IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3171/2016

In the matter between:

GARETH IAN ARNOLD First Applicant

ISIGIDI TRADING 413 CC Second Applicant

and

COLIN BIRD Respondent

ORDER

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[1] In respect of the first applicant's application for condonation for the late filing of his heads and practice note, there will be no order as to costs. The applicants' attorneys of record are not entitled to levy a fee payable by the applicants in respect of the heads of argument, practice note and application for condonation. Such order does not extend to counsel.

The respondent's application for contempt dated 4 July 2017

[2] The first applicant is declared to be in contempt of the order granted by his Lordship Mr Justice Gorven on 21 June 2016.

[3] The first applicant is directed to comply with the order of Gorven J of 21 June 2016 forthwith, pending the finalisation of this application and the action instituted under case no: 3805/2016.

[4] A rule nisi do issue calling upon the first applicant to show cause on affidavit and on the **30th** day of **August 2017** at 09h30 am or so soon thereafter as the matter may be heard, why, having being found to be in contempt of the court order of 21 June 2016:

[4.1] he should not be committed to prison for a period of six (6) months or such other sanction as this Honourable Court deems appropriate;

[4.2] the sanction in paragraph 4.1. is wholly suspended on condition that pending the finalisation of this application, and the action instituted under case no: 3805/2016, he complies with the order of Gorven J of 21 June 2016.

[5] The first applicant is directed to pay the costs occasioned by the contempt application including any reserved costs on an attorney / client scale.

The first applicant's counter-application dated 6 July 2017

[6] In respect of the first applicant's counter-application there will be no order as to costs.

The first applicant's contempt application dated 19 July 2017

[7] In respect of the first applicant's contempt of court application, the application is dismissed with costs.

JUDGMENT

HENRIQUES J

Introduction

[1] This matter concerns applications for contempt by the respondent and first applicant and a counter-application for contempt of court by the first applicant.

Respondent's application for contempt

[2] On 4 July 2016 the respondent, Colin Bird ("Bird") issued an urgent application to be heard on 7 July 2016. The relief as set out in the notice of motion was in the

following terms, namely:

‘1. The forms and service provided in the Uniform Rules of Court are dispensed with, and this matter is heard as one of urgency in terms of rule 6(12).

2. Pending finalisation of the action instituted by the first and second applicants under case no. 3805/16:

2.1 with immediate effect the first applicant is prohibited from exercising any transactional powers or authority at all over account number 6202179708 in his name trading as Steak and Ale held at First National Bank (the FNB account);

2.2 the Sheriff of Verulam is hereby authorised and empowered to exercise the sole transactional powers and authority over the FNB account;

2.3 pursuant to 2.1 and 2.2 the Sheriff of Verulam is directed and ordered, immediately this order is served on First National Bank, to transfer the total amount standing to the credit of the FNB account, less the minimum amount required to keep the FNB account open, to the account of the second applicant no. […] held at Standard Bank (the Standard account);

2.4 every five Court days after the service of this order on First National Bank, the Sheriff of Verulam is ordered and directed to transfer all amounts standing to the credit of the FNB account, less the minimum amount required to keep the FNB account open, to the Standard account.

2.5 with immediate effect the Standard account credit card machines are to be activated, so that all credit card receipts at the Steak & Ale business are credited to the said account to the exclusion of any other account including the FNB account;

2.6 with immediate effect the Sheriff of Verulam is to take possession and retain possession of the credit card machines which credit the FNB account with any of the credit card receipts at the Steak & Ale business, and the first applicant is ordered and directed to hand these credit card machines to the Sheriff;

2.7 with immediate effect the first applicant is prohibited from receiving or in any way handling or dealing with any of the cash received from

customers of the Steak & Ale business, or giving instructions to any person in connection with or related thereto;

2.8 with immediate effect all cash received from customers of the Steak & Ale business is to be received by a person/s nominated by the respondent, which person will be in attendance at the business during all opening hours, and will be deposited the next business day into the Standard account. The costs of the persons who will be in attendance will be borne by the second applicant.

2.9 the first applicant is ordered and directed to immediately this order is granted, to call on his attorneys Maharaj Attorneys to account to him for all money received by them from 1 April 2016 to date of this order, and for all fees and disbursements, and to instruct that firm to pay the surplus into the Standard account.

3. The first applicant is committed to jail for a period of six months for his contempt of this Court.'

[3] Abridged time limits were provided in the notice of motion for the delivery of the notice to oppose and filing of any answering and replying affidavits.

First applicant's counter application for contempt

[4] On 6 July 2016, the first applicant in response to such application instituted a counter-application for contempt, enrolled for hearing simultaneously with the respondent's contempt application. The order foreshadowed in the counter-application was the following:

'1. That a Rule *Nisi* do hereby issue calling upon the Respondent to show cause, if any, on the _____ day of July 2016 at 09h30 or so soon thereafter as the matter may be heard, why an Order in the following terms should not be made:

1.1 Pending the finalisation of the action instituted by the First and Second Applicants under Case No: 3805/2016:

1.1.1 the Respondent is directed to forthwith provide the First Applicant with the login details and transactional access to the Standard Bank Account of the business Steak & Ale under Account No. […] ("the Standard Bank account") in order for the First Applicant to transact on the Standard Bank Account for ordinary legitimate business of the business of Steak & Ale of the Second Applicant;

1.1.2 upon the First Applicant obtaining transactional access to the Standard Bank Account as aforesaid, the First Applicant is directed to close the First National Bank Account of Steak & Ale under Account No. […], and to transfer the balance standing to the credit of that account to the Standard Bank Account.

