

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 2023-027536**

**DELETE WHICHEVER IS NOT APPLICABLE**

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

  
**Judge Dippenaar**

In the matter between:

**SWAT SOS 247 (PTY) LTD T/A SOS SA  
ALEX GAGIANO  
LEANDRO GAGIANO**

**FIRST APPLICANT  
SECOND APPLICANT  
THIRD APPLICANT**

**AND**

**LUCINDA JONES**

**RESPONDENT**

**Neutral Citation:** *Swat SOS 247 (Pty) Ltd t/a SOS SA and Others v Lucinda Jones* (Case No: 2023-027536) [2023] ZAGPJHC 323 (18 April 2023)

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## JUDGMENT

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**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 18th of APRIL 2023.

**DIPPENAAR J:**

[1] The applicants, by way of urgent application seek relief against the respondent based on contempt of a court order granted on 12 April 2022 under case number 2022-325 ("the 2022 order"), permanent alternatively interim interdicts against the respondent, together with ancillary relief. The interdictory relief is aimed at protecting the first applicant's confidential business information and the personal information of the second and third applicants. At the hearing, the applicants sought attenuated relief and interim interdictory relief only.

[2] The respondent is a former employee of the first applicant. The second and third applicants are both involved in the business of the first applicant. Various disputes have arisen between the parties since January 2022. Amongst others, various criminal charges have been laid against the respondent and the parties have litigated in various forums.

[3] The trigger to the present application lies in information provided by a Mr Francois van Wyk to the applicants pertaining to the actions and conduct of the respondent. As part of the founding papers, Mr Van Wyk provided an extensive supporting affidavit dealing with his interactions with the respondent.

[4] The application is opposed by the respondent who challenges its urgency and disputes the application on its merits.

*Urgency*

[5] Having considered the papers and the arguments advanced by the respective parties, I am persuaded that the applicants have made out a proper case for urgency for the matter to be entertained on the urgent court's roll. The applicants have set out their grounds of urgency with sufficient particularity to comply with r 612(b). I am further persuaded that the applicants have illustrated that they will not obtain sufficient redress at a hearing in due course,<sup>1</sup> considering the risk of ongoing harm in the face of the respondent's conduct.

[6] On her own version the respondent considers her conduct lawful and she has given no indication that she will desist therefrom. The respondent has further failed to provide any undertakings to the applicants. It is well established that where the defiance of a court order is of an ongoing nature, it underscores the urgency of an application.<sup>2</sup>

[7] Considering the facts and the substantive evidence provided by the applicant's witness, Mr Van Wyk in an extensive affidavit attached to the founding papers, it cannot be concluded that the applicants delayed in the launching of the application for some five months or that the urgency is self-created, as contended by the respondent. Moreover, the applicants explain that the threat of a contempt application during November 2022 pertained to other breaches of the 2022 order.

[8] Prior to considering the merits there are a number of issues which require determination.

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<sup>1</sup> East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) paras [6]-[7]

<sup>2</sup> Secretary, Judicial Commission of Enquiry into Allegations of State Capture v Zuma and Others 2021 (5) SA 327 (CC) ("Zuma") par 31 and the authorities quoted therein.

*Amendment*

[9] At the hearing, the applicants sought an amendment of the citation of the first applicant in the headings of the application papers by the deletion of the registration number 2016/394855/07 and the substitution thereof with the registration number 2017/021945/07.

[10] That application is opposed by the respondent. The applicants in their replying affidavit explain that the wrong company registration number was inadvertently provided by the second applicant in error, the deponent to their affidavits to their attorneys which resulted in the incorrect registration number being reflected on their papers. The respondent relied on such incorrect registration number in raising various points *in limine* to which I later return.

[11] I am persuaded that it is in the interests of justice for the amendment to be granted so that the application can be determined on its true facts. The respondent did not seek leave to lead any countervailing evidence to the explanation tendered by the applicants. On the respondent's own version, she had been employed by the first applicant and the respondent would not be prejudiced by the amendment.

*The various points in limine*

[12] The respondent further raises three points *in limine* challenging the *locus standi* of the applicants, mainly predicated on the first applicant's registration number being reflected as 2016/394855/07, which belongs to an entity styled "Ace Risk Management" and on the contention that the third respondent who was not a party to the proceedings under case number 2022-325, lacks *locus standi*. The respondent seeks the dismissal of the application together with a punitive costs order.

