IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : PORT ELIZABETH

CASE NO. 3713/12

In the matter between:

SPR LOGISTIC CC **Applicant**

and

DHURMAN SUBRAMONEY **1st Respondent**
ALMEFLASH (PTY) LIMITED **2nd Respondent**
EUGENE SUBRAMONEY **3rd Respondent**

JUDGMENT

GRIFFITHS, J.:

[1] The applicant in this matter seeks various orders as against the three respondents all of which are predicated on a decision as to whether or not the respondents, or any one of them, have committed acts which amount to contempt of an order of this court granted by Schoeman J on 20 November 2012. The orders sought vary from the putting into operation of a suspended sentence in relation to the first respondent, to

effective sentences of imprisonment suspended for certain periods of time and fines.

[2] All three respondents have opposed the application and have delivered answering affidavits in response to the allegations made in the founding affidavit of the applicant and the matter served before me on 30 May 2013 as an opposed application. In their answering affidavits, the respondents contented themselves with a series of, in some instances, bald denials, and statements that the allegations made by the applicant in the founding affidavit are argumentative in nature and do not warrant a response. The net effect of these answering affidavits, read as a whole, was that none of the respondents regarded themselves, in any manner of speaking, to be in contempt of the relevant court order. Nowhere, however, in these answering affidavits did the respondents suggest that there were disputes of fact which ought to be dealt with by way of oral evidence despite the fact that, as I will seek to demonstrate later in this judgment, serious allegations were made by the applicant to the effect that the respondents have violated the relevant court order. Late in the afternoon before the matter was to be heard, heads of argument were filed on behalf of all three respondents in which, once again, no request was made for the matter to be referred to oral evidence on any issue alleged to be in dispute.

[3] When the matter was called before me, I asked Mr. Dala, who appeared for all three respondents in these proceedings, as to whether he was satisfied that the matter should merely be argued on the papers as the respondents had at no stage requested the matter be referred to oral evidence. His initial response was to the effect that he would argue the matter and then perhaps consider, depending on my attitude, requesting

that the matter be so referred. I indicated to him that, *prima facie*, my view of the matter was that there are a number of serious allegations in the applicant's founding affidavit which have simply not been responded to or denied by the respondents and that on this basis alone I might well have to find that the applicant has proved these matters beyond a reasonable doubt.

[4] The matter was thereafter argued on the papers. At the initial stages of the argument the first respondent was not present in court but, after time was given to Mr. Dala to contact his client, the first respondent arrive at court and sat through the rest of the proceedings. During the course of his argument, Mr. Dala invited me to speak directly to the first respondent with regard to the question of possible mitigation, in the event that I decided that he is indeed in contempt of court. I declined this invitation and indicated to Mr. Dala that he should address me in this regard on the instructions of his client. However, at no stage was any application made to have this matter referred for the hearing of oral evidence on any issue pursuant to the provisions of Rule 6 (5) (g).

[5] In order to establish that the respondents are guilty of contempt, the applicant is required to prove the terms of the order, knowledge of those terms by all three respondents, and the failure by the respondents to comply with the terms of the order. Should it so establish these matters beyond a reasonable doubt, it will normally be inferred that the respondents acted wilfully and with bad-faith in their failure to comply with the terms of the order[1].

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[1]Fakie NO v CCII Systems (PTY) Ltd. 2006 (4) SA 326 SCA; Burchell v Burchell 3 November 2005[2006] J0L (E) at paragraph 5

[6] In the present matter, is not in dispute that the order was granted and that the first and second respondents were aware of the terms thereof. The third respondent disputes that he was aware of the order and all three respondents deny that they have acted in contravention of the order. It thus remains incumbent upon the applicant to establish beyond a reasonable doubt that the third respondent was aware of the terms of the order, and that all three respondents acted in contravention thereof. In view of the denial by the respondents that they did indeed act in contravention of the order, should the applicant establish this fact beyond a reasonable doubt, the evidential onus will shift to the respondents to establish absence of bona fides and wilfulness.

[7] In terms of the aforementioned court order granted by Schoeman J, both the first and second respondents were, *inter alia*, interdicted from conducting business with or soliciting or attempting to solicit business from any past, existing or future customers of the applicant either for their own account or on behalf of any other person. The order made particular reference to some 42 businesses listed in the order, but did not limit its operation solely thereto. It was effective from 1 December 2012 for a period of three years.

