proceeding, which is concerned with the wilful refusal or failure to comply with an order of Court, is the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order” (Court's emphasis)

and at H

“As one of the objects of contempt proceedings is by punishing the guilty party to compel performance of the order, it seems to me that the element of urgency would be satisfied if in fact it was shown that respondents were continuing to disregard the order of 3 August 1977.”

[5] If the court considers the history of the matter, since the preservation order had been granted, I find the application to be

urgent, as the evidence shows that the respondent is continuously disregarding the order.

Background:

[6] The respondent relied on paragraph 2.23 of the preservation order when requesting a stay of the present application. Paragraph 2.23 of the preservation order provides:

“In addition and in general the mediator can be approached at any stage with any compliant as to the way in which this order is implemented

and will act as mediator. If the dispute cannot be resolved by him, he may arrange for a speedy arbitration thereof. The mediator can act as the arbitrator, unless the mediator is of the opinion that he is disqualified from acting as arbitrator or that it is otherwise advisable, in the interests of the company concerned, that someone else should act as arbitrator. ”

[7] There is a dispute between the parties as to the interpretation of paragraph 2.23 of the preservation order. This preservation order was granted with the return date 19 and 20 March 2013. This order was granted in terms of section 163 of the Income Tax Act, after SARS had obtained a judgment in its favour on 5 August 2010 in terms of which 100% of the issued shares in Talacar Holdings (Pty) Ltd, Talacar and Metlika Trading Limited's shareholders loan account were declared executable. This was to satisfy Ben Nevis Holdings Limited's tax debts which currently exceed R2,6 billion.

[8] The applicant was appointed curator bonis in whom the assets, as set out above, vested. The directors of Talacar and Gaius Atticus were ordered to immediately deliver the books and records under their control and in their possession relating to inter alia, the affairs of Talacar and Gaius Atticus and to inform the applicant of the whereabouts of these documents if they were not in the possession of the directors. It was set out in 2.4.5 and 2.6 that:

“2.4 The present director or directors of Talacar and Gaius Atticus are ordered to:

2.4.5 To assist and co-operate with the curator bonis at all reasonable times as may reasonably be required of him/her, and to provide the curator bonis with any information about the company's affairs as may reasonably be required, including full particulars of all insurance contracts in respect of the assets of the companies, which information must be furnished to the curator bonis forthwith.

2.6 In addition to what has been provided for above any person having documentation or assets of Talacar or Gaius Atticus in his or her possession, must, subject to what provided for below, when this order comes to that person's knowledge notify the curator bonis of the fact that such are in his or her possession and hand such to the curator bonis on demand, or within such time as the curator bonis may allow and, should that, for any valid reason, not be

possible, or should the person have a right to retain possession, then such person must make the documents or assets available to the curator bonis for inspection and to supply the curator with copies of any document pertaining to such company on demand by the curator bonis.

2.13 Within seven days of the granting of this order all motor vehicles belonging to Talacar must be handed to the curator bonis. Pending such delivery such motor vehicle may be used by the person presently entitled to use such vehicle, provided that before any such use the curator bonis be satisfied, by presenting to him of such proof as he may reasonably require that the vehicle is properly insured in favour of Talacar and that the vehicle will only be utilised in terms of the restrictions of such insurance policy. In case of no insurance existing the curator bonis may obtain such insurance, after which the said vehicle may be utilised as provided for above. In case of any dispute in this regard the ruling of the Mediator will be final.

2.14 The curator bonis will be entitled to take immediate control of the wine collection of Talacar and to take all steps required in his discretion to ensure that all wines are properly preserved. All reasonable steps to ensure

the above may be taken, including sealing of the access to the wine collection and putting guards in place, or the removal thereof to suitable other premises.

2.15 In addition to any other powers set out elsewhere herein the curator bonis will be entitled on 24 hours' notice to the occupant in control to access any dwelling belonging to Talacar and Gaius Atticus occupied by anyone for the purpose of inspection of the premises and the making of an inventory of all movable items and fixtures and fittings. The curator may take photos and may make a video recording. The curator will be entitled to request any person to give him information as to insurance of the articles in his or her possession, if any, and to give information in respect of any claim of right to possess any article.

