IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

14/12/2016

Case No. ~~36561/2014~~ 77475/15

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

DATE: 14/12/2016

SIGNATURE: Bradley

In the matter between:

ANNA MARIA VORSTER	First Applicant
SIEMTECH CC	Second Applicant
And	
JOHANNES MARTHINUS VORSTER	First Respondent
HIGHVELD TELECOMS (PTY) LTD	Second Respondent

ANNA MARIA ELIZABETHA WILLERS Third Respondent

GERT ANDRIES WESSELS Fourth Respondent

JUDGMENT

A. MAIER-FRAWLEY AJ

The application

1. This is an application for (i) the committal of the first and third respondents for contempt of court, alternatively, a declarator in respect of the first and third respondents, (ii) declaratory relief against the second respondent and (iii) further ancillary relief against the first, second and third respondents.

2. The applicants seek an order in the following terms:

> "1. That the First and Third Respondents be imprisoned for a period to be determined by the Honourable Court due to the First and Third Respondent's disobedience and contempt of the court order under case number 73245/2014;
>
> 2. That the Applicants be authorised to approach the Honourable Court for the issuing and authorization of a warrant of arrest against First and Third Respondents on the same papers in the event of prayer 1 be granted;
>
> 3.1 *In the alternative to prayers 1 and 2 above,* that the First and Third Respondents be imprisoned for a period to be determined by the Honourable Court, which imprisonment be suspended on conditions set out

by the Honourable Court due to the First and Third Respondents' disobedience and contempt of the court order under case number 73245/2014;

3.2 *In the further alternative,* that it be declared that the First and Third Respondents are in contempt of the court order under case number 73245/2014;

4. That it be declared that the Second Respondent is in contempt of the court order under case number 73245/2014;

5. That the First, Second and Third Respondents pay the costs of the application on a scale between attorney and own client, jointly and severally, the one paying the other to be absolved.

6. That the Fourth Respondent pays the costs of the application on a scale as between attorney and own client, jointly and severally, the one paying the other to be absolved with the First, Second and Third Respondents only in the event of the Fourth Respondent opposing the application."

3. At the hearing of the matter the applicants sought an amendment of the notice of motion to include the relief sought in prayer 3.2 as quoted above. The application was not opposed and prayer 3.2 was incorporated into the Notice of Motion. The applicants also sought condonation for the late filing of the replying affidavit and heads of argument. The application for condonation was not opposed and was granted in that a proper case had been made out for the relief sought.

4. The first applicant deposed to the founding affidavit both in her personal capacity and on behalf of the second applicant.

5. The present application is opposed by the first, second and third respondents. The fourth respondent is cited as an interested party and no relief is sought against him. The fourth respondent deposed to the founding affidavit on behalf of the

first, second and third respondents. The fourth respondent did not oppose the application in his personal capacity.

Introduction

6. The second applicant and the second respondent are close corporations that conduct business in competition with each other within the telecommunication industry. The first applicant is the sole member and sole manager of the second applicant. The first respondent is employed as the operational manager of the second respondent whilst the third respondent is employed as the telephone marketing and research assistant of the second respondent. The fourth respondent is the sole director and shareholder of the second respondent.

7. The applicants allege that the first second and third respondents contravened an order granted by this court on 30 October 2014 under case number 73245/14 (court order) and that they are guilty of contempt of court. The respondents dispute that they contravened the terms of the court order, alternatively, in the event that it be found that they did transgress the court order, they deny that they acted wilfully or *mala fide* in doing so.

8. The dispute concerning whether or not the respondents transgressed the court order was *inter alia* premised on a denial by the respondents that the applicants furnished proof that any persons or entities that were contacted by representatives of the second respondent, were *existing* clients of the second applicant, as contemplated in the court order. The answering affidavit was prepared on the assumption that the entities mentioned in the application were clients of the second applicant, without the respondents abandoning their contention that the

application was fatally defective for lack proof in this regard. But more about this later.

9. The respondents also deny that the first applicant has the requisite *locus standi* to bring the application.

10. I was urged to adopt a robust approach in determining the various disputes that have emerged on the papers. In this regard, I propose following the principles propounded in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).[1]

Background

11. Pursuant to an urgent application that was launched by the applicants against the first, second and third respondents on 2 October 2014, a court order was granted in this Court by Louw J on 30 October 2014 under case number 73245/14, (court order) in the following terms:

11.1 That the first, second and third respondents are prohibited to contact any of the second applicant's existing clients in order to persuade those clients to transfer their existing service agreements with the second applicant and to replace it with service agreements with the second respondent;

11.2 That the first and second respondents are prohibited to approach existing employees of the second applicant in order to persuade these employees to

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[1] See too: *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 55;

resign from the second applicant's employ in order to take up new employment with the second respondent;

11.3 That the first and second respondents are prohibited to utilize any information regarding the second applicant's clients;

11.4 That the first second and third respondents pay the second applicant's costs of the application on the attorney and client scale.