[13] In turn, the applicants *in limine* challenge the respondent's answering affidavit on the basis that the commissioner of oaths who had commissioned the respondent's answering affidavit is the spouse of the respondent's attorney of record and thus lacks independence. It is also contended that the male deponents to the confirmatory affidavits attached to the respondent's answering affidavit were not present when the affidavits were commissioned because their gender was in each instance, incorrectly reflected as female by use of the word "she". It is argued that the answering affidavit should be disregarded.

[14] It is apposite to deal with the applicants' point *in limine* first. Reliance is placed by the applicants on regulation 7(1) of the Regulations Governing the Administering of an Oath or Affirmation promulgated under s 10 of the Justices of the Peace and Commissioners of Oaths Act,<sup>3</sup> which expressly prohibits the commissioner of oaths from administering an oath or affirmation relating to matter in which he/she has an interest and is peremptory.

[15] Reliance is further placed on *Radue Weir Holdings Ltd/t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers*<sup>4</sup> ("*Radue*") in arguing that any purported affidavit that does not comply with the provisions of regulation 7(1) can and should be disregarded.

[16] The commissioner of oath in the answering affidavit identifies herself as: "Esme Dempsey (Kok) CA (SA) 20052831". No address is provided but the abbreviation "RSA" is included.

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<sup>3</sup> 16 of 1963 as amended

<sup>4</sup> 1998 (3) SA 677 (E) at 680 C-E and the authorities cited therein, 681G/H

[17] Whilst the failure to provide a business address lacks compliance with regulation 4(2)(a), this of itself does not render the commissioning fatally defective nor justifies the affidavit to be disregarded.

[18] It is trite that a commissioner of oaths who attests affidavits is required to be impartial, unbiased and entirely independent of the office where the affidavit is drawn. Such interest is not only pecuniary or proprietary. The principle is also linked to the evidentiary rule that an affidavit is inadmissible if the affidavit is attested to by an attorney who is the attorney for a litigant whose affidavit is to be used in the litigation.<sup>5</sup> The rule has been extended to exclude not only the attorney of record but also partners and candidate attorneys in the firm of attorneys and attorneys who act in association with the attorney of record of the litigant.

[19] The object for the rule in practice is:

*“to prevent an attorney from drawing up a petition and putting, as it were, the words of the petition in the mouth of a client, and then himself taking the oath of the petitioner to that petition. The reason for the rule appears to me to be that a person attesting an affidavit is required to be unbiased and impartial in relation to the subject-matter of the affidavit. If his position is such that this qualification is prima facie absent there is a danger that he may have influenced the deponent in relation to the subject matter of the affidavit”.*<sup>6</sup>

[20] The applicants could not refer me to any authority which extends the interest referred to in regulation 7(1) to the existence of a personal relationship between a litigant's attorney and the commissioner of oaths.

[21] The mere existence of a personal relationship as spouses, in circumstances where the commissioner of oaths is a chartered accountant and not an attorney in any way involved with the practice of the respondent's attorney of record, Mr Kok, does not of itself constitute an interest as envisaged by regulation 7(1) nor fall foul of the object of the rule,

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<sup>5</sup> Radue fn 2 supra, 679 H-682

<sup>6</sup> Whyte's Stores v Bridle NO, Harris NO and Waterberg Farmer's Co-op Society and Others 1936 TPD 72, quoted in Radue 680

given that the relationship between them is of a personal rather than a professional nature.

[22] The applicants did not place any additional facts before this court from which the conclusion can reasonably be drawn that the commissioner of oaths has a direct or indirect interest in the practice of Mr Kok as envisaged by regulation 7(1) or the applicable authorities. It would however be a salutary practice if any potential issue is avoided.

[23] Similarly, the inference sought to be drawn by the applicants that the supporting affidavits were not signed in the presence of the commissioner of oaths as required by regulation 3(1) is not justified purely on the basis that the commissioner of oaths did not replace the reference from “she” to “he”. No cogent primary facts were produced which could justify such a conclusion.

[24] It follows that the applicants’ point *in limine* must fail and that their contention that the opposing and supporting affidavits should be disregarded *in toto*, cannot be sustained.