2. That the Orders contained in paragraph 1.1 above operate with immediate effect pending the return day of the Rule or any further extension thereof.

3. That the Respondent pay the costs of this counter-application.'

[5] It is necessary to set out a brief history of the matter which resulted in the issuing of the orders which form the subject matter of the contempt applications. The various court orders issued are as a result of a dispute between the parties which is the subject matter of a pending action instituted under case no: 3085/2016.

[6] The action concerned whether or not the first applicant and the respondent were partners in a business, the Steak & Ale, or whether the first applicant held the business as a nominee for the respondent, alternatively whether or not the first applicant was an employee and manager of the business.

[7] To set out what precipitated the initial order in the litigation between the

parties, and in light of the fact that this forms the subject matter of the action, I borrow freely from the respondent's heads of argument cognisant of the fact that these allegations are disputed by the first applicant. The respondent alleges that he purchased a restaurant and bar in Umhlanga known as the Steak & Ale and employed the first applicant as manager thereof, it being common cause that the respondent was the sole member of the second applicant. Ownership of the Steak & Ale was acquired using the identity of the second applicant.

[8] The respondent subsequently transferred one hundred per cent of his share in the second applicant to the first applicant and required the first applicant to conclude a lease for the premises on which the Steak & Ale is situated in his name as well as to acquire the liquor license in his name to comply with the KwaZulu-Natal Liquor Licensing laws. The reason for doing so was as the respondent was a citizen of the United Kingdom and a non-resident of South Africa. As far as the respondent is concerned, he remained the sole beneficial owner of the members' interest in the second applicant and all financial affairs were managed by him.

[9] The respondent alleges that unbeknown to him, the first applicant siphoned off a significant amount of cash generated by the business in excess of R 100 000, as a consequence of which the respondent is intent on removing the first applicant from the business and also recovering monies due to the second applicant.

[10] The first applicant in an attempt to thwart such removal by the respondent instituted an urgent application and obtained an *ex parte* order on Saturday, 2 April 2016 before his Lordship Mr Justice Lopes. The effect of the order was to interdict

the respondent from taking control of the business and removing the first applicant therefrom on the basis of an alleged *en commandite* partnership in respect of the Steak & Ale.

[11] Lopes J granted a rule nisi returnable on 22 April 2016 in terms of which the first applicant was vested with the sole management and control of the business of the second applicant being the Steak & Ale, and Bird was prohibited from doing anything which directly or indirectly intruded on the management and control of the Steak & Ale.

[12] Among the allegations contained in the answering affidavit filed by the respondent related to the first applicant opening a new bank account into which monies of the second applicant and income derived from the Steak & Ale were diverted. The respondent averring that the internet access authority which the first applicant had to the second applicant's bank account at Standard Bank was limited to R 100 000 prior to the alleged diversion of funds to a First National Bank account. Simultaneously, with filing an answering affidavit anticipating the return date of the rule nisi of 2 April 2016, the respondent filed a counter-application together with a founding affidavit.

[13] On 13 April 2016, the application and counter-application were adjourned to 20 April 2016. The court order further records that the first applicant provided an undertaking to the respondent which was to provide the respondent with immediate, unlimited non-transactional access to the account Gareth I. Arnold t/a Steak & Ale held with First National Bank under account no: […] from inception. In addition he

was to procure the bank statements in respect of the bank account of Kingston House B and B in which the credit card transactions are reflected and all merchant receipts for the period 29 March 2016 to 11 April 2016.

[14] Having regard to the correspondence annexed to the papers, it would appear that immediate online access was not granted and appeared to have been delayed. After the further exchange of pleadings, the application and counter-application together with the anticipation application served as an opposed motion before Gorven J on 21 June 2016.

[15] On 21 June 2016, after hearing argument in the matter, Gorven J issued an order by consent, the effect of which was to discharge the order granted by Lopes J on 2 April 2016 and issue new orders *pendente lite*.

[16] The order of Gorven J issued on 21 June 2016 reads as follows:

> 'It is ordered:
>
> 1. Pending the final determination of the action in case number 3085/2016:
>
> 1.1 All cash received by the business Steak & Ale ("Steak & Ale") will be deposited into the Standard Bank Account: […] ("the Standard Bank account") on each working day that Standard Bank is open.
> 1.2 Within 14 working days the Standard Bank speed point credit card machines used by Steak & Ale on 31 March 2016 for credit card transactions will be activated and will thereafter be the only credit card machines used.
> 1.3 Pending implementation of 2 all payments received into the First National Bank Account will be transferred to the Standard Bank account

only (subject to the minimum balance of First National Bank) on each day both Banks are electronically functional.

1.4 No payment from the Standard Bank account may be made by any party with withdrawal authority except for ordinary legitimate business of the business Steak and Ale of the Second Applicant.

