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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 13863/2020

In the matter between:

GREYCROFT LTD **First Plaintiff/Applicant**

ANTHONY NEARY **Second Plaintiff/Applicant**

and

SILVER FALCON TRADING 544 (PTY) LTD **First Defendant/Respondent**

JONATHAN FRANK DOLGOY **Second Defendant/Respondent**

WALTER JAMES CLARK **Third Defendant/Respondent**

Coram: Bishop, AJ

Date of Hearing: 21 November 2023

Date of Order: 21 November 2023

Date of Judgment: 20 December 2023

JUDGMENT

BISHOP, AJ

[1] On 5 April 2022, this Court made a settlement agreement between the Applicants and the Second Respondent (**Mr Dolgoy**), an order of court. The order was amended on 13 October 2022 to correct an error. The Order required Mr Dolgoy to pay the Applicants R4 000 000 in terms of an agreed payment plan. In addition, Mr Dolgoy pledged as security for his debt, the shares he owned in a company called Swirl Solutions (Pty) Ltd. The parties agreed that, if Mr Dolgoy failed to make payments in terms of the agreed payment plan, he would transfer his Swirl shares to the Applicants.

[2] Mr Dolgoy did not make his payments in terms of the Order. He did not pay the Applicants a single cent. Nor did he transfer the Swirl shares. The Applicants sought an order holding Mr Dolgoy in contempt of the Order and directing him to comply by transferring the shares.

[3] Mr Dolgoy denied that he ever agreed to the settlement agreement underlying the Order, and sought its rescission. He also claimed he was not the owner of the Swirl shares. Ms Dolgoy's version is, as I explain below, best described as: not true.

[4] On 21 November 2023, after hearing the Applicants' counsel and Mr Dolgoy in person, I dismissed Mr Dolgoy's application for rescission, held Mr Dolgoy in contempt, and granted ancillary relief to aid the Applicants to determine the true ownership of the Swirl shares so that they could, hopefully take transfer. My order read in full:

1. *The Second Respondent's application to rescind the order granted by the Honourable Justice Slingers dated 13 October 2022 is dismissed.*

2. *The Second Respondent is declared to be in contempt of the court order granted by the Honourable Justice Slingers dated 13 October 2022.*
3. *The Second Respondent may purge his contempt by paying R4 000 000 to the Applicants, or transferring all shares he owns in Swirl Solutions (Pty) Ltd (registration number 2020[...]) within one month of the date of this order.*
4. *A rule nisi is issued calling upon the Second Respondent and all interested persons who have a legitimate interest, to appear and show cause, if any, on **2 February 2024** as to why an order should not be made in the following terms:*
 - 4.1. *The Second Respondent is compelled to do all such things and sign all such documentation as may be reasonably necessary to give effect to the transfer of shares held by the Second Respondent and/or the JFD Family Trust in Swirl Solutions (Pty) Ltd (registration number 2020/[...]) in compliance with the order of Honourable Justice Slingers dated 13 October 2022; and*
 - 4.2. *Should the Second Respondent fail to comply with the above order within 5 (five) days of service thereof, the Sheriff of the above Honourable Court is authorised to do all such things and sign all such documentation as may be reasonably necessary to give effect to the transfer of shares held by the Second Respondent and/or the JFD Family Trust in Swirl Solutions (Pty) Ltd.*
5. *A copy of this order shall be served by the sheriff of this court on:*
 - 5.1. *The trustees of the JFD Family Trust; and*
 - 5.2. *Swirl Solutions (Pty) Ltd (registration number 2020/[...]), at its registered address.*
6. *The Second Respondent shall pay the costs of this application and the counter-application on an attorney and client scale.*

[5] These are my reasons for granting that order.

The Facts

[6] The dispute between the parties goes back to October 2017. Greycroft Ltd lent Silver Falcon Trading 544 (Pty) Ltd R2 245 000 to serve as a deposit for the purchase of property in Kuruman. The property included stockpiled minerals and resources. Silver Falcon was required to repay the loan, as well as pay Greycroft a 20% share of the profit from selling the stockpiled resources (amounting to at least R660 000), within 90 days. Mr Dolgoy was, at the time, a director and shareholder of Silver Falcon. At the same time, Silver Falcon – represented by Mr Dolgoy – concluded a commission agreement with Mr Neary. It agreed to pay Mr Neary 5% of the net profits from selling the resources, and not less than R165 000.

[7] Silver Falcon did not honour either agreement. It did not repay the loan, nor did it pay the profit share or the commission. Mr Dolgoy blames Cawood Attorneys – the property owner’s business rescue practitioners – who he alleges refused to return the deposit. In this application, nothing turns on who was ultimately to blame.

