9037466_2
01/07/2015

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

(HELD AT BLOEMFONTEIN)

Case No SCA:
Court *a quo* (GP): 61790/2012

In the matter between:

RONALD BOBROFF & PARTNERS INCORPORATED	First Applicant
RONALD BOBROFF	Second Applicant
DARREN BOBROFF	Third Applicant

and

JENNIFER GRAHAM	First Respondent
MATTHEW GRAHAM	Second Respondent
THE LAW SOCIETY OF THE NORTHERN PROVINCES	Third Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that the Applicants hereby apply for leave to appeal to this Honourable Court, alternatively to the Full Court of the Gauteng Division (Pretoria) against part of the judgment (the findings in relation to contempt) and paragraphs 1, 4 and 5 of the orders made by the Honourable Justice Matojane on 17 March 2015. Consequently the orders which are sought in this application are the following:

1. the order of the Court *a quo* refusing leave to appeal, inclusive of the order as to costs on the attorney and client scale, be set aside;

2. that leave to appeal be granted to the applicants to appeal against paragraphs 1, 4 and 5 of the orders of the Court *a quo;*

3. that the costs of this application be costs in the appeal.

TAKE NOTICE FURTHER that:

(a) the affidavit of **RONALD BOBROFF** attached hereto as **Annexure "E"** will be used in support of this application;

(b) the application is accompanied [as required by Rule 6(2)] by a copy of the full judgment of the Court *a quo*, which was handed down on 17 March 2015, and which is attached as annexure **"A"**;

(c) as soon as the documents become available from the Registrar of the Court *a quo*, this application will be accompanied by copies of:

(i) the order of the Court *a quo* appealed against, which will be marked annexure **"B"**;

(ii) the order of the Court *a quo* refusing leave to appeal, which was handed down on 4 June 2015, and which will be marked annexure **"C"**;

(iii) the judgment of the Court *a quo,* which refused the application for leave to appeal, and which will be marked annexure **"D"**.

SIGNED AT JOHANNESBURG ON THIS THE 1st DAY OF JULY 2015.

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REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -07- 02
E. S. DREYER
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA GAUTENG AFDELING, PRETORIA

TO: **THE REGISTRAR OF THE HIGH COURT**
GAUTENG DIVISION (PRETORIA)

AND TO: **THE REGISTRAR OF THE SUPREME COURT**
OF APPEAL
BLOEMFONTEIN

AND TO:
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Received copy hereof on 2 July 2015

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For: First and Second Respondents' Attorneys

AND TO:
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ROOTH WESSELS
Datc/Datum: 02-07-15
Sonder benadeling van Kliënt se regte
Without prejudice of clients rights
GETEKEN EL @ 12H07

Received copy hereof on__ July 2015

For: Third Respondent's Attorneys

"A"

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 5203/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE ..... DATE 17·03·2015

In the matter between:

JENNIFER GRAHAM	First Applicant
MATTHEW GRAHAM	Second Applicant

And

RONALD BOBROFF & PARTNERS	First Respondent
RONALD BOBROFF	Second Respondent
DARREN BOBROFF	Third Respondent

JUDGMENT

MATOJANE J

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 5203/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

..... 17·03·2015
SIGNATURE DATE

In the matter between:

JENNIFER GRAHAM	First Applicant
MATTHEW GRAHAM	Second Applicant

And

RONALD BOBROFF & PARTNERS	First Respondent
RONALD BOBROFF	Second Respondent
DARREN BOBROFF	Third Respondent

JUDGMENT

MATOJANE J

Introduction

[1] The applicants seek to compel their erstwhile attorneys, the respondents to comply with an order of this court requiring the respondents to furnish information necessary to justify the fees charged in lodging their claim against the Road Accident fund.

[2] The central issue in this case is the proper interpretation to be given to one of the orders Mothle J gave on 15 April 2014. This court is called upon to decide whether an expert examination of the respondent's computer network was required and that the respondents are in contempt in their failure to comply therewith.