1.5 The balance standing to the credit of the First National Bank account at close of business the day after the date of this order less the minimum balance required by the First National Bank will be transferred by the First Applicant to the Standard Bank Account.

2. The rule nisi granted on 2 April 2016 is discharged.

3. All questions of cost are reserved for decision by the Court determining the action.'

[17] The order issued by Gorven J appears to have been necessitated by the fact that after hearing argument and submissions on 21 June 2016, and having regard to the papers filed, it was apparent that the first applicant had opened a new bank account at First National Bank, and all credit card receipts and a very small portion of the cash was being paid into this account as the first applicant was the only one with transactional powers on the account. This is despite the undertaking of 13 April 2016 provided by the first applicant. Affidavits had been filed confirming that as at 3 June 2016, there had not been compliance with the undertaking given by the first applicant to allow the respondent access to the transactional history.

[18] Gorven J expressed a concern about monies of the business owned by the second applicant being under the sole control of the first applicant. There was concern that the status quo which existed prior to the order of 2 April 2016 should be maintained. The order was varied as a consequence of negotiations between the

parties' legal representatives and by agreement and with the consent of the first applicant and respondent. The papers contain the allegation, which is not disputed by the first applicant, that every paragraph of the order of 21 June 2016 was approved and consented to by him prior to the order being granted.

[19] It is the first applicant's alleged non-compliance with the order of Gorven J which formed the subject matter of the contempt application. The respondent alleged that the first applicant had not complied with the contents of paragraphs 1.1 to 1.5 of the order. Correspondence, marked annexure "D", was addressed to the first applicant's attorneys on 24 June 2016 referring to the breach of the court order of 21 June 2016. The first applicant initially denied on affidavit that the letter was sent to and received by his attorney's offices, specifically the attorney dealing with the matter, Mr Maharaj. Subsequently, after confirmation was provided on affidavit by the respondent's attorneys that the letter was in fact sent and received, his response was that as the respondent's legal representative did not call for a response thereto, his legal representatives did not deem it necessary to respond thereto.

[20] The first applicant in addition indicates that the order of Gorven J only called upon him to comply with such order within 14 days of its issue. He was unable to comply with such order as he had not been given access to the Standard Bank account despite numerous requests to the respondent for such login access. The first applicant indicates that he is only able to comply with the order once such transactional access is granted, hence the order sought in the counter-application. Unless login access is provided and his transactional access reinstated to the Standard Bank account, he will not be able to pay suppliers of the business, rental,

salaries and wages or any other business expenses. As a consequence, he is not in contempt of the order, as his failure to comply is not wilful or *mala fide.*

[21] On 7 July 2016, an order was granted by consent by Moodley J, relating to the respondent's contempt application and the first applicants' counter-application of 6 July 2016 which reads as follows:

> 'It is recorded that without prejudice to the First Applicant's and the Respondent's contentions in their affidavits and applications dated 4 July 2016 and 6 July 2016 respectively:
>
> 1. Pending the outcome of the application and counter-application:
>
> 1.1 The Respondent is directed to forthwith provide the First Applicant with the login details and transactional access to the Standard Bank account of the business of the Second Applicant (Steak & Ale) under account no: […] to enable the First Applicant to transact on that account to pay ordinary legitimate business expenses of the Second Applicant, up to and including a maximum of R 100 000.00 (one hundred thousand rand) per day.
> 1.2 The application and counter-application are adjourned *sine die*.
> 1.3 The costs of today are reserved.
> 1.4 It is recorded that the First Applicant and the Respondent undertake to abide by the order of Gorven J on 21 June 2016.'

<u>First applicant's application for contempt</u>

[22] On 19 July 2016, the first applicant instituted the contempt application enrolled for hearing on 21 July 2016 in terms of which he sought an order against the respondent as follows:

'1.

That a Rule *Nisi* do hereby issue calling upon the Respondent to show cause, if any, on the _____ day of _____ 2016, at 09H30 or so soon thereafter as the matter may be heard, why an Order in the following terms should not be made:

1.1 An Order declaring that the Respondent is in contempt of paragraph 1.1 of the Order granted by her Ladyship Madam Justice Moodley on 7 July 2016;

1.2 An Order directing the Respondent to forthwith comply with paragraph 1.1 of the Order granted by her Ladyship Madam Justice Moodley on 07 July 2016;

1.3 An Order that the First Applicant is authorised to use the First National Bank (FNB) account of the Second Applicant for the purposes of depositing all cash and credit card sales of the business, Steak & Ale by using the speed point credit card machines of FNB for all credit card transactions, and to pay all ordinary legitimate business expenses of the business from the FNB account until such time as the Respondent compiles with paragraph 1.1 of the Order granted by her Ladyship Madam Justice Moodley on 7 July 2016, *alternatively*, until such time as the First Applicant is given transactional access to the Standard Bank account (account no: […]) to transact on that account to pay ordinary legitimate business expenses up to and including a maximum limit on that account of R 100 000.00 (one hundred thousand rand) per day.