2.18 The curator may dispose of assets belonging to Talacar and assets belonging to Gaius Atticus by means of auction or out of hand sales..."

[9] According to Deeds office searches the applicant ascertained that Gaius Atticus and Talacar are co-owners of the property at 54 Beachy Head Drive, Plettenberg Bay. Talacar is the owner of erf 2258, Blanco, Fancourt Golf Estate, as well as the owner of erfs 22 and 23 situated at 34 Coronation Road, Sandhurst, Sandton. Talacar owns a Ferrari, registration number HPS274GP parked at Sandhurst; a VW cabriolet, registration number CL26465 parked at Fancourt; a Mercedes Benz S500, registration number JJY630GP parked at Fancourt; Mercedes Benz registration number LGD145GP and Mercedes Benz registration number CBG439GP- whereabouts unknown to the applicant.

[10] The applicant took possession and control of the Plettenberg Bay and Fancourt properties in terms of the order.

The respondent's actions:

[11] A letter dated 15 November 2012 was handed to the respondent on 16 November 2012 referring him to the preservation order. The order was served on the respondent on 16 November 2012. On 16 November 2012 the respondent informed the applicant that Talacar did not own any wine. Thereafter the respondent advised that applicant that there was no wine stored on the premises at Sandhurst belonging to Talacar, which is a contradiction as to the first statement.

[12] On 16 November 2012 the applicant requested the respondent to make available all particulars of the bank accounts of the respondents in the preservation application. A further request in this regard was sent by e-mail on 11 January 2013 to which the respondent replied on 15 January 2013. The respondent disputed the applicant's authority to request the said books and documents and to hand it over in this reply.

[13] On 16 November 2012 the respondent was advised, in writing, that the vehicles of Talacar could not be used until the applicant was satisfied that the vehicles were properly insured. The respondent confirmed that all the vehicles belonging to Talacar were at the premises of a "panel beater" without providing any details of the panel beater. On 19 November 2012 the applicant

requested the respondent to hand over the Ferrari on 23 November 2012 at 10h00 and to provide proof of insurance. This arrangement was held over until 27 November 2012 should the applicant provide proof of insurance. Due to the lack of the requested information and pending arbitration by Mr Justice MM Joffe on the validity of the applicant's appointment inter alia, the applicant arranged temporary insurance for the Ferrari.

[14] On 11 December 2012 Joffe J handed down an award refusing to suspend any part of the operation or execution of the preservation order and refusing to remove the applicant as curator bonis.

[15] Since 11 December 2012 the respondent has thus known that the original order was unaffected. Thereafter the respondent committed

spoliation in respect of the Plettenberg Bay property on 27 December 2012, which resulted in an urgent application on 22 January 2013. This spoliation order was granted on 8 February 2013 by this court.

[16] This was as a result of the actions by the respondent, who had addressed an e-mail to all the estate agents in Plettenberg Bay wherein he asserted that the applicant had no right to request the agencies to market the properties.

- [17] On 11 January 2013 the respondent was requested to make available the keys to the Volkswagen Cabriolet and the Mercedes Benz S5000 within 5 days. The respondent was informed that the Ferrari would be removed on 16 January 2013. On the same date the respondent was advised that the applicant would inspect the Sandhurst property and the wine collection on 16 January 2013 at 11 h00. The applicant blocked the Talacar bank account as he had not received a reconciliation from the respondent since 14 November 2012, as arranged. The respondent was informed on 11 January 2012 that an eviction application would be launched to evict the respondent from the Sandhurst property.
- [18] On 15 January 2013 the respondent's attorney's replied to the letters of 11 January 2013 and disputed that the applicant is validly appointed as curator bonis and that it is incumbent on the applicant to ensure that the order is executed.
- [19] He furthermore disputed the applicant's authority to request books and documents, refused to hand over any of the vehicles and also refused to make the Sandhurst property or the wine collection available for inspection. On 16 January 2013 at 11h00, the respondent refused the applicant, the sheriff and the valuator access to the property.