[8] Paragraph 3 of the order dated 20 November 2012 stated as follows:

> "That the respondents are interdicted and restrained from conducting and/or being concerned and/or interested, directly or indirectly, in any business of the same kind as that carried on by SPR Logistics CC, being courier and/or transport business, within the Eastern Cape Province, Knysna, George

> and Mossel Bay areas. However the respondents may conduct courier and/or transport deliveries:
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> 3.1 from Port Elizabeth to Bathurst, Cookhouse, Cradock, Fort Beaufort, Graff Reinet, Grahamstown, Humansdorp, Jeffreys Bay, Middleburg (Eastern Cape), Port Alfred, Queenstown and Somerset East and vice versa."

[9] The facts leading up to the granting of this order may be briefly stated. On 24 November 2011 the first respondent and one Chetty, the sole member of the applicant, concluded a written agreement in terms whereof Chetty purchased the first respondent's interest in and to a business known as Dhurman Subramoney Transport CC which was referred to therein as "the business". The first respondent was at the time the sole member of the Close Corporation. In terms of the agreement, Chetty also purchased the trade name of the business which was "Ben's Express".

[10] The agreement also provided for a form of a restraint of trade in terms of which the first respondent undertook not to, without the applicant's written consent:

> "1. solicit or attempt to solicit business from any past, existing or future customers of the business either for his own account or for that of any other person;
>
> 2. Be concerned or interested, directly or indirectly, in any business of the same kind as that carried on by the business within the Province of the Eastern Cape."

[11] The applicant has alleged in its founding affidavit that the purpose of the restraint of trade was to protect the applicant's business prospects, client base and trade secrets because of the fact that the first respondent has in-depth and thorough knowledge of the operations, rates, prices, income, expenditure, assets, client base, client information, staff and procedures of the business sold, which information the first respondent could have used to undermine the ability of the business to compete competitively. In addition, the first respondent had devised the computerized logistics system of the business and was fully *au fait* therewith which knowledge he could have used to the disadvantage of the applicant. He had also assisted in the training of the applicant and his wife regarding the operation of the business and had long standing relationships with the business clients.

[12] Subsequent to the purchase thereof, Chetty changed the name of the Close Corporation to SPR Logistics CC. The business conducts courier and transport services throughout the Eastern Cape and beyond, in Knysna, George and Mossel Bay.

[13] The applicant alleges that during the period August 2012 to November 2012 the first and second respondents breached the terms of the restraint of trade agreement in various respects. The applicant further alleges that the breaches were in furtherance of the first and second respondents' active attempts to expand their courier and transport business, to gain a larger client base and to lure the applicant's clients away from it, in competition with the applicant.

[14] Despite a number of warnings being issued to the first and second respondents, they apparently did not desist from their unlawful actions

which ultimately resulted in an urgent application being launched out of this court seeking an interdict. This matter was heard on 20 November 2012 on which day an agreement was struck consequent upon which the order of court (dated the same date) was granted by agreement. At the time of the granting of this order, the first and second respondents had instructed their legal representatives to agree thereto and their said legal representatives were present in the chambers of Schoeman J when the order was granted. First and second respondents were, accordingly, fully aware of the nature, terms and extent of the restraint order.

[15] Despite the existence of the restraint order, the first and second respondents continued to act in breach of the agreement and, indeed, the restraint order. This culminated in a further urgent application on the part of the applicant as against the first respondent seeking an order that the first respondent be held in contempt of court, together with allied relief. This was once again opposed by the first respondent and was ultimately argued before Smith J on 21 December 2012. Smith J, in an *ex tempore* judgment, dismissed the first respondent's opposition and found him to be in contempt of court. He sentenced the first respondent to six months imprisonment which he suspended for a period of three years on condition that the first respondent not be found guilty of contempt of court during the period of suspension, together with a fine of R15,000.

[16] Because of its importance *vis a vis* the alleged conduct of the respondents in the present application, it is necessary to record certain aspects of the application which served before Smith J. Smith J in his judgment dealt with the alleged breaches of the court order in that matter as follows:

"1. On 1 December 2012 the respondent (first respondent in these proceedings) had informed one of his employees, namely Trushen Padayachee, that he had no intention of abiding by the court order. He planned to start a courier company of which his son, Eugene Subramoney would be the face. That company would provide courier and transport services in the East London and Garden route areas. He also told Padayachee that once the company had been established he would approach all the applicant's clients to give their business to the new company instead of the applicant.