[3] The applicants seek an order in prayer 2 of the Notice of Motion declaring that the second and third respondents are in contempt of paragraph 4 of the order made on 15 April 2014. The applicants further seek orders, following upon the declaratory order in prayer 2 of the Notice of Motion, that the respondents be directed to comply with paragraph 4 of he order made by the court in the following respects:

1.2.1 delivering a printout reflecting all Graham-related entries in the first respondent's electronic fee billing system;

1.2.2 allowing access to the first respondent's computer network and electronic fee billing system by an independent information technology expert in order to compile a report.... Relating to certain matters referred to paragraphs 3.2.1 and 3.2.2 of the Notice of Motion.

[4] In prayer 4 of the Notice of Motion the applicants seek an order directing that any inability on the part of the respondents to comply with prayer 3 be attested to on affidavit deposed to by the respondents.

[5] In prayer 5 of the Notice of Motion the applicants seek an order committing the respondents to a period of imprisonment as the court deems fit, or imposing a fine, in the event of the respondents failing to comply with prayer 3 within the stated time.

Background

[6] The matter has its genesis in serious injuries Mathew Graham suffered in a motor vehicle accident on 4 September 2006. Jennifer Graham, then represented by the respondents on a contingency fee basis, lodged a claim with the Road accident Fund in the amount of R2 million. The applicants accepted a settlement of their claim in the amount of R1 979 952.69. The respondents deducted 40% of the payout in respect of their professional fees.

[7] The applicants filed a complaint of overreaching against the respondents with the Law Society and addressed a request for relevant information pertaining to respondent's fees to the respondents. The request went unanswered and four months later, applicants served a formal request ("the request") for information on respondents. The request read:

"COMPLAINANT'S REQUEST FOR OUTSTANDING INFORMATION

1. Despite repeated requests, the respondents have failed to produce or allow access to the following records:-

1.1 a printout reflecting all Graham-related entries in the second respondet's electronic fee-billing system as well as access by an independent committee appointed information technology expert to the respondent's computer network for purposes of establishing and compiling a report on when and on which computer:

1.1.1 each of the file notes appearing in the bundle was brought into existence and edited from time to time, and

1.1.2 each of the entries appearing on the printout (referred to in paragraph 1.1 above) was made and amended from time to time;

1.2 extracts reflecting all Graham-related entries in the second respondent's books and records of account (including printouts of ledger accounts and statements in respect of the firm's trust and business accounts) recording:

1.2.1 the receipt from the Road Accident Fund and any investment by the respondents of the sums of R1,979,952,69 and R293,369.99;

1.2.2 the disbursements to third parties and the payment to the complainants of any amounts forming part of such sums;

2.

2.1.1 the appropriation as fees by the respondents of any amounts forming part of such sums, and

2.1.2 the treatment of interest earned on any amounts forming part of such sums;

2.2 the originals of Jerry Joubert's:

2.2.1 certificate dated 3 March 2010; and

2.2.2 letter dated 10 August 2011,

copies of which appear in the bundle as annexures RBP8 and RBP9 to the respondent's answer to the complaint; and

2.3 all correspondence and any other documents exchanged between the respondents and the society / committee in relation to the complaint.

3. The existence of the requested records is not in dispute. Nor is it suggested that they are not in the respondent's possession. It is also not the respondent's duties *qua* officers of the court and members of the society;

4. they are withheld without any justification or on the flawed basis that the complainants are not entitled to them.

5. The respondents set for themselves the standard of "*utmost transparency and accountability to the client*". The complainants seek to hold them to no higher mark.

6. The committee is requested to direct the respondents to produce the requested records within a period of five court days."

[8] In June 2011 the applicants, who were dissatisfied with the manner in which they allege the Law Society dealt with their complainant against respondents instituted an action against the respondents.

They implicated respondents in grave misconduct relating to, *inter alia*, fabricating false file notes, charging false disbursements, falsifying financial records in their billing practices in prosecuting client's claims against the Road Accident Fund. Applicants sought amongst others that the court should take over the Law Society's disciplinary enquiry or allow it to continue under the court's supervision.

[9] The disciplinary enquiry instituted by the Law Society in the conduct of the respondents has been postponed indefinitely.

[10] On 15 April 2014 an order was granted by Mothle J. The order reads:

"1. The Application for a declaratory order against the Law Society as well as the relief sought to have this Court take over the Disciplinary Enquiry of the Law Society, alternatively place such inquiry under supervision by this Court is dismissed.