Contempt of court:

- [20] The court must be satisfied, beyond a reasonable doubt, that:

"an order was granted:

-against the respondent;

-the respondent was either served with the order or was informed of its contents and had knowledge of the same; and -the respondent disobeyed the order or neglected to comply with it."

- [21] The respondent must establish reasonable doubt, as soon as the aforesaid requisites have been satisfied. "Reasonable doubt" relates as to whether the non-compliance to the order was wilful and mala fide. In Noel Lancaster Sands (Edms) Bpk v Theron en Andere 1974

- (3) 689 (TPA) Botha J held at p 692 E - G:

"Daar is natuurlik vanselfsprekend grade van onredelikheid en dit mag we\ gebeur dat 7? respondent se optrede so opsigtelik en skreiend

onredelik is dat die Hof bereid is om

op grond daarvan sy verklaring dat hy bona fide opgetree het te verwerp as onwaar, maar dan sou die beslissing teen die respondent gaan op die basis van 'n bevinding dat hy nie bewys het dat hy bona fide was nie, en die onredelikheid van sy optrede sou siegs die metode wees om tot by daardie resultaat uit te kom." (Court's emphasis)

- [22] It is quite clear from all the respondent's actions since the preservation order was granted on 14 November 2012 that the respondent has tried everything to avoid the order being executed. He has been obstructive in every respect and his actions has lead to a spoliation application against him and a finding by Joffe J confirming the perservation order on arbitration. These legal actions have not deterred the respondent at all from being totally obstructive. He has refused steadfastly to co-operate with the applicant in any manner. There is no dispute that the order had been served and explained to the respondent in numerous letters by the applicant's attorneys. It is clear that the respondent is deliberately and wilfully obstructing the applicant to avoid the preservation order being executed.
- [23] This court has no doubt that the respondent has disobeyed the order and failed to comply with paragraphs 2.1; 2.4.1; 2.4.2; 2.4.5; 2.6; 2.13; 2.14 and 2.15 of the order.
- [24] I have no qualms in finding this matter urgent, as the respondent has steadfastly disobeyed and ignored the order and the award by Joffe J. It is clear from his actions that he has no intention of complying with the preservation order. He has been granted ample opportunity to comply, but has refused to do so. It is urgent that the applicant should be allowed to execute the order.
- [25] The argument by Mr Louw, for the respondent, that the vesting of the assets of the companies in the applicant will only take place once he is the registered shareholder of companies cannot be entertained.
- [26] In *Watt v Seaplant* 1999 (4) SA 443 CPD Traverso J held at p 448 C - D:
- "It is well-established that our law recognises the abstract system of transfer of ownership. All that is therefore required is that the transferor must have the animus transferendi dominii and the transferee the animus accipiendi dominii. Any flaw in the underlying*
- transaction is therefore irrelevant." (Court's emphasis)
- [27] There is thus no legal reason for the respondent to refuse to comply with paragraphs 2.4; 2.5; 2.6 and 2.7.
- [28] It is clear there is no dispute as to the way in which the order should be implemented. It is very clear and the respondent does not dispute it. The respondent does not want to comply with the preservation order at all. There is no dispute "as to the way in which this order is implemented." It is clear that Joffe J decided that the order has immediate effect and should not be suspended. There is confirmation in writing by the respondent's attorneys that he has no intention of complying with the requests made by the applicant. I find that there is no merit in the counter-application, it is a further effort to frustrate the applicant in executing the order.
- [29] I have regarded the counter application for stay of the urgent application in terms of section 6 of the Arbitration Act 42 of 1965. (Paragraph 2.23 of the order reads inter alia:

“In addition and in general the mediator can be approached at any stage with any complaint as to the way in which this order is implemented

and will act as mediator.”

[30] The date set out in the application for the stay of the urgent application is 8 March 2013. It was served on 7 February 2013. In this application the respondent relies on section 6 of the Arbitration Act 42 of 1965. Section 6 provides:

“6 Stay of legal proceedings where there is an arbitration agreement

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

[31] It does not preclude the court to decide on a matter. I cannot find that the respondent has made out a proper case in the counter

application. It was merely launched to further delay and frustrate the execution of the preservation order. The mediation clause in the preservation order is clear and does not relate to a refusal to comply with the order in all respects.