[8] Just two weeks after the agreements were concluded, Mr Dolgoy resigned as a director of Silver Falcon. The applicants allege that Mr Dolgoy knew at the time the agreements were concluded that Silver Falcon would not be able to honour its obligations. Making commitments he would be unable to honour seems to be a trend in Mr Dolgoy’s behaviour.

[9] In September 2020, Greycroft and Mr Neary sued Silver falcon, Mr Dolgoy and Mr Clark (another director of Silver Falcon), under the two agreements. None of the Defendants entered appearances to defend.

[10] In February 2021, Mr Neary and Mr Dolgoy reached a settlement agreement under which Mr Dolgoy would pay the Applicants R4 000 000. This was confirmed in email correspondence in March 2021. No payments were made. It was, as Mr Neary describes it, “yet another empty promise by Dolgoy”. Mr Dolgoy made further promises to make payment in terms of this settlement agreement, but never did. The Plaintiffs then applied for default judgment. That application was set down for hearing on 5 April 2022.

[11] On 30 March 2022, the Applicants’ attorneys wrote to Mr Dolgoy to confirm that the application for default judgment would be heard on 5 April 2022, and to propose a settlement agreement. It was, roughly, the same as the one agreed to a year earlier – Mr Dolgoy would pay R4 000 000 in four monthly instalments of R1 000 000. The material difference was that Mr Dolgoy was also required to cede shares in a company as security for payment of the debt. Mr Dolgoy could identify the company.

[12] The correspondence that followed, that eventually led to the settlement, is vital. It shows that Mr Dolgoy knew exactly what he was agreeing to.

[12.1] Mr Dolgoy replied to the letter of 30 March 2022 on 1 April 2022 asking why payment was only sought from him, and not from Silver Falcon or Mr Clark. The Applicants’ attorneys responded the same day explaining why. Mr Dolgoy responded the same day saying “I would like to sign the settlement for you, but I can not commit to that amount knowing I might not be able to pay a portion at any given time.”

[12.2] Mr Dolgoy and Mr Neary spoke the next day – 2 April 2022 – and agreed that Mr Dolgoy could make fixed payments on a workable schedule. Mr Dolgoy wrote to the Applicants’ attorney that day stating that “I am committed to sorting

out and signing the settlement agreement” but asking “if we could lengthen the time period of payments and lower the monthly amount”.

[12.3] On 4 April 2022, Mr Dolgoy sent a proposal that he would pay R100 000 per month for six months and then make two or three larger payments. Mr Neary wrote back on the same day confirming the terms of a settlement agreement that largely reflects the ultimate agreement reached. They also agreed that Mr Dolgoy would pledge his shares in Swirl as security.

[12.4] The same day the Applicants’ attorneys sent Mr Dolgoy the final settlement agreement, and he attended their offices to sign it. The Applicants’ attorneys again wrote to him confirming that the order would be made an order of court.

[12.5] The settlement agreement was made an order of court the next day. The Applicants’ attorneys wrote to Mr Dolgoy on 20 April 2022 confirming this had occurred and providing a copy of the court order.

[13] The following emerges from this history: Mr Dolgoy was actively involved in negotiating the settlement agreement. He knew its terms. He knew it applied to him personally and not to anybody else. He proposed the payment plan and chose Swirl as a company in which he held shares. He knew it was going to be made an order of court. He knew the agreement was made an order of court.

[14] Despite all this, Mr Dolgoy failed to make any of the monthly instalments. When the Applicants demanded that he deliver the Swirl share certificates, he did not do so. He provided no explanation or excuse.

[15] The Applicants then issued this application. It sought, in the first place, an order compelling him to comply with the Order by transferring the Swirl shares, failing which the Sheriff would be permitted to do so. In the alternative, it sought an order holding Mr Dolgoy in contempt, and committing him to imprisonment for one month.

[16] Given what Mr Dolgoy had already revealed about his character, his response was as predictable as it was brazenly contradictory. First, he brought a counter-application to rescind the Order that he had expressly agreed to. He claims that he never agreed to the settlement. Instead, he merely committed himself “to assist in obtaining the refund from Cawood Attorneys without .. admitting any liability to stand in for such payment” himself. His version of how his signature came to appear on the settlement agreement deserves quoting in full:

An appointment was then arranged with the Applicants’ Attorneys which appointment I attended and upon arrival at the Attorney’s offices I was taken into a boardroom where I was presented with certain documents and instructed to sign at several instances.

I did not read the document nor was I explained the contents of the document that I have signed.

I, mistakenly so, accepted that the document which I signed set out the relevant background as to why Cawood Attorneys would be responsible to refund the deposit to the Applicants.

The first think that I heard of this matter, only expecting to testify against Cawood Attorneys was when I received the notice of motion in this application.

[17] This version is patently false. It is inconsistent with the string of correspondence between Mr Dolgoy, Mr Neary, and the Applicants’ attorneys. That correspondence explains why the Applicants are pursuing him, not Cawood Attorneys, and shows that

he knew he was settling his liability, not assisting the applicants to pursue claims against any other person.

