THE LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG

Not Reportable
Case no: J 913/21

In the matter between

BURQUIP INTERNATIONAL (PTY) LTD **Applicant**

and

JEFFREY LEE GERAL **First Respondent**

YOLANDI MULDER **Second Respondent**

Heard: 4 November 2022
Delivered: 13 January 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 13 January 2022 at 12h00).

Summary: Contempt of court – non-compliance with consent order which was made an order of court – Respondents bringing a strike out application in respect of the hearsay evidence contained in the applicant's founding affidavit – Respondents did not file answering affidavits
Principles of contempt stated and considered – *mala fides* and wilfulness are presumed unless the contemnors are able to demonstrate sufficient evidence to create reasonable doubt as to their existence – this was not done
Contempt of court proved – contempt application granted – fine imposed failing payment committal to imprisonment

JUDGMENT

SWARTZ, AJ

Introduction

[1] This is a contempt of court application. This matter emanates from a restraint of trade application against the respondents. The applicant contends that the respondents are in breach of the consent order made an order of court on 3 September 2021 ("the consent order").

[2] In terms of the consent order, the respondents made the following undertakings:

> "2. The First Respondent undertakes:
>
> 2.1 Until 7 July 2022, to not contact and/or in any way engage with, either directly or indirectly, any of the Applicant's customers or suppliers in Gauteng; and
>
> 2.2 to honour the confidentiality undertakings contained in the employment contract concluded between the Applicant and the First Respondent dated 18 January 2017.
>
> 3. The Second Respondent
>
> 3.1 until 9 July 2022, to not contact and/or in any way engage with, either directly or indirectly, any of the Applicant's customers or suppliers in Gauteng; and
>
> 3.2 to honour the confidentiality undertakings contained in the employment contract concluded between the Applicant and the Second Respondent dated 3 July 2017."

[3] A rule *nisi* for contempt proceedings was issued by this court on 12 August 2022. The return date was 4 November 2022. This rule *nisi* was personally served on both respondents on 23 August 2022.

The parties submissions

[4] After the consent order was made an order of court, the applicant alleges that the first respondent breached the consent order in the following respects:

4.1 on 28 October 2021, the first respondent contacted Mr Newman, a co-owner of New Moon Trailers being an established customer of the applicant through WhatsApp texts;

4.2 on or about the second week of January 2022 a representative of Rassie Trailers verbally disclosed to employees of the applicant that the first respondent addressed an email to the owners of Rassie Trailers in which the first respondent marketed Henred Leicht's[1] products;

4.3 on or about the first week of January 2022, the first respondent sent a WhatsApp text to Mr Zachariya Casey the owner of Zachariya Casey Commodities (Pty) Ltd. This WhatsApp text informed Zachariya Casey that he is now employed by Henred Leicht and invited Zachariya Casey to visit the premises of Henred Leicht; and

4.4 the first respondent and the applicant's customers became friends on Facebook and inevitably any marketing activity of Henred Leicht's products performed by the first respondent on his Facebook profile would be received by the applicant's customers.

[5] After the consent order was made an order of court, the applicant alleges that the second respondent breached the consent order in the following respect:

5.1 on 22 November 2021 the second respondent acting in her representative capacity as an employee of Henred Leicht, sent an email to Mr Donald Chalmers of T & I Chalmers Engineering (Pty) Ltd, a long-standing supplier of the applicant. In this email the second respondent requested a quotation for large quantities of serval stock

[1] Competitor of the applicant

items supplied by T & I Chalmers Engineering (Pty) Ltd for Henred Leicht.

[6] The respondents have not filed answering affidavits but instead brought an application on 14 October 2022 to strike out the hearsay evidence that the applicant relies on to prove that the respondents' are in contempt of the consent order. The respondents are seeking that the evidence tendered in the applicant's founding affidavit in paragraphs 22 to 26, the first sentence of paragraph 30, paragraphs 32, 34 to 38 be struck out as such paragraphs constitutes inadmissible hearsay evidence. The respondents further seek an order extending the rule *nisi* in order for the respondents to furnish answering affidavits once the abovementioned paragraphs have been stuck out.

[7] The respondents in their heads of argument contend that the applicant has not proved non-compliance with the consent order dated 3 September 2021 in that the applicant's proof of non-compliance by the respondents amounts to inadmissible hearsay evidence.

Evaluation

[8] There is no direct evidence from the applicant to prove non-compliance with the consent order save for the documentary evidence of the WhatsApp screen shots and the email that the second respondent sent T & I Chalmers Engineering (Pty) Ltd.

[9] Nevertheless this court is required to decide if the hearsay evidence that the applicant has disclosed is admissible in order to support the relief it seeks for contempt of consent order.

[10] In *PSA v Minister: Department of Home Affairs*[2] the Labour Appeal Court relied on rule 11 of the Rules for the Conduct of Proceedings in the Labour

[2] [2013] 3 BLLR 237 (LAC) at paras 7 to 14.