2. On 6 December 2012 the respondent had also subcontracted courier services to deliver two parcels for NCS Resins (PTY) Ltd., one parcel was to be delivered to a company in Plettenberg Bay and the other to a company in the Craggs. The Applicant attached two waybills in respect of the said deliveries which indicated that the respondent was operating the business under the name of Ben's Transport and that he had provided courier and transport services to NCS (PTY) Ltd…..

3. On 7 December 2012 the branch manager of Courier Services, one Sarah Marais had seen the Respondent visiting the premises of Eagle Work Wear in his 8 ton truck. The respondent had also informed Marais that he had started a new courier and transport company operating under the name of Ben's Transport, which would provide courier and transport services in the East London and Garden route areas.

4. On 7 December 2012, one of the applicant's employees namely Renganathan Pillay was informed by an employee of Courier Services (one of the applicant's customers) that the

> respondent had personally approached them on 6 December 2012 and attempted to solicit courier and transport work from them. The Respondent had proposed to subcontract Courier Services to carry out courier and transport services in the Garden route area, including Plettenberg day, Knysna, George and Mossel Bay, and that in exchange Courier Services would sub-contract the Respondent to carry out courier and transportation services in the East London area. The respondent had informed them that he was conducting the business under the name of Ben's transport."

[17] Smith J further stated with regard to the answering affidavit delivered on behalf of the first respondent that:

> "The respondent has filed an answering affidavit. He deals with the Applicant’s comprehensive allegations regarding the alleged incidents of contempt, in a rather terse and perfunctory manner."

[18] Later in his judgment Smith J dealt with the denial by the first respondent that he had any connection with Ben's Transport as follows:

> "Mr. Moorhouse has correctly submitted that it is improbable that the Respondent has no connection with Ben's Transport. His assertion that the company belongs to his son (the third respondent in these proceedings) and that he does not have any connection with it is implausible for the following reasons:
>
> - His son had never owned or operated his own courier company

- He does not have a client base and

- He had no resources to start a courier and transporting any on his own.

- He had been the operations manager of (the second respondent), the company which the Respondent had established for the sole purpose of evading the terms of the restraint agreement.

  I pause here to mention that this allegation is made in paragraph 21 of the Applicant's founding affidavit and has not been denied by the Respondent.

- The format of the invoices utilized by Ben's Transport is almost identical to that which was used by (the second respondent). Except for the name, the invoices bear the same business address, telephone and facsimile numbers.

- The fact that the invoices reflect Eugene as the person who accepted the parcels on behalf of Ben's Transport is of no consequence as he was also the person who had accepted parcels on behalf of (the second respondent)."

[19] Having made these observations, Smith J proceeded to state:

"The inference is therefore ineluctable that the company that was ostensibly started by the Respondent's son (the third respondent in these proceedings), immediately after he had been prohibited in terms of the court order from involvement in the courier and transport business, was part of a stratagem devised for the sole purpose of enabling the Respondent to circumvent the consequences of the court order".

[20] Smith J finally concluded:

> "I am for these reasons of the view that the Respondent's version is so far-fetched, implausible and unworthy of credence that it should be rejected out of hand. The Respondent has not put up any facts to cast reasonable doubt on the ineluctable inference that his conduct was wilful and mala fide."

And later:

> "It is clear that the Respondent never intended to comply with the order. Soon after the order became operational, he informed his staff that he did not intend to comply with it and immediately set about assisting his son to establish a courier and transportation business with the sole purpose of evading the consequences of the court order. Ben's Transport was then established with the thinly disguised façade of being an independent company owned by his son. He had however immediately commenced to actively solicit business on behalf of Ben's Transport from the Applicant's clients and continued to do so in a brazen fashion even after he was given notice of these proceedings."