[25] The points *in limine* raised by the respondent are primarily premised on the contention that the applicants lack *locus standi* and that there has been a misjoinder of the first applicant. It is argued that the registration number provided pertains to an entirely different entity and that a registration number “stands as the identity of a company”. It is argued that this is not a mistake in the description of the first applicant but rather that the affidavits refer to a non-existing company. The second point *in limine* is primarily predicated on the first.

[26] The first point *in limine* underpins the argument. The respondent’s contention that there was no mistake in the description of the first applicant focuses entirely on the registration number provided and disregards the description of the name of the first applicant. It was argued that in motion proceedings, the applicant cannot amend its affidavits. That much is trite and is common cause.

[27] The argument however disregards the unchallenged evidence of the second applicant that the wrong registration number was erroneously provided and the issue was explained in reply. A court must not ignore the true facts nor consider the matter with an undue formalistic approach. It is undisputed from the papers that the first applicant was the employer of the respondent and that the parties all agreed this to be the case. The identity of the first applicant is clear.

[28] There is thus no merit in the respondent's contention that the deponent to the applicants' papers presented evidence regarding a company that does not exist or that the company before the court is Ace Risk Management. I have already concluded that the applicants should be allowed to correct the description of the first applicant as the amendment seeks to do.

[29] There is thus no merit in the respondent's contention that the first applicant does not enjoy *locus standi* and that it has been mis-joined to these proceedings. It also does not follow that, as the 2022 order only relates to the first applicant, there is no basis for the contempt proceedings against the respondent.

[30] In her second point *in limine*, the respondent contends that the second respondent has no *locus standi* as she cannot be a director of the first respondent given that the first respondent does not exist, has no *locus standi* or has been mis-joined. The grounds advanced as similar to those raised in relation to the first point *in limine*.

[31] I conclude that there is no merit in this argument. I have already dealt with the position of the first applicant. The respondent's argument further disregards that the second applicant is contending for an interest in her own right, given that her personal information has found its way into the possession of the respondent and that she was a party to the proceedings which culminated in the 2022 order.



[32] The respondent's third point *in limine* is that the third applicant has no direct and substantial interest in this application and was not a party to the proceedings which resulted in the 2022 order. On that basis it is argued that the third respondent lacks *locus standi* to seek contempt relief. It is argued that the third applicant's interest in the application is "not ring fenced".

[33] Whilst the third respondent may not seek any contempt order, the argument disregards that the third applicant is asserting his rights in relation to his own personal information in relation to the interdictory relief sought. There is thus no merit in the contention that he lacks *locus standi* in the present proceedings or that his interest should be "ring fenced".

[34] It follows that the respondent's points *in limine* must fail.

[35] In relation to the issue of costs pertaining to these issues, they were dealt with in argument together with the merits and did not prolong the proceedings unduly. Those costs are to be costs in the cause in the application and it is not necessary to make a separate costs order in relation thereto.

#### *The merits*

[36] The two central issues to be determined relate to whether the respondent should be incarcerated pursuant to her contempt of the 2022 order and whether the applicants have established the requirements for interim interdictory relief.

[37] The papers are replete with factual disputes on multiple issues. The respondent's papers are filled with bald denials and internal and external contradictions on certain issues, notably regarding her possession of the respective applicants' personal information, her interactions with Mr Van Wyk and whether she breached the 2022 order and is in contempt thereof. In various respects, the respondent did not present

countervailing evidence to the averments of the applicants and their witness, Mr Van Wyk and did not meaningfully grapple with the evidence presented.

[38] Neither of the parties requested a referral to oral evidence or trial. Instead, the applicants, relying on *Wightman*,<sup>7</sup> argued that the respondent's version should be rejected on the papers as palpably false and untenable and that her version did not raise *bona fide* factual disputes.

[39] The respondent on the other hand contended that the applicants resorted to speculation and conjecture in relation to their contempt allegations and failed to provide substantiating proof of their averments in relation both to the contempt and interdictory relief sought.

[40] In my view, it is not necessary to resolve all the factual disputes on the papers, nor is it possible to do so. Although I agree with the applicants that the respondent's version is in various respects untenable, her version cannot be rejected in its totality. Rather, it should be considered in relation to the central issues raised in this application. It can also not be concluded that the applicants' version is based on speculation and conjecture. The facts must be considered in determining whether the applicant has made out a proper case for the relief sought.