Court (the Rules) read with rule 6 (15) of the Uniform Rules of Court in dealing with an application to strike out.

[11] Rule 6 (15) of the Uniform Rules of Court provides:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted."

[12] The subrule is not exhaustive of the grounds upon which an application to strike out matter from an affidavit may be brought.[3] Inadmissible evidence such as hearsay evidence may be struck out.[4]

[13] The use of the word "may" indicates that the court has a discretion in an application to strike out matter from an affidavit.[5]

[14] Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act[6] as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

[15] The exception to this rule is regulated by section 3 of the Law of Evidence Amendment Act which provides:

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[3] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368G; Tshabalala-Msimang v Makhanya [2008] 1 All SA 509 (W) at 516e; *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) at 321B; LF v TF 2020 (2) SA 546 (GJ) at paragraph [25].
[4] *Premier Produce Co v Mavros* 1931 WLD 91; *Cash Wholesalers Ltd v Cash Meat Wholesalers* 1933 (1) PH A24; *Jay's Properties v Turgin* 1950 (2) SA 694 (W); *Flange Engineering Co (Pty) Ltd v Elands Steel Mills (Pty) Ltd* 1963 (2) SA 303 (W); *Dublin v Diner* 1964 (2) SA 304 (D); *Wronsky v Prokureur-Generaal* 1971 (3) SA 292 (SWA); *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1973 (1) SA 937 (C); Wiese v Joubert 1983 (4) SA 182 (O); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* (No 1) 2003 (5) SA 518 (C) at 546E–547E; *Broode NO v Maposa* 2018 (3) SA 129 (WCC) at 140A–C; LF v TF 2020 (2) SA 546 (GJ) at paragraph [26].
[5] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368G.
[6] Act No. 45 of 1988.

"3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

[16] As stated by the Labour Appeal Court in *Public Servants Association of South Africa v Minister of Department of Home Affairs and Others*:[7]

"Section 3(1) of the Act has ushered our approach to the admissibility of hearsay evidence into a refreshing and practical era. We have broken away from the assertion–oriented and rigid rule–and–exception

[7] [2013] 3 BLLR 237 (LAC) (27 November 2012)

approach of the past.[8] Courts may receive hearsay evidence if the interest of justice requires it to be admitted. In S v Ndlovu Cameron JA, as he then was, puts it thus:

"The 1988 Act was thus designed to create a general framework to regulate the admission of hearsay evidence that would supersede the excessive rigidity and inflexibility - and occasional absurdity - of the common-law position. In the result, as this Court recently stated in Makhatini v Road Accident Fund, the 1988 Act retained the 'common law caution' about receiving hearsay evidence, but 'altered the rules governing when it is to be received and when not', principally by glossing the common-law exceptions with the general criteria of relevance, weight and the interest of justice."[9]'

[17] I now turn to evaluate the hearsay evidence which the applicant seeks to place before this court, which if admitted would prove contempt of the consent order.

[18] Paragraphs 22 to 26 and the first sentence of paragraph 30 of the applicant's founding affidavit deals with the communication that the first respondent had with Mr Newton from New Moon Trailers. These allegations are supported by two confirmatory affidavits of employees of the applicant (Mr Koegelenberg and Mr Kalombo) who allegedly Mr Newton disclosed such evidence to.

[19] There is also a screenshot of WhatsApp texts. The contents of this screenshot speaks for itself although it is unclear who this text was sent to by "Jeff 2". The applicant alleges that this was the first respondent's text that he sent to Mr Newton. Taking into account the two confirmatory affidavits, the screenshot of the WhatsApp texts and considering the provisions of section 3(1)(c) of the Law of Evidence Amendment Act, this court finds that the probative value of the evidence is high and it is in the interests of justice to find this evidence admissible.

[8] D T Zeffert et al : The South African Law of Evidence. Butterworths 2003 at pages 365 to 366.
[9] See *S v Ndlovu* 2002 (6) SA 305 (SCA) at paragraph 15. footnotes omitted.

[20] Paragraphs 32 and 34 of the applicant's founding affidavit, deals with the hearsay evidence of Mrs Kruger from Rassie Trailers disclosing to the applicant's employees (Mr Langenhoven and Mr Koegelenberg) that the first respondent contacted her. Having regard to the nature of evidence associated with restraint applications, the two affidavits of the applicant's employees and the provisions of section 3(1)(c) of the Law of Evidence Amendment Act, this court finds the probative value of this evidence high and it is in the interests of justice to find such evidence admissible.

[21] Paragraphs 35 to 38 of the applicant's founding affidavit, deals with the hearsay evidence given by Mr Zachariya Casey from Zachariya Casey Commodities (Pty) Ltd to an employee of the applicant (Mr Kalombo). For the same reasons mentioned above this court finds this evidence admissible.