1.4 That the Respondent be committed to jail for a period of six (6) months or such other period as this Honourable Court deems appropriate or such other sanction as this Honourable Court deems appropriate is imposed upon the Respondent for his contempt of the Order granted by her Ladyship Madam Justice Moodley as aforesaid.

1.5 That the Respondent pay the costs of this application on an attorney and client scale.

2.

That paragraph 1.2 and 1.3. hereof operate with immediate effect pending the return day of the Rule or any further extension thereof.'

[23] The first applicant sought interim relief pending the return date of the rule nisi.

[24] The basis for the contempt application was as a consequence of the

respondent's alleged failure to provide the first applicant with access to the Standard Bank account despite a request for same to Karina De Beer, the respondent's representative. The first applicant indicates that he made a request for login details for the Standard Bank account on 8 July 2016, requesting he be provided with same by the latest 11 July 2016 in order for him to comply with the order of Moodley J. In addition, he indicated that he would transfer funds from the FNB account to the Standard Bank account less the minimum balance required to cover the cost of commission on card transactions. This was only once his access was confirmed.

[25] De Beer responded indicating that he could not retain the amounts for commission on card transactions, and in addition that the activation of his access to the Standard Bank account was finalised on Friday 8 July 2016 and that he should contact the Standard Bank call centre to ask for his activation token. E-mails are annexed dealing with the exchange of correspondence between De Beer, the first applicant and employees of Standard Bank in relation to his transactional access. The first applicant alleging that he was unable to comply with the order as he had not been granted transactional access and he could therefore not comply with the order of Moodley J.

[26] The respondent opposed the first applicant's contempt application issued for 21 July 2016. In answer to the allegations, the respondent indicates and relies on the affidavit of De Beer indicating that as at 8 July 2016, the respondent had complied with the order of Moodley J dated 7 July 2016. The basis upon which the first applicant was not granted immediate access was due to the fact that his identity document did not timeously reach the bank as he needed to comply with FICA. The

delay in ensuring access was placed squarely at the door of the first applicant. In addition, the respondent makes the point that it was Gorven J's order of 21 June 2016 which dictated that the first applicant comply and that he had failed to do so despite consenting to the order and having knowledge of what it stipulated.

[27] Furthermore, having regard to the annexure to De Beer's affidavit, it would appear that respondent had complied with Moodley J's order of 7 July 2016 and the first applicant had transactional access up to R 100 000 per day. Standard Bank's requirement for the first applicant to submit his identity document was not a requirement that the respondent had imposed resulting in the first applicant not having access with effect from 8 July 2016.

Contempt proceedings

[28] Despite the fact that wilful disobedience of a court order in civil proceedings constitutes a criminal offence, a practice exists in the high court in terms of which proceedings are instituted by way of an application on notice of motion for committal of a respondent for contempt of court. In *Erasmus Superior Court Practice* (2 ed) vol 1 the authors summarise the position as follows:[1]

> '*(a)* The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
> *(b)* The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.
> *(c)* In particular, the applicant must prove the requisites of contempt (the order;

[1] A2-169 to A2-170.

> service or notice; noncompliance; and wilfulness and *mala fides*) beyond reasonable doubt.
> *(d)* But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.
> . . .
> Contempt of court, in the present context, has been defined as "the deliberate, intentional (i.e. wilful) disobedience of an order granted by a court of competent jurisdiction."'
> (Footnote omitted)

[29] The *locus classicus* in respect of contempt of court is the decision in *Fakie NO v CCII Systems (Pty) Ltd.*[2] It is useful to refer to certain passages from such case as these are relevant to this matter. The court, per Cameron JA indicated the following:

At para 6:

> '. . .the essence of [contempt of court]. . .lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional "stamp of approval", since the rule of law - a founding value of the Constitution – "requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained".'[3]
> (Footnotes omitted)

At para 9:

> 'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and *mala fide*". A deliberate disregard is not enough, since the non-complier may genuinely, albeit

[2] 2006 (4) SA 326 (SCA) para 42.
[3] *S v Mamabolo (E TV & others intervening)* 2001 (3) SA 409 (CC) para 14; *Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer, Port Elizabeth Prison, & others* 1995 (4) SA 631 (CC).

> mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).'
> (Footnotes omitted)

At para 10:

> 'These requirements – that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.'
> (Footnote omitted)

At para 19:

> 'The onus is that of the criminal standard of proof being proof beyond reasonable doubt.'

At para 42:

> 'In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt. But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.'

[30] A respondent can escape liability if he/she can show he was *bona fide* in his

disobedience of such court order, that he genuinely though mistakenly believed he was entitled to commit the act or omission alleged to be in contempt of such court order. In deciding this, an element of reasonableness enters the arena specifically in relation to determining the absence of *bona fides*. There are degrees of reasonableness and the mere fact that such conduct was unreasonable is not tantamount to an absence of *bona fides*.

[31] *Fakie*'s case also deals with disputes of fact in contempt proceedings. A party is entitled where a dispute of fact exists to ask for the matter to be referred for oral evidence. Similarly, a party is entitled to argue on the affidavit that the requisites for contempt of court have been fulfilled.