[18] Mr Dolgoy's dishonesty had further layers. He claims – for the first time after receiving the contempt application – that he is not the owner of the Swirl shares he put up as security. In an email on 27 January 2023 he told Mr Neary that “I need to let you know I do not own any shares in Swirl Solutions and only negotiated deals. I got reimbursed Comms for that. I was going to receive but did not get. I will explain this to you in our discussion.”

[19] But in his affidavit, his version changed. He then claimed that the shares are owned by “the JFD Family Trust” and he is “therefore not in a position, nor allowed, to consent to the transfer thereof.” Mr Dolgoy's initials are JFD. He claims he never would have signed a settlement agreeing to transfer those shares. This, too, is a bald-faced lie. It was Mr Dolgoy that identified the Swirl shares to serve as security. He either lied when he concluded the settlement agreement by claiming to own the shares, or he acted dishonestly later by moving them to his family trust to avoid his obligation to transfer them.

[20] Mr Dolgoy never pleaded that he lacked the funds to have made payment under the Order. His version is that he was unaware of any obligation to make any payment, not that he was not in a position to do so. Mr Dolgoy also continues to assert that he should not be held liable for the Applicants' loss because it was all the fault of Cawood Attorneys. That argument – if it has any merit – had to be pursued in defending the action before he signed the settlement agreement. It wasn't.

[21] Dishonesty is not uncommon in litigation. But I have seldom encountered a liar as prolific yet poor as Mr Dolgoy. At every turn he seeks to avoid his obligations and will lie and lie and lie to achieve that end.

Postponement

[22] Mr Dolgoy was initially represented by attorneys. They assisted him to launch his counter-application for rescission and prepare his answering affidavit in the contempt application. However, his attorneys withdrew as his attorneys of record on 23 August 2023. Interestingly, when they withdrew, the email address they provided for Mr Dolgoy was j[...]@swirlsolutions.co.za.

[23] Mr Dolgoy appeared in person at the hearing of the matter. He indicated that he would like a postponement in order to obtain legal representation. I refused the postponement. To my mind, no purpose would have been served by postponing. Mr Dolgoy had already had the opportunity to put his version to the court, assisted by attorneys. A postponement would merely delay the inevitable, cause further prejudice to the Applicants, and rack up further legal costs that may ultimately have to be borne by Mr Dolgoy.

[24] The matter therefore proceeded and Mr Dolgoy represented himself. He advanced submissions in defence of his position. I explained the legal position carefully to Mr Dolgoy throughout and ensured he understood the nature of the proceedings, and the nature of the order that I granted.

Rescission

[25] An order of court incorporating a settlement agreement has exactly the same effect as an order made without agreement between the parties. As was put in *Moraitis*: “The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order.”¹ As an order by agreement between the parties is not an order granted by default, the grounds for rescinding it are narrow – fraud, *justus error* or common mistake.

[26] Mr Dolgoy never directly alleges fraud. He implies that he may have been misled. But he never contends that the Applicants intentionally deceived him about the content of the summons, the application for default judgment, or the settlement agreement. In light of the correspondence detailed above, no such claim would be credible. Nor was there any common mistake – there is no doubt at all the Applicants knew what they were signing.

[27] What of *justus error*? Mr Dolgoy must show, first, that he laboured under an error about the settlement agreement. He must, second, establish that the “error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.”² Finally, he must convince the Court that the Applicants knew he was labouring under an error or should have known, or that his mistake was otherwise excusable.³

¹ *Moraitis Investments (Pty) Ltd & Others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at para 10.

² *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & others* 1978 (1) SA 914 (A) at 922H-923A, quoted with approval in *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* [2016] ZASCA 157 at para 8.

³ *Gollach* (n 2 above).

[28] Mr Dolgoy meets none of these requirements. The evidence shows that, contrary to his claims, he knew exactly what he was signing. He negotiated the terms. His claim to the contrary is simply false. His supposed error – that he did not think he should be liable – goes to the merits of the dispute and cannot be a basis for rescission. And the Applicants could not have anticipated that, having negotiated an agreement with Mr Dolgoy, he did not know what he was signing. His explanation for why he did not understand he was signing a settlement agreement is, in light of the correspondence, an obvious fabrication.

[29] The application for rescission must therefore fail. I do not deem it necessary to consider whether there was, in any event, good cause to rescind. Mr Dolgoy would have needed to establish good cause in addition to *justus error*. As I have found he has established neither, it is not necessary to consider whether there was good cause.

Contempt

[30] There are four requirements for contempt: (a) an order of court; (b) knowledge of the order; (c) non-compliance with the order; and (d) willfulness or bad faith.⁴ The Applicants must establish the first three.