[22] The respondents are not challenging the evidence that the second respondent contacted T & I Chalmers Engineering (Pty) Ltd. Such contact by the second respondent is in breach of clause 3.1 of the consent order.

[23] The presentation of the applicant's evidence is not unusual in restraint of trade applications as applicants to such applications often do not embroil their clients and / or customers in litigation. The applicant endeavoured to adduce evidence in these circumstances. The hearsay rule is not applied rigidly in such proceedings because it is not always possible to obtain such evidence.

[24] It is trite that compliance with consent orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution of the Republic of South Africa, 1996.[10] The matter of *Fakie NO v CCII Systems (Pty) Ltd*[11] is the leading authority on contempt of court proceedings. In this decision the Supreme Court of Appeal

[10] JSO v HWO (24384/2009) [2014] ZAGPPHC 133 (19 February 2014).
[11] 2006 (4) SA 326 (SCA).

describes the application for committal for contempt by a private party as a *"peculiar amalgam*" because *"it is a civil proceeding that invokes a criminal sanction or its threat*."[12]

[25] The Court continues further that:

> "The test for when the 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,..."[13]

However, in paragraph 41[14] the Court held:

> "... this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites..., unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide the requisites of contempt would have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt."

[26] The Supreme Court of Appeal summarised its findings as follows[15]:

> "(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with consent orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirement.

[12] Ibid at para 8.
[13] Id fn 9 at para 9.
[14] Id fn 9.
[15] Id fn 9 at para 42.

(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; service or notice; non-compliance; 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."

[27] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*[16] in a unanimous decision delivered by Nkabinde J, the Constitutional Court subsequently explained that:

"[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a consent order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by

[16] 2015 (6) BCLR 711 (CC).

imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the role of law.

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a consent order requiring a person or legal entity before it to do or not do something (*ad factum praestandum*), the following elements need to be established on a balance of probabilities: (a) the order must exist; (b) the order must have been duly served on, or brought to the notice of, the alleged contemnor; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or ma/a fide".

[28] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in *Fakie* (supra) and held in paragraph [36] that the decision creates a presumption in favour of the applicant as follows:

"Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established."

[29] Nkabinde J continued:

"[37] However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief, a mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance."

[30] The first three elements of the test for contempt of court have been established.

[31] Since the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the respondents are able to provide evidence sufficient to create reasonable doubt as to their existence. The respondents thus needed to rebut the presumption of *mala fide*s and wilfulness.

[32] The respondents have chosen to bring an application to strike out the applicant's hearsay evidence and have not filed answering affidavits.

[33] The court has admitted the applicant's hearsay evidence. The respondents have not provided the court with any substantial reason or explanation for their non-compliance with the consent order dated and therefore *mala fides* and wilfulness are presumed. Accordingly, there is no reason for the respondents' inability to comply with the consent order.

[34] The final question then is whether there are any alternative means through which the court can ensure compliance with the consent order. I am of the view that the applicant has exhausted all its remedies. In light of the absence of an adequate explanation for the respondents' non-compliance with the consent order, I am satisfied that the balance of convenience favours the applicant and that a failure to declare the respondents in contempt and ordering the respondents to pay a fine failing which committal to prison would result in irreparable harm being done to the applicant to which there is no alternate remedy.

[35] Accordingly, I find that both respondents are in contempt of the consent order.

[36] In the circumstances, the following order is made:

Order

1. The respondents' application to strike out is dismissed.

2. The first respondent, Jeffrey Lee Geral and the second respondent, Yolandi Mulder are in contempt of court.

3. A fine is imposed upon the first respondent, Jeffrey Lee Geral, in the amount of R40 000 payable at the office of the Registrar of this Court by no later than 15h00 on 14 February 2023.

4. A fine is imposed upon the second respondent, Yolandi Mulder, in the amount of R40 000 payable at the office of the Registrar of this Court by no later than 15h00 on 14 February 2023.

5. Should the first respondent, Jeffrey Lee Geral and the second respondent, Yolandi Mulder, not comply with the orders referred to in orders 3 and 4 above then the first respondent, Jeffrey Lee Geral and the second respondent, Yolandi Mulder are each sentenced to 90 days imprisonment.

6. The applicant shall bear the responsibility of ascertaining whether orders 3 and 4 referred to above have been complied with by the first respondent, Jeffrey Lee Geral, and second respondent Yolandi Mulder.

7. Should the first respondent, Jeffrey Lee Geral, and second respondent, Yolandi Mulder fail to pay their fines referred to in orders 3 and 4 above, the Department of Correctional Services is authorised to take them into imprisonment to serve their committal.

8. The first respondent, Jeffrey Lee Geral and the second respondent, Yolandi Mulder, are ordered to pay the costs of this application to the applicant, jointly and severally, the one paying the other to be absolved.

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	R Grundlingh
Instructed by:	Joubert Attorneys
For the Respondent:	S Grobler SC
Instructed by:	Honey Attorneys