2. The Disciplinary Enquiry appointed by the Council of the Law Society to Enquire into the complaint against the Bobroffs is ordered to convene a sitting of this Enquiry to take place within sixty (60) calendar days from the date of this order.

3. The Disciplinary Department of the Law Society Is ordered to conduct an inspection of the books of account including the trust accounts of Ronald Bobroffs & Partners Inc, as recommended by Mr Vincent Faris, thereafter compile a report and serve the report to all the parties in this application, within thirty (30) calendar days from the date of this order.

4. Ronald Bobroff and partners Inc, Darren Bobroff and Ronald Bobroff are ordered to deliver to the Law Society and the attorneys representing Jennifer and Matthew Graham, the information and items listed in the notice of Request For Outstanding Information, within fifteen (15) calendar day from date of this order."

[11] It is the interpretation of paragraph 4 of this order that is at the heart of this matter.

[12] On 25 April 2014 Mr. van Niekerk an attorney for the applicants addressed a letter to the respondents reminding them that they are required to deliver information and items listed in the request by Wednesday 30 April 2014. He suggested that KPMG be appointed as the independent IT expert to compile referred to in paragraph 1.1 of the request. He stated in his letter that:

> "We have copied Mr Jaco Fourie of the LSNP as regards the appointment of an independent IT expert. We suggest someone from KPMG forensics for example, which has the capacity and who will be independent.
>
> The rest of the information should in the meanwhile though be supplied to us and the LSNP by the deadline and we shall be grateful to hear from you what arrangements have been made by your client in this regard."

[13] The respondent's attorneys replied as follows to the letter:

> "In our respectful view, the court order did not direct our clients to provide access by an independent committee appointed information technology expert to their computer network. In any event, if we have misunderstood the order, we believe that it will be for the committee of the Law Society to

appoint a suitably qualified expert to examine our client's computer network with regard to this matter."

[14] On 30 April 2014, which is the time stipulated by the court, the respondents delivered their response to paragraph 4 of the order of 15 April 2014. In the first paragraph of the response, respondents explained that they are not able to produce a printout reflecting the time billing entries relating to the applicants because when applicant's electronic files were closed or archived, the software they used automatically deleted the work in progress transactions that were completed and billed. Respondents explained further that their cost consultants who prepared the party and party bills of costs in the matters relied on notes in the files and the actual file content to prepare bills of costs.

[15] Mr. Kretzmer, the CEO of Legal Interact, which supplied the hardware and software of the computer programme of the respondents confirmed in an affidavit deposed by him that when the applicant's electronic file was achieved on 27 January 2011 all the work in progress transactions, which had been recorded in the matter were deleted and cannot be retrieved. In the light of these factors and in the application of the Plascon-Evans [1] test, Mr Unterhalter SC, correctly in my view, conceded that it must be accepted for the purpose of this application that the application has to be decided on the version of the respondents as to why they have been unable to deliver the printout relating to entries in the respondents electronic fee billing system following the order of court.

[1] Plascon Events Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[16] If follows therefore that the relief sought in paragraph 3.1 of the Notice of Motions must fail as the respondents have explained under oath that they are unable to deliver the requested printout.

[17] Applicants argue that as respondents relied solely on file notes to generate fee statements and accounts for purposes of billing their clients, an independent IT expert is needed to examine respondent's computer network so as to confirm the veracity and integrity of the file notes contained in the applicants folder. Mr. Unterhalter SC argued that as the order stipulated that respondents must make available the "information and items" listed in the request, the information requested in paragraph 1.1.1 and 1.1.2 of the Request can only be obtained through the IT inspection. He submitted that an IT inspection is a necessary condition for the fulfilment of the order.

[18] Respondents for their part argue that order no.4 of the court's judgment directed the respondents to deliver to the Law Society and the attorneys representing the applicants "the information and items listed" in the Request and that "Access" to the respondents computer network does not comprise "information and items".