[21] On an examination of the papers in this matter, it is clear that the applicant has, once again, put up a comprehensive set of papers fully itemizing and describing in extensive detail the infractions it alleges the applicant has perpetrated against the restraint order since Smith J delivered the aforementioned judgment. Once again the first respondent, and indeed, the second and third respondents, have responded thereto in a very similar manner to the first respondent's

answers in the earlier contempt application which, as Smith J described them, are "terse and perfunctory". From these answering affidavits it however becomes clear that the respondents do not contest the fact that the restraint of trade agreement exists, that the first and second respondents were, by way of the restraint order, interdicted from breaching the restraint agreement in the respects itemized in the restraint order, and that Smith J found them to be in contempt of the restraint order. Is furthermore common cause that neither the first nor second respondent applied for leave to appeal against the order of Smith J and that that order has accordingly remained extant and in force since it was made on 20 December 2012.

[22] It is furthermore evident from the answering affidavits that the respondents candidly admit that the second respondent has, ever since the granting of the contempt order, continued carrying on the business of courier services within the area of the restraint. They, however, contend that the first respondent has since resigned as a director from the second respondent and that the third respondent has taken over control thereof. They had considered a deregistration of the second respondent as a company but decided that this was too lengthy and expensive and that it would be far simpler to merely change the trading name to "Titan Transport". This they did, and they accordingly maintain that this change of control in the company and change of trading name is sufficient to avoid the rigours of the restraint order.

[23] On analysis of the papers and apart from the factors mentioned in the preceding paragraph, it appears that the following allegations made by the applicant in its founding affidavit are accepted

by the respondents as being common cause, or are at least uncontroverted in the answering affidavits:

1. That the second respondent is currently and has for some time been conducting a courier and transport business within the area of the restraint;

2. That the second respondent is currently rendering courier and transportation services to NCS Resins (PTY) Ltd. within the area of the restraint;

3. That during March 2013 the first respondent, together with an employee of the second respondent, transported and delivered goods to a business known as Betcrete in East London for the company NCS Resins (PTY) Ltd., again within the area of the restraint;

4. That, on 10 May 2013, the first respondent attempted to solicit courier and transporting work which was to be conducted within the East London and George areas, from SA Logistics for and on behalf on the second respondent and this with the third respondent's knowledge;

5. That, again on 10 May 2013, the first respondent informed a certain Mr. Blignaut (an area manager of South African Logistical Company (PTY) Ltd.) that the second respondent was in fact his business and

that he operated this business together with the third respondent. He furthermore informed Blignaut that he, that is the first respondent, was conducting courier and transport work for various clients in Port Elizabeth by transporting their goods to the East London and George areas;

6. That, the first respondent's name appears on the company profile of the second respondent that was sent to Mr. Blignaut after a discussion had been held between the first respondent and Blignaut relating to a quote for courier and transport services.

7. That the first respondent had solicited and obtained courier and transport business from NCS Resins (PTY) Ltd.

8. That the second and third respondents are indeed obtaining monetary benefit from the courier and transport business which they are providing.

[24] The undisputed matter mentioned in subparagraph five above requires further elaboration in view of its importance. The first respondent did not mention the existence of the restraint order or the subsequent contempt order to Mr. Blignaut but did mention that he had sold his previous business known as "Ben's Express". During this discussion Blignaut requested the first respondent to send him a quote together with certain necessary information. Later on the same day such documentation was sent to Blignaut from the e-mail address

"titanexpress@telkomsa.net". Copies thereof were annexed to the founding affidavit.

[25] This documentation consisted of a letter, a company profile, a credit application and a quotation. From it the following facts emerge:

1. That the second respondent operates as "Titan Express" from the address 31 Driedoorn Street, Malabar, Port Elizabeth;

2. The name of the first respondent appears that the bottom of the letter;

3. The second respondent provides courier and transport services throughout the whole of the Eastern Cape;

4. The second respondent maintains a fleet of transport vehicles, all of which are itemized in this documentation. It is not disputed that most of these vehicles belong to the first respondent.

[26] Whilst the respondents denied that the e-mail with the attached documentation was sent by the first respondent, alleging that it was sent by the third respondent, of significance to this matter is the fact that it was not denied that the meeting took place between the first respondent and Blignaut, nor indeed did they deny the discussions at the meeting as alleged by Blignaut.