[31] There was an order, and it was provided to Mr Dolgoy shortly after it was granted. There is no debate that Mr Dolgoy has not complied with the order. First, he did not pay the amounts owing.⁵ Second, he did not transfer the Swirl shares.

⁴ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 42.

⁵ Usually parties do not bother seeking contempt for the failure to pay money in terms of court order. It is not constitutionally permissible to imprison someone for the failure to pay (*Coetzee v Government of*

[32] Mr Dolgoy bears the evidentiary burden to establish that his non-compliance was not wilful or in bad faith.⁶ Although the Applicants initially proposed imprisonment, that was not pursued, and I did not consider imprisonment at this stage. The standard of proof is therefore the ordinary one in civil proceedings – a balance of probabilities.⁷

[33] Mr Dolgoy has hopelessly failed to meet that standard. Mr Dolgoy never says he is unable to pay. His explanation for his failure to pay is that he was not aware he had an obligation to do so, because he was not aware of the settlement agreement or the court order. That is a lie. He knew about the settlement agreement. He knew what it required him to do. He knew it had been made an order of court. His attempt to wriggle out of his obligations by lying about what he knew compounds his bad faith, it does not excuse it.

[34] His explanation for his failure to transfer the Swirl shares is different. He says he does not own them. But he gives two different versions. In his 27 January 2023 letter, he claims that he negotiated deals for Swirl, and was going to receive shares, but that did not materialise. But in his affidavit, he alleges the shares are held by a family trust. I do not see how both versions can be true – if he was earning shares through commissions, why would they ever be owned by a family trust?

the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others [1995] ZACC 7; 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC)), and the ordinary remedies of execution are therefore far more effective means to extract payment. But that does not mean that the failure to pay amounts owing – especially when the party agreed to do so – cannot justify a declaration that the person is in contempt.

⁶ *Fakie* (n 4 above) at para 42.

⁷ *Ibid.*

[35] Assuming they are held by the family trust, Mr Dolgoy never explains whether this was the case when he concluded the settlement agreement, or whether they were transferred to the Trust only after the settlement was concluded, in order to avoid compliance. He provides no share certificates or member registers to establish his claims. Nor did he provide any evidence about the nature of the Trust, his role in the Trust, or proof that it is a true trust and not an alter ego.

[36] Mr Dolgoy has failed to displace his evidentiary burden to show that his failure to transfer the shares was not wilful or in bad faith. There are a number of possibilities. He is lying, and he does in fact own the shares. He did own the shares when the agreement was concluded, but subsequently transferred them to a trust. The Trust is his alter ego. Or, he never owned the shares and lied about his ownership to induce the agreement. It is impossible to know which is true. Only the last might lead to a finding he was not in contempt, although it would mean he had fraudulently induced the settlement agreement.

[37] As the burden was on Mr Dolgoy to show that his failure to perform was in good faith, or that performance was impossible, and as he has not provided sufficient evidence to discharge that burden, I found he is in contempt on this score as well.

[38] I therefore made a declaration that Mr Dolgoy was in contempt. I also afforded him an opportunity to purge his contempt by complying with his obligations. He could either pay the money owing, or transfer his shares in Swirl within one month. Either would purge his contempt. As I made no punitive order, the purging would have not other practical effect than to remove the moral stain that accompanies a civil declaration of contempt.

The Remedy

[39] While I conclude that Mr Dolgoy failed to establish he did not act wilfully or in bad faith, there is no clarity about who in fact owns the Swirl shares. An order compelling him to transfer the shares, without more, might be a *brutum fulmen*, something courts must avoid.⁸

[40] For that reason, the Applicants suggested, and I granted, a rule nisi. The rule requires that any interested party show cause why an order should not be made compelling Mr Dolgoy to transfer all shares he and/or the Trust hold in Swirl to the Applicants, and authorizing the Sheriff to effect the transfer if he fails to do so. The order must be served on Swirl and on the trustees of the Trust. Mr Dolgoy indicated in court that he would provide the trustees' details to the Applicants.

[41] The purpose is, hopefully, to establish with clarity who owns the Swirl shares, and whether it is possible for them to be transferred to the Applicants, as the Order requires. If it is, the rule will be confirmed. If it is not, the Court considering the matter on the return date of the rule will have to determine how to proceed. But should have better information about who owns the Swirl shares than I did.

[42] Finally, I determined that Mr Dolgoy should be liable for the costs of the application. Given his conduct both as a contemnor, and his patent dishonesty with the Court, I determined that those costs should be paid on a punitive scale.

[43] Those, then, are the reasons for my order on 21 November 2023.

⁸ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC).

M J BISHOP
Acting Judge of the High Court

Counsel for Applicants:
Attorneys for Applicants

Adv DM Robertson
STBB

Counsel for Second Respondent:

In person