[19] Respondents submitted in their heads of argument and in court that firstly, an inspection by an IT expert was not expressly ordered, it did not form part of the order and was not intended to be part of the order. Secondly, that having regard to the time period, i.e. 15 calendar days within which the respondent had to deliver the information and items listed in the notice for request of outstanding information, the court must have assumed that the information and records were capable of being delivered by the respondents within

the time frame and did not contemplate an inspection of the computer by an IT expert. Mr Hellens argued that Mothle J was never asked to order an investigation by some independent information technology expert but was asked to order the Law Society to appoint someone who would make that investigation.

Relevant rules of interpreting a court's judgment or order

[20] It is trite that a court order is interpreted in much the same way and in accordance with the same rules of interpretation as any other written instrument such as a statute, a contract or a patent. The court's intention must be ascertained primarily from the language of the order, which must be read with the reasons given for it. The approach was set out thus by Trollip JA in **Firestone South Africa (Pty) Ltd v Gentiruco AG**[2]:

> "The basic principles applicable to construing documents also 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. . . 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 is subjective intention was in giving it. . . 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. . . 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

[2] 1977(4) SA 298 (A)

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. . ."

[21] Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality**[3] 2012 (4) SA 593 (SCA), in giving the judgment of the court, said that over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and elsewhere. In paragraph 18 of the judgment he said the following:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.
>
> The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read

[3] 2012 (4) SA 593 (SCA)

in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

[22] These principles are consistent with the dictum of the Constitutional Court in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs**[4] that "the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous". The method of interpreting contracts has recently been summarized as follows by the Supreme Court of Appeal in **Bothma-Batho Transport (Edms) Bpk v S Bothma en Seuns Transport (Edms)Bpk**[5]:

> "Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.

[23] I turn now to the central issue in this matter- the interpretation of paragraph 4 of the order.

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[4] 2004 (4) SA 490 (CC)
[5] 2014(3) SA 492 (SCA)

[24] In my view, paragraph 4 of the order properly interpreted is clear. It orders Ronald Bobroff and partners Inc, Darren Bobroff and Ronald Bobroff to deliver to the Law Society and the attorneys representing Jennifer and Matthew Graham, the information and items listed in the notice of Request For Outstanding Information, within fifteen (15) calendar day from date of the order.(own emphasis)

[25] Paragraph 1.1 of the Request lists information and items to be delivered. The first item listed is to make delivery by allowing access by an: "independent committee appointed information technology expert to the respondent's computer network for purposes of establishing and compiling a report on when and on which computer:

1.1.1 each of the file notes appearing in the bundle was brought into existence and edited from time to time, and

1.1.2 each of the entries appearing on the printout (referred to in paragraph 1.1 above) was made and amended from time to time.

[26] The obligation would therefore be fully discharged only once an independent committee appointed information expert has access to the respondents' computer network for purposes of compiling a report on when an on which computer each of the file notes appearing in the bundle was brought into existence and edited from time to time. Without giving access into the computer network the requisite information cannot be obtained. In my view, the inspection of respondents' computer network follows from the express language of the order.

[27] It is in this context that the letter from Mr Van Niekerk to respondents' attorneys, prior to the expiry of the time for delivery of the response to the order, reminding them of the deadline and the ambit of the court order should be understood. In the letter Mr Van Niekerk, correctly interpreted the order to determine the means by which the information was to be procured, he suggested someone from KPMG forensics and the respondents, if respondents' intended complying with the order they could have either raised an objection to this person or suggested someone else to the Law Society or approached the court to seek clarification on how the order might be enforced and by what means. The only explanation offered by the respondents in conducting themselves contrary to the order is that the order did not make express provision for an information technology expert to be agreed between the parties.

[28] The order has three distinct clear parts to it. In the first place it provides for a time period for compliance with its terms – 15 days to deliver outstanding information and items listed in the notice of Request For Outstanding Information. Secondly, The Disciplinary Department of the Law Society is ordered to conduct an inspection of the books of account including the trust accounts of Ronald Bobroffs & Partners Inc, thereafter compile a report and serve the report to all the parties in this application, within thirty (30) calendar days from the date of the order. Thirdly, The Enquiry into the complaint against the respondents' is to take place within sixty (60) calendar days from the date of the order.