12. The applicants and the first to the third respondents were cited in the urgent application as they are in the present application.

13. The backdrop to the grant of the court order was the following. The first applicant and the first respondent were previously married to each other. They were still married when the court order was granted although they have since divorced. The divorce proceedings were contentious and acrimonious. During their marriage, the second applicant, of which the first applicant was the sole member, conducted business alongside that of another close corporation known as 'Mpumalanga Rentals CC', of which the first respondent was the sole member. The businesses were conducted in a universal partnership between the first applicant and the first respondent within the telecommunication industry.

14. Mpumalanga Rentals CC was liquidated by the first respondent without explanation. Many of the service contracts of Mpumalanga Rentals CC were taken over by the second applicant although the first respondent sought to transfer the contracts to a new company. In several instances courts were called upon to intervene in the afterflow of events between the first applicant and the second respondent, which led to orders relating to violence and spoliatory relief being granted against the first respondent. Further occurrences ultimately culminated in an urgent application before Louw J, *inter alia* because the first

respondent had threatened to destroy the first applicant financially as well as the second applicant's business.

15. The first respondent had begun soliciting the second applicant's clients and employees. One such employee was the third respondent who was induced by the first respondent to take up employment with the second respondent at better remuneration. This was accomplished after the first respondent formed the second respondent in September 2014, with the first respondent as its director together with one, Mr. Nel (Nel). After merely a few days, the first respondent and Nel resigned as directors and the fourth respondent was appointed as sole member and director of the second respondent.

16. In the urgent application, the applicants *inter alia* contended that the first respondent was unlawfully competing with the business of the second applicant by conducting business through the vehicle of the second respondent in the same field and within the same geographical area of the second applicant's business with the malicious intent to destroy the business of the second applicant.

17. The third respondent had intimate knowledge of and information about the second applicant's clients. By virtue thereof, when the third respondent resigned from the second applicant's employ, she signed a written undertaking not to contact any of the second applicant's clients or to make contact with any future clients of the second applicant.

18. Louw J granted interdictory relief as set out in the court order, having found, *inter alia,* that (i) it was the first respondent's intention to destroy the first applicant financially; (ii) notwithstanding the change of directorship of the second respondent, the second respondent remained the driving force behind the second respondent (which was directly competing with the second applicant) and

was able to use and was using the second respondent as the vehicle with which to financially destroy the applicants; (iii) the third applicant had detailed knowledge regarding the particulars and identity of the second applicant's clients due to the position she held at the second applicant; (iv) the purpose of the registration of the second respondent by the first respondent was for the second respondent to compete with the second applicant with the object of destroying the second applicant's business; (iv) the third respondent had contacted clients of the second applicant in breach of her written undertakings to the second applicant; (v) the first respondent had contacted clients of the second applicant with a view to secure their business for the second respondent; (vi) the dominant purpose of the first respondent's conduct in advancing the interests of the second respondent was to inflict harm to the first and second applicants with a malicious motive.

19. Pursuant to the grant of the court order, it came to the attention of the first applicant that certain representatives of the second respondent, including the first and third respondents, were contacting clients of the second applicant in order to persuade them to transfer their existing service agreements, or to put it colloquially, to move their service contracts with the second applicant over to the second respondent. To this end, it is alleged that several of the second applicant's clients terminated their service agreements with the applicant and contracted instead with the second respondent.

20. The applicants considered such conduct to be directly in conflict with prayer 1 of the court order (referred to above) and apropos launched this application for contempt proceedings against the relevant respondents for failing to comply with the said court order.

21. The founding papers make reference to various clients of the second applicant who were allegedly approached telephonically or in person or through

correspondence by some or other functionary of the second respondent with a view to influencing them to move their business from the second applicant to the second respondent. I do not propose to deal with each and every alleged approach made, as has been done in the affidavits filed in the application.

22. According to the applicants, the first and third respondents and another employee of the second respondent, one Loraine Lawrence (Loraine) made one or other such approach to the following clients who held service agreements with the second applicant: 'AJ Safety', 'RI&D', 'R+R Pool Care', 'Benicon', 'CMR', 'WWS', 'Afrilink', 'Talisman', 'F&K Hire', 'Stone&Style', 'Universal', 'Redland', 'Konica Minolta Witbank'. By way of example, clients who were approached by the first respondent were Benicon (to whom he made calls and furnished a quote), WWS (to whom he made calls and furnished a quote), Federale Stene and Konica Minolta Witbank. Clients who were *inter alia* called or emailed by the third respondent were WWS (to whom she sent a contract to be signed), Universal, and Afrilink. Several calls were made by Loraine to AJ Safety, RI&D, CMR, WWS, Afrilink, Talisman, F&K Hire, Stone & Style, and Redland for purposes of marketing the business of the second respondent, as enumerated below.