[27] This does not end there. A supplementary affidavit from Blignaut was filed some time after the respondents had delivered their affidavits. Disturbingly, in that affidavit Blignaut stated that on 16 May 2013 he received a telephone call from a certain "Theo", a person whom he stated "is employed by the first respondent". The further paragraphs of this affidavit bear repeating:

> " 5. I asked Theo as to the reason for his call whereby he informed me that it is regarding the quotation that his boss forwarded to me on Friday 10 May 2013, whereby Theo and the First Respondent attended my business premises on the aforementioned date in order to discuss the quotation that I required.
>
> 6. Theo accused me of setting a trap for his boss, the First Respondent by requesting a quotation from him, whereby I told him this was nonsense.
>
> 7. I asked him why he is phoning me since he is just the driver and his boss should contact me whereby he told me that the First Respondent instructed him to call me.
>
> 8. I told him I was not prepared to speak to him whereby he threatened me and told me that I should be careful.
>
> 9. I immediately went to the Kabega Park Police Station and made an affidavit, detailing the content of my telephonic conversation with Theo, attached hereto and marked annexure "K1"."

[28] Not only is the significance of this affidavit clearly apparent, but at no stage did the respondents seek to file further affidavits or in any

manner contest the content of what is stated in this affidavit by Blignaut. Accordingly, the evidence of Blignaut dealing with the meeting on 10 May 2013 and with the subsequent interaction with Theo, remains entirely uncontested.

[29] As I have stated earlier in this judgment, it is incumbent upon the applicant to establish its case beyond a reasonable doubt. The SCA has put its stamp of approval on the normal civil procedure of establishing these facts in motion proceedings[2]. Froneman J (as he then was) in a full bench decision of the Eastern Cape had this to say with regard to the incidence of the onus in contempt proceedings which are brought on notice of motion:

> "Secondly, it should be kept in mind that application or motion proceedings are primarily geared to a determination of issues on the basis of facts that are not in dispute. Normally applications are decided on the basis of facts set out by the respondents, together with other admitted facts in the applicant's papers. In such a case, or where it appears that no bona fide or genuine dispute of fact arises from the papers, the issues are determined on essentially undisputed facts, by their very nature already accepted as beyond doubt, not only reasonable doubt."[3]

[30] And later:

> "Lastly, where a higher standard of proof may well play a role is (1) in the manner of drawing inferences from these undisputed facts, (2) in determining disputes of fact on the papers alone, and (3) in the approach to determining facts in

[2]Fakie's case – see footnote 1
[3] Burchell (supra footnote 1) at paragraph 24

> dispute where there has been a referral to oral evidence. All these potential difficulties can be overcome, however.
>
> If inferences need to be drawn from the undisputed facts it would have to be kept in mind that the ultimate inference as to the guilt of the offender must be the only reasonable inference and not merely the most plausible or probable one.
>
> The "robust" approach to determine disputed facts on paper might have to be reconsidered or adapted, but that kind of approach is in any event rarely and then only very circumspectly applied."

[31] In approaching this matter on this basis, it seems to me that there is no doubt whatsoever that the first respondent has simply continued to disobey the restraint order, despite the clear warning given to him by Smith J in the earlier contempt proceedings. This is clearly evidenced by, *inter alia*, the evidence of Blignaut. Not only is this evidence uncontested by all three respondents but there is no evidence placed before me which would tend to dilute the force of Blignaut's evidence. For example, the respondents have not stated that Blignaut might in any way be biased towards them, or any one of them, for any reason whatsoever. On the contrary, it seems that the relationship between the first respondent and Blignaut was nothing but cordial until Blignaut became aware of the fact that the first respondent was acting in contravention of the court order.

[32] This is further underpinned by the subsequent attempt by the person Theo to undermine the force of Blignaut's evidence by what can only have been a threat of some sort of harm in the event that Blignaut proceeded to stand by his testimony in these proceedings. Theo's clear statement that he was acting on the instructions of the first respondent

establishes, together with all the other evidence, beyond any doubt that the first respondent contravened the court order with bad intent.

[33] As regards the first respondent, there are two further aspects which point to his ongoing disobedience towards orders of court. Mr. Moorhouse has brought to my attention that during the course of these proceedings, the respondents were put on terms by way of court order to file their papers by a certain date. This was completely disregarded. However, of more importance, is the fact that the first respondent was ordered by Smith J in his judgment dated 21 December 2012 to pay a fine of R15,000. To date, this has not been paid and no explanation whatsoever has been put up in his affidavit, or by way of submission in court, as to why this fine has not been paid.