[41] The respondent further argued that the applicants relied on hearsay evidence, specifically in relation to Mr Van Wyk, who is not a party to the application. This contention lacks merit, given that Mr van Wyk provided an extensive affidavit which was in various respects not meaningfully addressed or challenged by the respondent in her affidavit. It is well established that a party can rely on the evidence of any witness relevant to the issues which arise in an application and is not constrained to only advance evidence of the parties to the application.

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<sup>7</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) paras [12]-[13]

### *Contempt*

[42] The requirements for civil contempt are well settled in our law.<sup>8</sup> These requirements are: (i) an order must exist; (ii) it must be duly served on or brought to the notice of the contemnor; (iii) there must be non-compliance with the order; (iv) the non-compliance must be willful and *mala fide*.

[43] Once an applicant has proved the existence and service of the order and its non-compliance, the contemnor bears an evidential burden to present evidence in relation to willfulness and *mala fides* which casts reasonable doubt on whether his non-compliance with the order was willful and *mala fide*.<sup>9</sup> Where the applicant seeks a committal order, such as in the present instance, the applicable standard is that willfulness and *mala fides* must be established beyond a reasonable doubt.<sup>10</sup> I accept that this standard applies in the present application.

[44] The existence of the 2022 order of 12 April 2022 is undisputed. On the respondent's own version, she was provided with a copy of the said order after her arrest on 20 April 2022 and is aware of the order and its contents. The applicants have thus established the first two requirements.

[45] Regarding the third, being the breach of the order, the applicants' case in sum is that the respondent breached paragraphs 2.3 and 2.5 of the 2022 order. Although the notice of motion refers only to clause 2.5, the founding affidavit refers to both paragraphs 2.3 and 2.5 and the notice of motion and founding affidavit must be read together.<sup>11</sup> Their case is that the applicant during late April 2022, after the granting of the 2022 order, incited investigations into the first applicant and its management through the medium of

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<sup>8</sup> Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA); Phoko & Others v Ekurhuleni City 2015 (5) SA 600 (CC); Matjhabeng Municipality v Eskom Holdings Ltd & Others; Mkhonto & Others v Compensation Solutions (Pty) Ltd 2018 (1) SA 1 (CC) ("Matjhabeng") paras [67] and [85]-[88]; Zuma fn 4 *supra*

<sup>9</sup> Matjhabeng *supra* para [63]

<sup>10</sup> Matjhabeng *supra* para [67]

<sup>11</sup> Betlane v Shelly Court CC [2015] JOL 34003 CC par 29

Mr van Wyk. In so doing, it is contended that the respondent breached paragraphs 2,3 and 2.5 of the 2022 order.

[46] It was argued on behalf of the respondent that the applicants failed to prove that the respondent incited parties to launch investigations against the first applicant or that she is in breach of the 2022 order. It was argued the order referred to “unnecessary” investigations and the applicants had not proved the investigations were unnecessary. Lastly, it was argued that insofar as the respondent breached the 2022 order, she did not commit any breach deliberately and *mala fide*.

[47] The applicants’ case is substantially corroborated by Mr Van Wyk. According to Mr Van Wyk the respondent met him during late April 2022 and instructed him to investigate the allegations contained in the respondent’s hand written statement dated 29 January 2021 (“the statement”). The statement contains allegations pertaining to the first applicant and its management. From the uncontested evidence, it appears that the statement was prepared by the respondent during 2022 rather than 2021 after the termination of her employment with the first applicant. The statement formed a central feature in the proceedings which resulted in the 2022 order.

[48] The respondent’s version in her answering affidavit is contradictory in various respects. By way of example, she initially contended that she was only introduced to Mr Van Wyk after 20 April 2022 and that he represented himself to be a part of Crime Intelligence and a private investigator. Her version was that Mr van Wyk looked at the statement and requested information that could support those allegations, whereupon she down loaded all the information on an allegedly corrupt hard drive and handed it to him on a memory stick. Later in her answering affidavit, the respondent avers that she handed the memory stick to Mr van Wyk before 12 April 2022. The affidavit is also contradictory in that the respondent initially refers to one copy she made of the hard drive whereas she later avers she had given out two copies of the hard drive, one to Mr van Wyk and the other to SAPS/PSIRA.