[29] It is clear from the judgment that the court has carefully considered the request for outstanding information and concluded that this information must be provided and imposed time periods of 15 and 30 days so that the enquiry could take place within 60 days.

[30] In paragraph 91 of the judgment the court stated.

> "I have considered the list of outstanding information and items as its appears in the notice titled Request for Outstanding information and I am of the view that the information and items required are relevant to the complaint and should have been delivered. The Law Society defers to the Disciplinary enquiry to deal with the requested information and items. I am not aware of any reason why the required information and items should not be made available to the Grahams as requested, before the next sitting of the enquiry."

[31] In my view, the inspection by an independent IT expert was intended and meant to be part of the order. The respondents have not granted that access, they are therefore not in compliance with the order, the next question to consider is whether their non compliance is wilful and *mala fide*.

[32] In **Fakie NO v CCII Systems (Pty) Ltd**[6] the court in dealing with the onus of proof in cases of civil contempt held that an applicant in punitive committal proceedings must prove all elements of contempt beyond reasonable doubt – Once applicant proves the court order, service of the notice, and non compliance, the evidentiary burden to show reasonable possibility that non-compliance was not wilful or mala fide lies with the respondent.

[33] In prayer 2 of the Notice of Motion applicants do not seek an order that respondents be committed for contempt, they seek an enforcement of a court order without criminal sanction. In **Mthimkulu and Another v Mahomed and Others**[7] the full bench

[6] 2006 (4) SA 326 (SCA) at par 9 and 10
[7] 2011 (6) SA 147 at par 18

of the South Gauteng High Court held that where a civil contempt order is sought without punitive sanction, proof of contempt of court may be established on a preponderance of probabilities. The court held further that the court may issue a declaratory that a respondent is in contempt of court established only on a balance of probabilities. It follows therefore, that in the present case, the applicants have established on the balance of probabilities that respondents are in contempt of the order.

Application for amendment

[34] In prayer 3.2 of the Notice of Motion applicants sought an order directing respondents to comply fully with paragraph 4 of order by allowing access to the first respondent's computer network by an independent information technology expert whereas the court order spoke of an independent committee appointed information expert to have access to the respondents' computer network.

[35] Mr Unterhalter SC brought an application to amend the notice of motion by including the words "committee appointed" to which Mr Hellens SC objected arguing that the application to amend is not done on notice with supporting affidavit and that it was not the case respondents were called to meet in the answering papers.

[36] Having regard to the fact that applicants sought to compel respondents to comply with what is contained in the Request, which is what the court ordered, it cannot be said that the applicants sought in the Notice of Motion an order different to the one that was made by the court. In my view, failure to use the words "committee appointed" in the Notice of Motion is a mere omission and

respondents could not be under any illusion that applicants sought a different order to the one made by the court. The application is accordingly granted.

Conclusion

[37] For the reasons set out above, the following order is issued:

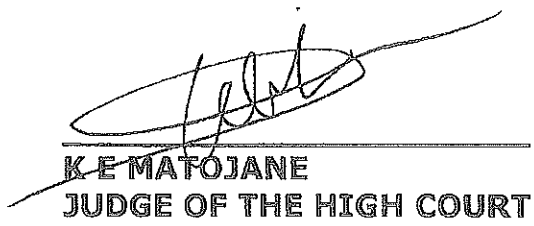
1. The second and third respondents ("the respondents") are declared to be in contempt of paragraph 4 of the Order granted by His Lordship Mr Justice Mothle on 15 April 2014 under case number 61790/2012.

2. The respondents are ordered to comply fully with paragraph 4 of the order of the learned judge, including allowing access by an independent committee appointed information technology expert to the respondent's computer network for purposes of establishing and compiling a report on when and on which computer, each of the file notes appearing in the bundle was brought into existence and edited from time to time.

3. It is ordered that any disability on the part of the respondents to comply with prayer 3.2 of the Notice of Motion as amended be attested to on affidavit deposed to by second and third respondent.

4. The second and third respondents are each ordered to pay a fine of R100 000, suspended on condition that they comply with prayer 3.2 as amended within 30 days of the of this order.

5. The respondents are ordered to pay the costs of this application on attorney and client scale.



K E MATOJANE
JUDGE OF THE HIGH COURT