[32] In paragraphs 55 and 56 of the *Fakie* judgment, Cameron JA deals with disputes of fact in contempt proceedings as follows:

> '[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a *bona fide* dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that failed to raise a real, genuine or *bona fide* dispute of fact but also allegations or denials that are so far-fetched or clearly

untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.'

(Footnotes omitted)

[33] In these applications neither of the parties relies on any disputes of fact.

Issues

[34] In respect of the respondent's application for contempt, the question to be decided is whether or not, having regard to the instances of contravention which the respondent alleges, the first applicant was in breach of the orders of Gorven J of 21 June 2016, and whether such non-compliance can be said to be wilful and *mala fide* beyond reasonable doubt?

[35] In respect of the first applicant's counter-application for contempt, the question to be decided is whether the respondent was in breach of the order of Gorven J requiring him to provide the first applicant with transactional access to the Standard Bank account and whether such non-compliance can be said to be wilful and *mala fide* beyond reasonable doubt?

[36] In respect of the first applicant's application for contempt, the issue to be

decided is whether or not the respondent is in breach of the order of Moodley J of 7 July 2016, and whether such non-compliance can be said to be wilful and *mala fide* beyond reasonable doubt?

[37] I propose to firstly deal with the respondent's application for contempt. It is common cause that the first applicant was party to the negotiations of the terms of the order of 21 June 2016. The affidavits filed indicate that the orders were discussed telephonically with the first applicant and he agreed to every term thereof. In addition, the first applicant had knowledge of the order on 21 June 2016, alternatively by the latest 24 June 2016. It is also common cause and as was conceded by Mr Quinlan, who appeared for the first applicant, that the first applicant concedes, albeit for a limited period of time that he had not complied with the order. His defence is that such non-compliance was not wilful and *mala fide*.

[38] The explanation proffered by the first applicant was the following:

[38.1] His failure to deposit all the monies into the Standard Bank account was because he did not have transactional access to same. He was unable to comply with the order as had he done so, he would not be able to pay service providers.

[38.2] In addition he indicates that annexure "D" which was the letter from the respondent's attorneys to his attorney dated 24 June 2016 which brought the non-compliance with Gorven J's court order to his attention, was not sent to the attorney who was dealing with the matter. In addition, an attorney who was assisting Maharaj then looked for the e-

mail on his former attorney, Ms Janse Van Vuuren's e-mail. When it was pointed out by the respondent's attorneys that the e-mail of 24 June 2016 was in fact sent to Maharaj's e-mail, his response was that his attorney did not deem it necessary to respond to annexure "D" as such letter did not call for a response from his legal representatives.

[38.3] In addition Mr Quinlan submits that the fact that it was only after thirteen days that the first applicant directed enquiries to the respondent does not mean that his conduct was wilful and *mala fide*.

[39] I have considered the affidavits filed in these pleadings and have had regard to the submissions of Mr Jorgensen who appeared on behalf of the respondent. The following is clear:

[39.1] The first applicant had knowledge of the order of 21 June 2016 on the day when it was granted. His non-compliance with such order necessitated the contempt application which was issued on 4 July 2016.

[39.2] Having regard to the affidavits and the accounting exercise done by the respondent's attorneys of record, it is clear and it is conceded by the first applicant that he failed to deposit all monies into the Standard Bank account. His explanation is that he did not have access to the account. The difficulty is that he also did not deposit all of the cash deposits into the Standard Bank account and there is no explanation therefore. There are no invoices attached to his affidavit to indicate payments made to service providers in cash, alternatively, he does not

in any way in his affidavit allude to the service providers whom he made payment in cash to.

[39.3] A further difficulty lies in the explanation proffered in relation to the letter sent to the first applicant's attorneys on 24 June 2016. It is clear that annexure "D" was sent to the attorney dealing with the matter on his behalf. The explanation for the lack of response to annexure "D" is not satisfactory nor is it reasonable, and creates more questions than answers. I agree with the submission of Mr Jorgensen that if Maharaj's view was that he did not receive the letter, what does not make sense is why would an attorney assisting him look for an e-mail on Janse Van Vuuren's e-mail if they were not expecting it?

[39.4] In addition, the first applicant knew he had to comply with the order of 21 June 2016 within fourteen days. If on his version he was paying suppliers he would have known on the 21st, at the latest 3 July 2016, that he did not have access and would require access to pay service providers. Yet he chose to keep quiet about his lack of access to the account and if he forgot about it or did not realise the necessity of having access at the time the order of 21 June 2016 was agreed to, he did not explain why it took him thirteen days to realise it, the day before he had to comply. The impression that one gets is that the first applicant is trying *ex post facto* to explain his deliberate disregard for the orders of 21 June 2016.

[39.5.] This is further exacerbated by the fact that the respondent and Karina De Beer have indicated that it has been the practice that the respondent would manage the finances of the business but more so

that De Beer would pay the service providers.

[39.6] Even if one were to accept the first applicant's version that the cash deposits only averaged 20 per cent of all takings then on his version, taking into account the bank statements annexed to the papers, cash in the sum of R 128 850 remains unaccounted for. The first applicant merely responds to this accounting exercise done by the respondent's attorneys as not being a proper accounting exercise.