[32] There is no doubt that the respondent will not comply with the court order as Joffe J has already ruled and made an order to the effect that the order has immediate effect and should not be suspended. The respondent steadfastly refuses to comply at all. There is no dispute or complaint as to the way in which the order is implemented, the respondent refuses pointblank to obey the order.

[33] The applicant undertakes not to seek an order in terms of prayer 3.5 of the notice of motion, should the respondent undertake to forthwith deliver the Ferrari to Mr Strydom of PWC according to the new order granted.

[34] The respondent chose not to deal with the allegations in the founding affidavit. In *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paragraph 42 Cameron JA found:

“To sum up:

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala f(des) beyond reasonable doubt.

- (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt
- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”(Court’s

emphasis)

[35] I can come to no other conclusion but that contempt of court has been proved. The respondent did not advance any evidence to show that he was not wilful and mala fides. All the evidence show that the respondent is obstructing the court order wilfully and has no intention to comply with the order. Therefore I find the respondent in contempt of court.

[36] I therefore make the following order:

1. The matter is urgent;
2. The respondent is in contempt of the court order granted by His Lordship Mr Justice van der Merwe on 14 November 2012 in the above Honourable Court Case under case no. 65542/2012 (“the order”)
3. The respondent is ordered to purge his contempt of the order within 24 hours of service of this order by:

3.1 Delivering to the applicant, in his capacity as curator bonis, all books and records in his possession or under his control relating to the affairs of Talacar Holdings (Pty) Ltd (“Talacar”) and Gaius Atticus (Pty) Ltd (“Gaius Atticus”) including, in particular, all bank statements and formal company documents (including but not limited to minutes of meetings) in accordance with paragraphs 2.4 of the order;

3.2 Insofar as the respondent is not in possession or does not have control of the books and records referred to in paragraph 3.1 above, the respondent is required to inform the applicant in writing as to the whereabouts of such records in accordance with paragraph 2.4.2 of the order;

3.3 Handing the keys of the Volkswagen Golf Cabriole’ with registration number parked in the garage at 54 Beachy Head Drive,

Plettenberg Bay (“the Plettenberg Bay property”) so that same can be removed by the Sheriff;

3.4 Handing over the keys to the Mercedes S500 vehicle with registration number JJY 630 GP currently parked at Erf 2258, Blanco, George situated in the Fancourt Golf Estate (“the Fancourt property”) so that same can be removed by the Sheriff;

3.5 Handing over the keys to the Ferrari with registration number HBS 274 GP currently parked in the garage at 34 Coronation Drive, Sandhurst (“the Sandhurst property”) and giving the sheriff and applicant access to the Sandhurst property so that the vehicle can be removed;

3.6 Permitting the applicant and a valuator to attend at the Sandhurst property for the purpose of inspecting and valuing the wine

collection and the assets previously attached.

4. In the event of the respondent failing to purge his contempt in terms of paragraph 3 above:-

4.1 The Sheriff of the above Honourable Court is directed to take all and any steps necessary to ensure the removal of the vehicles referred to in paragraphs 3.3 to 3.5 above;

4.2 The Sheriff is directed to take any steps necessary to obtain access to the Sandhurst Property to enable the applicant to inspect the wine collection and the assets attached and to have them valued;

4.3 The respondent is committed to prison for a period of 3 months imprisonment suspended for 3 years on condition that the respondent

is not found in contempt of court during the period of suspension.

5. The respondent is ordered to pay the costs of this application on the scale as between attorney and own client, such costs to include the cost of two counsel.

6. The counter application is dismissed with costs, including the costs of two counsel.

Judge Preorius

Heard on: 13 February 2013

For the Applicant / Plaintiff: Adv Luderitz SC

Instructed by: Gildenhuis Malatji INC

For the Respondents: Adv Louw SC ,Adv Gioiua

Instructed by : Routledge Modise INC

Date of Judgment : 22 February 2013

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