[34] As regards the second respondent, the only defence put up has been that it is no longer trading under the name of "Ben's Transport" but now trades under the name of "Titan Transport". The respondents have attempted to argue that they believed this would be sufficient to avoid the rigours of the restraint order. They have stated that they did not deregister the company as this would be too long and expensive. Mr. Dala has argued that this is reasonable by virtue of the fact that the first respondent and his son, the third respondent, are mere laymen and do not understand the law.

[35] This argument is, in my view, totally unfounded. The respondents have openly conceded that the second respondent has continued trading in the area designated in the restraint order and to that extent this clearly amounts to a contravention of the order. The only argument can therefore

be that the second respondent continued to trade in this manner unwittingly, and without the intent to disobey the order or in bad faith.

[36] The first and second respondents have, throughout these proceedings, the restraint and first contempt proceedings, been legally represented. It seems to me therefore that either they failed to ask their legal representatives for advice as to whether their actions would amount to a contravention of the order, or that they made such a request but were given incorrect advice. The latter was neither advanced in their answering affidavits nor presented in argument by Mr. Dala. Insofar as the former proposition may, possibly, be inferred from the answering affidavits, if this was so it seems to me that in doing so they acted in bad faith as they realized that their legal advisors would correctly advise them that the respondent is a juristic entity which has been interdicted and restrained from carrying on such business in the designated areas and that to trade under a different name would make no difference whatsoever. In other words, they clearly practiced a form of "wilful blindness". It seems to me that there can be little doubt but that this was a further "stratagem devised for the sole purpose of enabling the Respondent to circumvent the consequences of the court order", to borrow from the words of Smith J.

[37] Regarding the third respondent, as indicated earlier in this judgment Mr. Dala has argued that there is insufficient proof that he was aware of the restraint order. I beg to disagree. It is common cause that he is the son of the first respondent and that they both lived at the same residence from which the business is operated. Mr. Dala has sought to argue, without any foundation in fact, that because the first and third respondents are Indians, it is common knowledge that they lived together in an extended family situation. As I have said, there is no factual basis

whatsoever for this and neither, in my view, is there is sufficient foundation before me to take judicial notice thereof as being factually correct. In my view, the factual matrix to this matter, as it existed from before the restraint order was granted, clearly indicates that the first and third respondents are fully *au fait* with each other's business dealings and, indeed, the third respondent has learned his trade from the first respondent.

[38] On a reading of the judgment of Smith J it is furthermore clear that the third respondent was fully implicated in the matters which gave rise to that application. In this regard he stated:

> "It is clear that the Respondent (first respondent in these proceedings) never intended to comply with the order. Soon after the order became operational, he informed his staff that he did not intend to comply with it and immediately set about assisting his son to establish a courier and transport business with the sole purpose of evading the consequences of the court order. Ben's Transport was then established with the thinly disguised façade of being an independent company owned by his son (the third respondent in these proceedings). He had however immediately commenced to actively solicit business on the half of Ben's Transport from the Applicant’s clients and continued to do so in a brazen fashion even after he was given notice of these proceedings."

[39] It seems to me that it is patent from this and various other factors that the third respondent colluded with the first respondent in a further stratagem to avoid the consequences of the restraint order. The third respondent maintains that the second respondent's business is conducted by him and him alone. This is clearly given the lie to when one has regard

to the evidence, *inter alia*, of Blignaut. Pertinently in this regard, the third respondent maintains that it was he who had sent the e-mail with the attached documentation relating to quotes etc. to Blignaut, not the first respondent. Accepting Blignaut's evidence as to the previous meeting with the first respondent and the fact that Blignaut had requested the first respondent to send him a quote, one can only but conclude with little doubt that either this e-mail was sent by the first respondent himself, or that, if the third respondent did indeed send it, it was sent on the instructions of the first respondent.

[40] I should add further (as mentioned above) that neither the first nor the second respondents have applied for leave to appeal against the judgment of Smith J and that that judgment accordingly remains in force to this day. This is also an indication of an implied acceptance on the part of these respondents of the facts, circumstances and reasoning as set out by Smith J in that judgment.

[41] Based on the foregoing, I am satisfied that the applicant has proved beyond a reasonable doubt that all three respondents were fully aware of the restraint order and that they knowingly pursued their business in contravention thereof. As I have indicated, there is an evidential onus on them to establish lack of intent and *mala fides*. In my view, the facts of this matter show with little doubt that the respondents intended by their machinations to subvert the restraint order and thereby acted in bad faith. In the circumstances, I find that it has been established beyond a reasonable doubt that all three respondents are in contempt of the court order granted on 20 November 2012.