[39.7] If one has regard to the concerns expressed by Gorven J on 21 June 2016, the aim of the order was to protect the interests of the second applicant in and to the business of the Steak & Ale. It was not to preserve the status quo as indicated by the first applicant in his affidavit.

[40] I agree with the submission that it is the first applicant's state of mind that must be considered in deciding whether his default in not complying with the orders of Gorven J was wilful and *mala fide*. His state of mind is a factor which is relevant to this and which is relevant as to whether he has discharged the evidential burden. What is interesting is that a day prior to the order of Gorven J, certain amounts were transferred. Whilst I accept the submission of Mr Quinlan that these transfers cannot be viewed as being in contempt of the order of Gorven J, what they clearly show is the first applicant's state of mind. In my view the respondent has shown beyond reasonable doubt that the first applicant was in wilful and *mala fide* default of the orders of Gorven J. In addition it cannot be said that the first applicant acted reasonably in the circumstances nor can one accept that his explanations are reasonable and it must follow that he has not discharged the evidential burden. In

addition, given the conduct of the first applicant, and the manner in which he has opposed the contempt application, a punitive costs order is warranted.

[41] That then brings me to the first applicant's counter-application. At paragraph 12 of the heads of argument submitted by Mr Quinlan on behalf of the first applicant he submits the following:

> 'Given Her Ladyship Madam Justice Moodley's order of 7th July 2016 directing the Respondent to provide the First Applicant forthwith with login details and transactional access to the Standard Bank account, it is no longer necessary to decide the First Applicant's counter-application at page 484 of the papers as it is now redundant.'

[42] There is thus no reason to issue any orders in this matter.

[43] I now turn to the first applicant's application for contempt. The basis for this application is that the respondent is in contempt of paragraph 1.1 of the order of Moodley J of 7 July 2016 as he has not provided the first applicant with login details and transactional access to the Standard Bank account. The respondent acknowledges that the order of 7 July 2016 was brought to his attention on the same day. Karina De Beer complied with such order and the first applicant had transactional access to the Standard Bank account with effect from 8 July 2016.

[44] In addition, he submitted that the first applicant had to contact Standard Bank to obtain his login details and comply with their FICA requirements. If one has regard to the affidavit of Karina De Beer deposed to on 20 July 2016 and annexure "CDB1"

annexed thereto, the respondent complied with the order of 7 July 2016. Annexure "CDB1" records that the first applicant's transactional access was up to R 100 000 per day. The first applicant was required to contact the bank to activate his token access and in addition the bank indicated that it required his identity document before it would activate his access. This was not a requirement imposed by the respondent but rather a requirement imposed by the bank. The Standard Bank mislaid the certified copy of the first applicant's identity document. In addition the Standard Bank had responded on 8 July 2016 confirming that the first applicant had transactional access but activations would take between two to seven working days. This is clearly a requirement beyond the respondent's control. Consequently, it must follow that I am of the view that the respondent complied timeously with the order of Moodley J dated 7 July 2016 and he was not in wilful and *mala fide* default of the order.

[45] That then brings me to the appropriate orders to grant in the respective applications. In the first applicant's counter-application, in light of the fact that Mr Quinlan has indicated that there is no need for the court to issue orders as it has been rendered redundant, it is appropriate that there be no order as to costs.

[46] In respect of the first applicant's contempt application, the first applicant has been unsuccessful and there appears to be no reason why costs ought not to follow the result. Consequently, the application is dismissed with costs.

[47] The first difficulty which arises in respect of the respondent's contempt application is that the relief which the respondent sought was far wider than one

would have anticipated in a contempt application. In addition, having regard to the certificate put up by the respondent's attorneys of record, it was only the relief in paragraph 3 which was enrolled for hearing for determination. This specifically related to whether or not the first applicant was in contempt of the order of 21 June 2016. The remainder of the relief set out in paragraphs 2.1 to 2.9 are strictly matters which form the subject matter of the application and the counter-application and which appear to vary the order of Gorven J.

[48] Mr Quinlan submitted that it was only the relief in paragraph 3 which was enrolled for hearing and the relief contained in the other paragraphs of the order was an attempt to vary the order of Gorven J of 21 June 2016 and should not be granted. Subsequently, after raising with Mr Jorgensen the fact that in this division, even though there is no practice directive which makes provision for it, it is customary when one is seeking an order for contempt to do so in the form of a rule nisi. It is clear that the respondent has not drafted the relief in respect of the contempt application in such form as is the normal practice in this division.

[49] After providing Mr Jorgensen with some time and after debating the contents of an appropriate order with him, he drafted in manuscript, an amended order in terms of which the relief sought by the respondent in the notice of motion of 4 July 2016 was drafted in the form of a rule nisi and the relief set out in paragraphs 2.1 to 2.9 of the original notice of motion was drafted as interim relief operating with immediate effect. He further included an additional paragraph being paragraph 7 in terms of which the first applicant was ordered to provide the respondent or his nominee with full access to all documentation and records pertaining to the Steak &

Ale including all records pertaining or relating in any way to the GAAP computer and/or accounts or records held by GAAP pertaining to the Steak & Ale.