[49] Significantly, it is not disputed that Mr van Wyk investigated the allegations in the statement in order to find proof of the allegations. The respondent's version was not that she had laid criminal charges with the SAPS or that a docket had been opened, supporting any official investigation. Reliance was only placed on the discredited statement that had already featured in the proceedings under case number 2022-325. On the respondent's own version, she contends that her urging of further investigations into the first applicant is allegedly lawful and does not constitute a breach of the 2022 order. She suggests that any further investigations she may instigate into the first applicant will be lawful so that a court cannot stop her from doing so.

[50] Further, it is common cause that Mr van Wyk was provided with a copy of more than a terabyte of information contained on the hard drive in the form of a USB stick. That information included a substantial amount of the applicants' private information. It was further not disputed that the respondent paid Mr Van Wyk R4000 for such investigations. According to Mr Van Wyk, the respondent still owes him for disbursements made to other third parties who illicitly intercepted certain communications and that she had queried whether she received value for the services rendered by him. Whilst the respondent disavowed any involvement with illicit activities, she did not address Mr Van Wyk's averments in detail, in circumstances where the respondent has personal knowledge of her interactions with Mr Van Wyk.

[51] The respondent's version concerning her interactions with Mr Van Wyk is contradictory and vague in various respects. The respondent has in my view failed to seriously and unambiguously address all the facts set out in the applicants' founding papers and in the affidavit of Mr van Wyk. These facts necessarily fall within the respondent's knowledge and the respondent has failed to provide any cogent countervailing evidence. The bare denials contained in the respondent's answering affidavit further lack a factual basis why the veracity or accuracy of Mr van Wyk's statements are disputed.

[52] In argument, when confronted with the respondent's failure to address all the applicants' allegations, including those of Mr Van Wyk, reliance was placed on a blanket denial of any averments not addressed in the answering affidavit. That does not assist the respondent.

[53] Given the undisputed fact that the respondent paid Mr van Wyk for his services, her averment that she was approached by Mr van Wyk does not bear logical scrutiny, is untenable and can be rejected on the papers.<sup>12</sup>

[54] In terms of the 2022 order, paragraph 2.3 interdicts the respondent from contacting the applicants by means of third parties, save through their respective attorneys of record, or by inciting third parties to contact the applicants whether in person or any other means, including social media. Paragraph 2.5 interdicts the respondent from contacting various institutions, including SAPS and PSIRA to further incite these parties to launch unnecessary investigations against the first applicant on allegations made by the respondent and any third party incited by her.

[55] Considering the facts, the applicants have in my view established a breach of the 2022 order and specifically paragraph 2.5 thereof.

[56] Where willfulness and *mala fides* are presumed, it must next be considered whether the respondent has met the evidentiary burden to rebut such inference.<sup>13</sup> Put differently, whether the respondent has presented evidence to establish a reasonable doubt as to whether her non-compliance with the 2022 order was wilful and *mala fide*.<sup>14</sup> If not, contempt will be established beyond a reasonable doubt.

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<sup>12</sup> *Soffiantini v Mould* 1056 (4) SA 150 (E), *Truth Verification Testing Centre v PSE Truth Detection CC and Others* 1998 (2) SA 689 (W)

<sup>13</sup> *Zuma* fn 4 *supra* par [37]

<sup>14</sup> *Zuma* para [41]

[57] The applicants argue that the respondent has failed to provide a reasonable explanation and has failed to discharge her evidentiary burden to rebut willfulness and mala fides. It is argued that the respondent should have foreseen that her instructions to Van Wyk to investigate various police officials, staff of the first applicant and the first applicant itself, would by necessity have engaged the SAPS by requesting further investigations into her previously discredited allegations and she should have appreciated the risk that she would be breaching para 2.5 of the 2022 order by giving such instructions. It is argued that this indicates that the respondent had the intention of breaching the order and attempted to prevent detection by inserting a third party, Mr Van Wyk. It was argued that the fact that the respondent sought to insert a third person between herself and the SAPS, evidences an appreciation on the part of the respondent that her conduct would breach paragraph 2.5 of the 2022 order. It is further argued that by handing Mr van Wyk the same statement that had been discredited in the 2022 application, the respondent must have appreciated that her conduct amounted to the selfsame wrongful conduct which paragraph 2.5 of the order sought to interdict. It is further argued that if it is demonstrated that the respondent had subjectively foreseen the risk of the 2022 order being breached, as they contend, the onus rests on her to negative the inference of *dolus eventualis*.<sup>15</sup>