[42] Because of their attitude to this matter, the respondents placed nothing before me by way of affidavit to mitigate the severity of their actions. Belatedly, and because I pointed to the fact that many of the serious allegations in the papers remain uncontroverted, Mr. Dala sought to apologize on the part of the first respondent. He also sought to apologize on the part of the third respondent but it was pointed out to him that the third respondent was not at court and had not apologized in his answering affidavit. Mr. Dala then pointed to an allegation in the third respondent's answering affidavit to the effect that he had apologized for having run "Ben's Transport" in contravention of the court order. This however relates to the factual matrix giving rise to the first contempt order and not to these proceedings. In the circumstances, it seems to me that the third respondent has not placed before this court any form of apology.

[43] Apart from various suggested sentences for all three respondents relating to the contempt of court under review in this application, the applicant seeks an order that the suspended sentence imposed by Smith J be put into operation. I have already dealt with the fact that the first respondent's actions in this matter smack of a clear and deliberate attempt to avoid the consequences of the restraint order. In addition, and as stated by Plaskett J in the matter of **Victoria Park Ratepayers Association v Greyvenouw CC**[4]

[4][2004] 3 All SA 623 (SE)

> "It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system…. That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

[44] This is the second time that the first respondent has been found to be guilty of contempt of the same court order. On the first occasion he was given an opportunity by way of a suspended sentence and a fine to desist from his misguided ways. He obviously did not regard this as being of any consequence to him as he merely continued to flagrantly flout the operation of the law by dismissing the various court orders with contempt. Should I give him a further suspended sentence, I have little doubt that he will merely continue to disregard the powers of this court. In my view, the time has come for him to learn for once and for all that court orders have all the force of law behind them and ought to be heeded. In the circumstances, I intend to put the suspended sentence into operation. Furthermore, I believe that it would be apposite for the first respondent to have a further suspended sentence hanging over his head which will hopefully serve as a "sword of Damocles" in order to prevent him from any future transgressions.

[45] As regards the second and third respondents, I believe that a fine and a suspended sentence respectively would be fitting.

[46] In these circumstances, I grant the following order:

1. **The first respondent is declared to be in contempt of the court order granted by this court under case number 3713/12, dated 20 November 2012;**

2. **The suspended sentence imposed by this court on 21 December 2012 on the first respondent is to be brought into effect immediately and the first respondent is accordingly sentenced to six months imprisonment;**

3. **The first respondent is to commence serving the sentence referred to in paragraph 2 of this order within 48 hours of the service of this order upon him;**

4. **In the event of the first respondent failing to present himself in order to serve the aforesaid sentence the Sheriff of this court with the assistance of the South African police services if necessary, is hereby directed and authorized to take the first respondent into custody;**

5. **The first respondent is ordered to pay the fine imposed upon him by this court on 21 December 2012 within 48 hours of this order being served upon him;**

6. **The first respondent is further sentenced to nine months imprisonment in respect of the aforementioned contempt which period of imprisonment is totally suspended for a period of three years from the date of this order on the condition that the first respondent not be found guilty of contempt of court during the said period of suspension;**

7. **The second respondent is declared to be in contempt of the court order granted by this court under case number 3713/12 dated 20 November 2012;**

8. **The second respondent is find R30,000 in respect of the aforesaid contempt which fine shall be paid within one month of the service of this order on the second respondent;**

9. **The third respondent is declared to be in contempt of the court order granted by this court under case number 3713/12 dated 20 November 2012;**

10. **The third respondent is sentenced to six months imprisonment, which period of imprisonment is totally suspended for a period of three years from the date of this order on the condition that the**

third respondent not be found guilty of contempt of court during the aforesaid period of suspension.

11. The respondents are ordered to pay the costs of this application on the attorney and client scale, jointly and severally, the one paying the other to be absolved.

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JUDGE OF THE HIGH COURT

HEARD ON : 30 MAY 2013
DELIVERED ON : 18 JUNE 2013

COUNSEL FOR APPLICANT : Mr Moorhouse
INSTRUCTED BY : Kuban Chetty Attorneys

COUNSEL FOR RESPONDENTS : Mr Dala
INSTRUCTED BY :Wilke Weiss Van Rooyen Inc.