[50] Having regard to the certificate and practice note it is clear that the only relief which was enrolled for hearing was the order for contempt as contained in paragraph 3 of the respondent's notice of motion dated 4 July 2016. Paragraph 7 of the amended draft order in manuscript was not relief sought in such original notice of motion. In addition, were I to grant any of the relief as contained in paragraphs 2.1 to 2.9 of the notice of motion, I would in effect be re-visiting the order of Gorven J of 21 June 2016. In my view, to some extent, this relief is foreshadowed in the counter-application which would have to be argued and the issues in the counter-application determined on another day. It is quite apparent that this relief ought to be strictly speaking either dealt with in the pending action, alternatively can only be dealt with when the application and the counter-application are enrolled for hearing.

[51] I further raised with Mr Jorgensen during the hearing of the matter, the fact that apart from the sheriff not having notice of the relief sought, I could not find any authority which authorised me to provide certain of the relief directing the sheriff to do certain things. In the time available Mr Jorgensen also could not refer me to authority authorising me to do so and subsequently conceded that the form of the orders sought directing the sheriff to do so were not competent.

[52] In the premises the most appropriate order which I must issue in this application is to deal with the contempt application. I am of the view that the first applicant is in contempt of the order of Gorven J of 21 June 2016. I am reluctant to

grant a final order in respect of the sentence to be imposed, in light of the fact that the respondent did not comply with the practice in this division and seek a rule nisi. I believe it will be in the interests of justice and it will only be appropriate to issue a rule nisi for the sentence to be imposed and to provide the first applicant with an opportunity to make submissions in relation thereto on the appropriateness or otherwise of the proposed sanction or an alternative.

[53] In the draft order prepared by Mr Jorgensen, orders were sought directing that the sheriff be authorised to supervise the execution of the order. At the hearing of the application the following difficulty arose in regard thereto. Firstly, the papers had not been served on the sheriff to enable the sheriff to comment on the order sought. In the time available in preparation for the opposed hearing, I was not able to find anything in the Sheriffs Act 90 of 1986 which authorised him to do so. What also was not canvassed in the order was who would pay the costs occasioned by the sheriff's daily monitoring of the situation.

[54] In addition, what posed further difficulties is the fact that all I would be required to do was issue an order for contempt. I requested Mr Jorgensen to find some authority for the proposed order, but he was unable to do so. His submission in this regard was that he knows of no authority which says that I cannot and this was the basis upon which he submitted the respondent was entitled to the order sought.

[55] The order is in the form of what has been referred to as a supervisory order. The application before me is essentially a contempt application. The rationale behind seeking such an order, according to Mr Jorgensen, was the fact that the first

applicant has been in continual breach of the order and appears to not take court orders seriously. The order sought was designed to prevent further breaches of the order. In my view the remedy which the respondent has for any further breaches of the order is to bring further contempt applications. I know this may be cold comfort for the respondent in light of the first applicant's continual breach of the order. However, the rule nisi and the effect thereof would be to have a sword, so to speak, hanging over the head of the first applicant which I hope will deter him from further breaches of the order.

Conclusion

[56] Certain matters warrant mentioning. These relate to an application made at the hearing of the matter for the first applicant to be granted leave to deliver a supplementary affidavit. Such application was served on 20 March 2017 and filed in court on the same day. Initially when the matter was argued Mr Quinlan sought to proceed with the application. When, however, it became apparent that the application was being opposed, his instructions were to withdraw the application which he duly did. The costs order which I issued in relation to the withdrawal of such application are a matter of record.

[57] In addition, the first applicant also attempted to file a two page affidavit deposed to on 23 March 2017 dealing with the current state of compliance with the court order of 21 June 2016 of Gorven J. Such affidavit was provided to the court and the respondent a few minutes before the matter was to be argued as an opposed application. No explanation was provided on oath as to why the affidavit was being

tendered so late and why it was not possible for the first applicant to file such affidavit prior to the hearing of the matter. I was advised by Mr Quinlan that as a consequence of him being briefed late, the affidavit was prepared on 23 March 2017 after consultation with the first applicant at his request.

[58] I did not allow the first applicant to admit the affidavit and issued an order to that effect. The reasons for doing so were as the first applicant did not provide any proper explanation on oath as to why the affidavit was being tendered so late in light of the fact that there was a contempt application and a counter-application for contempt. The basis for both applications was the alleged non-compliance with the order of Gorven of 21 June 2016 and the subsequent order of Moodley J of 7 July 2016.

[59] The failure to explain the delay in filing the affidavit so late was also exacerbated by the fact that the affidavit contained broad allegations of compliance. It contains no specificity in relation to the dates upon which there was supposed compliance. Consequently, it served no purpose to admit the affidavit.

[60] The last matter which requires mentioning relates to the conduct of the applicant's attorney of record Ms. Sewbuckus and the late filing of the application for condonation as well as the late filing of the heads of argument and practice note.

[61] It is common cause that the notice of set down in this matter was served on the applicants attorneys on 1 September 2016. Counsel dealing with the matter held a brief from July of 2016. On 20 February 2017, the registrar e-mailed Ms.