[58] The respondent on the other hand argues that even if it is found that she breached the 2022 order, her conduct is not willful and *mala fide* as she was *bona fide*. Reliance is placed on the principle in *Facie*<sup>16</sup> that:

*“a deliberate disregard of a court order is not enough since the non complier may genuinely, albeit mistakenly believe ...herself to be entitled to act in the way claimed to constitute contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide”.*

[59] The respondent contends that the 2022 order deprives her of protection under s 205 of the Constitution 1996 and disregards her constitutional rights and actions. It is

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<sup>15</sup> HEG Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others 2000 (1) SA 507 (C) at 518 E/F-519A/B

<sup>16</sup> *Facie*

contended that the 2022 order limits all actions and not only unlawful actions. On this basis it is contended the order is unconstitutional. She contends that she genuinely believed she is entitled to work with and cooperate with SAPS and was approached by SAPS and PSIRA rather than her approaching them.

[60] In her answering affidavit, the respondent criticises the 2022 order in strident terms, calling it “unjustified” and “unconstitutional”. The respondent further states in her answering affidavit:

*“I further find it disgusting that this court will give an order that will prevent me from approaching SAPS, even on matters concerning SOS or the second applicant.... The second applicant further tries to make out the case that I incited Mr Francois van Wyk to launch unnecessary investigations into SOS and herself. She failed to both show that Mr Francois Van Wyk was incited to launch any investigation into SOS or herself, and failed to show that such investigation was unnecessary”*

[61] Notwithstanding such criticism, the respondent has taken no steps to have the 2022 order set aside, despite on her version having been in possession of it since 20 April 2022. In bald terms, it is averred that she intends to do so in due course. This vague contention does not avail her, given that the respondent has remained supine for almost a year.

[62] The respondent’s view is misguided in the extreme. It is trite that court orders are valid and binding until set aside<sup>17</sup> and it is not open to the respondent to simply disregard the 2022 order based on her personal view that it is “unconstitutional” and “disgusting”.

[63] Moreover, from the respondent’s own evidence, there is no indication that she intends abiding by the 2022 order. Rather her evidence indicates a contrary intention and a view that the order is not binding on her as the order “cannot prevent lawful actions”. The respondent’s refusal to comply with the 2022 order is objectively viewed, unreasonable.

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<sup>17</sup> Culverwell v Beira 1992 (4) SA 490 (W) at 494 A-D



[64] Willful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. As held in *Matjhabeng*:<sup>18</sup>

*“The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority”*

[65] The respondent’s own *ipse dixit*, evidences such unlawful disdain for judicial authority and militates against her bona fides. Such conduct is regrettable and can and should not be countenanced.

[66] Proof of *bona fides* raised in justification of the contempt will serve as a defence to an application for committal in the case of direct contempt. The evidentiary burden to prove *bona fides* rests squarely on the respondent.<sup>19</sup>

[67] Considering the facts, it cannot in my view be concluded that the respondent has discharged the evidentiary burden to cast reasonable doubt on her conduct being wilful and *mala fide* in breaching the 2022 order. Her own version militates against her *bona fides* and the conclusion that reasonable doubt exists.

[68] I conclude that the requirements for contempt have been established.

[69] The applicants seek a custodial sentence of direct imprisonment. It is argued that the respondent has not shown any remorse for her non-compliance with the 2022 order and the 2022 order did not have a chilling effect on her “malevolent actions”. It is argued that a coercive order will serve no practical effect and that a punitive sanction would be the most appropriate as even suspension of such order would not persuade the respondent to respect court orders.

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<sup>18</sup> Fn 1 supra paras [48] and [50]

<sup>19</sup> Zuma para [43]

[70] I do not agree. In my view, deprivation of the respondent's liberty should be a last resort. In *Fakie Cameron JA* cited with approval the dictum in *Cape Times Ltd v Union Trades Directories (Pty) Ltd*,<sup>20</sup> wherein it was held:

*"Generally speaking, punishment by way of fine or imprisonment for the civil contempt of an order made in civil proceedings is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such punishment".*

[71] In the present instance, it would be appropriate to rather impose a coercive sentence to obtain enforcement with the terms of the 2022 order.