Sewbuckus regarding the applicants' compliance with the new practice directive relating to the filing of heads of argument and a practice note. Based on submissions from the Bar, I was advised by Mr Quinlan that such e-mail did not come to Ms. Sewbuckus' attention and despite it being received at a reception e-mail of Maharaj Attorneys, such e-mail was not forwarded to Ms. Sewbuckus.

[62] On 15 March 2017, the respondent's attorneys e-mailed correspondence to Maharaj Attorneys confirming that the matter would be proceeding as an opposed motion. On 8 March 2017, the respondent's heads of argument was served on the applicants attorneys. When the applicants had not complied with the practice directive, the registrar allocated to me at the time contacted Ms. Sewbuckus regarding same. The response received was that it was the applicants' intention to file heads of argument and a practice note but same would be late as the date for the opposed motion had not been arranged with counsel who was on brief.

[63] Counsel who was on brief was not available and consequently an alternative counsel had to be briefed to draft the heads of argument and practice note and deal with the matter on 24 March 2017. The e-mail further recorded that given the voluminous nature of the papers, a delay would be experienced in relation to the filing thereof. No indication was given in response as to an anticipated date on which the heads of argument and practice note would be filed nor was there any indication as to whether an application for condonation would accompany same.

[64] An application for condonation was handed up at the hearing of the matter and Mr Quinlan tendered an apology as a consequence of the conduct of Ms.

Sewbuckus. He indicated that despite the fact that she was an attorney of this court and had handled the matter together with Mr Maharaj, she was overwhelmed and consequently there was a delay in the filing of the heads of argument and practice note. As a consequence of this, she did not take any adequate steps to notify the court or the respondent that the heads of argument and practice note would be late.

[65] At the hearing of the matter, Mr Quinlan indicated that should I be disposed to granting a punitive cost order, I should issue a rule and provide the applicants' attorneys an opportunity to deal with the delay on oath. The reason for this can only be as no proper explanation was contained in the condonation application and Mr Quinlan supplemented the explanation with submissions from the Bar.

[66] The conduct of the applicants' attorney of record is to be deprecated. Given the nature of the matter, an appropriate cost order would not alleviate any prejudice that the respondent was suffering should the court have been disposed to adjourning the matter. More often than not, this appears to be the conduct of attorneys when heads of argument and practice notes are filed late. As one does not want to prejudice the other party, one is always forced into a position of having to deal with the matter without the benefit of considering heads of argument and practice note and / or any authorities referred to by the party in preparation of the matter.

[67] Given the already over-burdened court rolls, this conduct is to be discouraged and a caution sounded to the applicants' attorneys to refrain from this conduct in future. So as not to delay matters any further by the issuing of a rule nisi, an order will issue directing that the applicants' attorneys of record are not entitled to levy a

fee payable by the applicants in respect of the heads of argument and practice note. Such order does not extend to counsel.

In the premises the following orders do issue:

[68] In respect of the first applicant's application for condonation for the late filing of its heads of argument and practice note, there will be no order as to costs. The applicants' attorneys of record are not entitled to levy a fee payable by the applicants in respect of the heads of argument, practice note and application for condonation. Such order does not extend to counsel.

The respondent's application for contempt dated 4 July 2017

[69] The first applicant is declared to be in contempt of the order granted by his Lordship Mr Justice Gorven on 21 June 2016.

[70] The first applicant is directed to comply with the order of Gorven J of 21 June 2016 forthwith, pending the finalisation of this application and the action instituted under case no: 3805/2016.

[71] A rule nisi do issue calling upon the first applicant to show cause on affidavit and on the **30th** day of **August 2017** at 09h30 am or so soon thereafter as the matter may be heard, why, having being found to be in contempt of the court order of 21 June 2016:

[71.1.] he should not be committed to prison for a period of six (6) months or such other period as this Honourable Court deems appropriate;

[71.2] the sanction in paragraph 71.1.is wholly suspended on condition that pending the finalisation of this application, and the action instituted under case no: 3805/2016, he complies with the order of Gorven J of 21 June 2016.

[72] The first applicant is directed to pay the costs occasioned by the contempt application including any reserved costs on an attorney / client scale.

The first applicant's counter-application dated 6 July 2017

[73] In respect of the first applicant's counter-application there will be no order as to costs.

The first applicant's contempt application dated 19 July 2017

[74] In respect of the first applicant's contempt of court application, the application is dismissed with costs.

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HENRIQUES J

Case Information

Date of hearing	:	24 March 2017
Date of judgment	:	31 July 2017

Appearances

Counsel for Applicants	:	Advocate P.D. Quinlan
Instructed by	:	Maharaj Attorneys 3 Rydall Vale Crescent Rydall Vale Park La Lucia Ridge, Durban Ref: MH Stamp/A287 (E) melissa@maharajattorneys.co.za / CC: yuthika@maharajattorneys.co.za (T) 031-566 2177 (F) 031 566 2400
Counsel for Respondent	:	Advocate P. Jorgensen
Instructed by	:	Eiser & Kantor Attorneys c/o Atkinson, Turner & De Wet 478 Lilian Ngoyi (Windermere) Road Morningside, Durban Ref: Mr Atkinson/gr06/B1894 (T) 031-312 1303 (F) 031-312 0175 (E) atkinsonturner@atdw.co.za