[72] Were the respondent to persist in her conduct, it is open to the applicants to approach a court for a custodial sentence.

[73] Considering the respondent's scurrilous and unwarranted criticism of the 2022 order, it would further be appropriate to mulct the respondent in a punitive costs order to reflect disapproval at the stance adopted by the respondent.

#### *Interdictory relief*

[74] At the hearing, the applicants persisted with interim interdictory relief only and indicated an intention to institute proceedings for final interdictory relief. In considering the applicant's claim for interim relief, the principles in *Webster v Mitchell*<sup>21</sup> apply.

[75] The requirements for interim interdictory relief are trite. They are: (i) a *prima facie* right, although open to some doubt; (ii) an injury actually committed or reasonably apprehended; (iii) a favourable balance of convenience; and (iv) the absence of any other satisfactory remedy available to the applicant.

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<sup>20</sup> 1956 (1) SA 105 N at 120 D-E

<sup>21</sup> 1948 (1) SA 1186 (W) 1189

[76] The applicants' case is that the respondent is in possession of a substantial amount of their personal and confidential information as particularised in their founding papers.<sup>22</sup> It is common cause that she is no longer employed by the first applicant. No version is proffered as to any entitlement on the part of the respondent to be in possession of any such information.

[77] The respondent does not dispute that she is in possession of such information but rather seeks to proffer an explanation of how she came into possession of the information. Her own version is internally contradictory and the chronology of events does not support her version. The respondent further did not dispute that she copied the information on the hard drive and her version is inconsistent as to how many copies she made.

[78] The respondent's version is characterised by bald denials and the bald contention that she is not in possession of anything belonging to or associated with the first respondent. The respondent in bald terms avers that the hard drive on which the information was contained has been corrupted and was thrown away by her father.

[79] Although the respondent contends that the hard drive was destroyed after information was successfully copied therefrom despite the hard drive "being corrupted", her version regarding copying of the documents from a corrupted hard drive is farfetched and untenable and can be rejected on the papers. No cogent evidence of an expert nature was presented that this is possible.

[80] For present purposes it is not necessary to determine all the factual disputes on the papers. Suffice it to state that the respondent's version does not raise a *bona fide* and serious dispute of fact on the papers as to the existence of the applicants' *prima facie* rights.

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<sup>22</sup> Meter Systems Holdings Ltd v Venter and Another 1993 (1) SA 493 (W) pertaining to what is confidential information

[81] Moreover, following the approach adopted by Malan J in *Johannesburg Municipal Pension Fund*,<sup>23</sup> the applicants' claims are not frivolous or vexatious, there is some prospects of success and there is a serious claim to be tried, which is sufficient to constitute a *prima facie* right and justifies the granting of interim interdictory relief.

[82] I conclude that the applicants have illustrated a *prima facie* right to the relief sought.

[83] I am further satisfied that the applicant has illustrated that an injury is being committed or is reasonably apprehended, for the reasons that follow.

[84] The applicant has illustrated a strong *prima facie* quasi vindictory right and thus does not need to show a reasonable apprehension of irreparable harm.<sup>24</sup> In any event I am satisfied that the applicants have illustrated such harm, given the respondent's own advices to Mr van Wyk and the averments made in her answering affidavit.

[85] The respondent's contention on the issue of a reasonable apprehension of irreparable harm is that the applicants cannot prove that she is still in possession of the information. This argument does not bear scrutiny, given the bald and unsubstantiated allegations in her affidavit and the inconsistencies in the respondent's own version pertaining to how many copies she made of the information.

[86] Moreover, the respondent did not tender not to utilise any information in her possession, nor tender to return such information to the applicants.

[87] I am satisfied that the facts the applicants have illustrated a reasonable risk of continuing irreparable harm, specifically considering the respondent's own version as to what her views are on the order granted on 12 April 2022. These views illustrate that the

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<sup>23</sup> *Johannesburg Municipal Pension Fund and Others v City of Johannesburg* 2005 (6) SA 273 (W) at 281-282

<sup>24</sup> *BSI Boiler & Steam Installation CC v Executive Toys Commercial (Pty) Ltd* 2016 JDR 0220 (GP) paras 7.1 and 7.2

respondent regards the order as “unconstitutional” and that she has scant respect for its terms.

[88] I turn to consider the balance of convenience. The respondent’s argument that as there is no well-grounded apprehension of irreparable harm there is no balance of convenience to consider, lacks merit.

[89] In considering the balance of convenience, I have applied the test enunciated in *Olympic Passenger Service (Pty) Ltd v Ramlagan*,<sup>25</sup> being the stronger the prospects of success, the less the need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.

[90] The respondent has not contended for any prejudice if the interdictory relief sought is granted. She has further not put up any countervailing evidence for the prejudice contended for by the applicants.

[91] In considering the relevant facts, I conclude that the balance of convenience favours the applicants. The respondent will suffer no prejudice if the interdictory relief sought is granted.

[92] In relation to the existence of an alternative suitable remedy, the respondent contends that the applicants should have arranged a round table meeting to try and amicably resolve the matter. The argument misconceives that there must be a suitable alternative legal remedy. The further argument that the applicants have a damages claim available, also does not bear scrutiny. The applicants are not obliged to wait until

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<sup>25</sup> 1957 (2) SA 382 D

damages are suffered before they seek relief. The applicants are not compelled to wait for damages to be incurred and sue afterwards for compensation.<sup>26</sup>

[93] I am satisfied that the applicants have illustrated that there is no alternative adequate remedy available.

[94] For these reasons I conclude that the applicants are entitled to the interim interdictory relief sought.

[95] There is no reason to deviate from the normal principle that costs follow the result. Considering the conduct of the respondent in relation to the matter and her expressed views in relation to the 2022 order, I am persuaded that a punitive costs order is warranted, as sought by the applicants.

[96] I grant the following order:

[1] The forms and periods of service are dispensed with and this application is heard as one of urgency in terms of rule 6(12);

[2] The applicant's application for leave to amend the headings to the application papers is granted and the registration number in respect of the first applicant 2016/394855/07, wheresoever same appears in the headings to the papers is hereby deleted and substituted with the registration number 2017/021945/07;

[3] The respondent is declared to be in contempt of paragraph 2.5 of the court order granted on 12 April 2022 under case number 2022-325;

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<sup>26</sup> Buthalezi v Poorter & Others 1974 (4) SA 831 (W)

[4] The respondent is directed to comply with the order of 12 April 2022 granted under case number 2022-325 and the terms of paragraph [6] of this order;

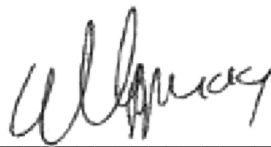
[5] The applicant is granted leave to approach the court on supplemented papers, if deemed necessary, for appropriate relief in the event of the respondent breaching this order or the order of 12 April 2022 granted under case number 2022-325;

[6] Pending the finalisation of an action to be instituted by the applicants against the respondent for permanent interdicts and other relief, the respondent is interdicted and restrained from divulging, disseminating 'or exploiting in any way whatsoever, whether for gain or otherwise, any of the information she had copied onto the memory stick (depicted in annexure "FVW1" to the affidavit of Francois Van Wyk attached to the founding affidavit as "AG7") that belongs to, pertains to or emanates from any of the applicants, including such information as may be contained on any copies that may have been made of the aforesaid information, or contained in any print-outs that had been made of the aforesaid information or any other copies thereof, to any third party;

[7] The order in [6] above shall operate as an interim order with immediate effect;

[8] The applicants are directed to institute the proposed action in [6] above within 30 days of date hereof, failing which the order in [6] shall lapse;

[9] The respondent is directed to pay the costs of the application on the scale as between attorney and client.



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**EF DIPPENAAR  
JUDGE OF THE HIGH COURT  
JOHANNESBURG**

**APPEARANCES**

<b>DATE OF HEARING</b>	<b>: 5 APRIL 2023</b>
<b>DATE OF JUDGMENT</b>	<b>: 18 APRIL 2023</b>
<b>APPLICANT'S COUNSEL</b>	<b>: Attorney. MW Verster</b>
<b>APPLICANT'S ATTORNEYS</b>	<b>: BMV Attorneys</b>
<b>RESPONDENT'S COUNSEL</b>	<b>: Adv. M Luyt</b>
<b>RESPONDENT'S ATTORNEYS</b>	<b>: Rudie Kok Attorneys</b>