23. The respondents admit that the first respondent made several calls to Konica Minolta Witbank, Benicon, S & J Radio DSTV Decoder Testing Centre, being a member of the WWS group (S & J Radio) and Federale Stene. According to the first respondent, calls to Konica Minolta Witbank were test calls after the first respondent assisted such entity in repairing their telephone system. Calls to Benicon occurred after Benicon requested the first respondent, of its own volition, to provide it with a quote for telephone services. The call to S & J Radio was personal in nature and unrelated to the second applicant or the second

respondent's business. The first respondent denies that he contacted Federale Stene.

24. The respondents admit that the third respondent made calls to a member of the WWS Group, namely, Johan Venter of 'Johan Venter Makelaars' as well as to Universal.

25. The respondents deny that the conduct of the first and third respondents constitutes a transgression of the terms of the court order, firstly because none of the calls were made for purposes of persuading the second applicant's clients to transfer their contracts to the second respondent and secondly, because the applicants failed to provide evidence that the clients so contacted were *existing* clients of the second applicant, that is, clients both at the time of the court order and at the time of the transgression of the court order.

26. The respondents admit that several calls were made by Loraine to the second applicant's clients as averred. The deponent to the answering affidavit contends that that these calls were either made for 'market research' purposes or in circumstances where Loraine called the clients by mistake. In all instances it is averred that she did not attempt to persuade the clients to transfer their service agreements to the second respondent. Quite surprisingly, no confirmatory affidavit by Lorraine was attached to the answering affidavit. Other than the deponent's statement that Lorraine resigned from the second respondent's employment, no explanation was furnished to explain why a confirmatory affidavit could not be obtained from Loraine. The difficulty which the respondents face in this matter is that the fourth respondent deposed to the answering affidavit and made averments relating to Loraine, which were not confirmed by her. The allegations therefore remain unsubstantiated, and are for

that reason to be ignored as inadmissible hearsay. This point was pertinently raised on behalf of the applicants in their written heads of argument.

27. In all instances of contact, the respondents disavowed either breaching the terms of the court order or if they did transgress the court order, that they had the requisite intention or *mala fides* to commit the crime of contempt.

28. The respondents admit that 15 of the second applicant's clients concluded contracts with the second respondent for the provision of telephone services. They contend that some of these contracts were cancelled with the second applicant by the clients of the second applicant before the court order was granted. Those that were cancelled after the grant of the court order, were done so by the second applicant's clients out of their own volition and not as a result of being persuaded to do so by employees of the second respondent. Clients such as Kohler Auto, Konica Minolta Witbank and WJ Bezuidenhout attorneys contacted the respondents and requested the respondents to provide telecommunication services to them as they were allegedly not satisfied with the services that were being provided by the second applicant.

29. In the answering affidavit deposed to by the fourth respondent, he states that he sought senior counsel's opinion on the nature and extent of the court order, the measures to be implemented by the second respondent to avoid any transgression of the order, and what the second respondent should do if approached by a person or entity that was a client of the second applicant. Pursuant to such advice, he compiled a blacklist of every person and/or entity suspected of being a client of the second applicant and implemented internal measures to safeguard against transgressing the order. Internal measures included, *inter alia*, notifying and instructing all employees of the second respondent not to contact those clients. If an appointment was made with a potential client of the second applicant or such

client's email address was obtained, the first respondent, who was responsible for preparing quotes and attending appointments with clients, would first verify that such client did not appear on the blacklist. If it did, the appointment would not be honoured and the email address would not be added to the second respondent's email list of clients for bulk marketing by way of email.

Legal submissions, the law and evaluation

Locus standi of the first applicant

30. It was submitted on behalf of the applicant that the present application concerns the profitability and continued existence of the second applicant, of which the first respondent is the sole member, and for that reason, the first applicant enjoys the necessary locus *standi.*

31. The aforegoing submission holds merit. In *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) the court held that it is not necessary that a litigant have a financial or a legal interest in a business for a finding that he has *locus standi*: anyone who is a director and in full control of a company which is trading and anyone who is the manager of a business has a real interest that the business should survive and that its profitability should not be harmed, would thus be vested with the necessary *locus standi.*

32. The attack by the respondents on the first applicant's *locus standi* was correctly not pursued in argument on behalf of the respondents

Elements of contempt

33. The requirements of a contempt order are:[2]

(a) The existence of a court order;

(b) That the respondent had service or notice of the court order;

(c) Non-compliance by the respondent with the court order; and

(d) That the respondent acted wilfully (intentionally) and *mala fide* in transgressing the court order.

34. In *Pheko v Ekurhuleni City*,[3] the court held as follows: "Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders... Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order." (footnotes omitted)

35. The requirements of a contempt order must be proved beyond a reasonable doubt. Once the applicant has proved the order, service thereof and non-compliance therewith, the respondent bears an evidential burden in relation to

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[2] See: *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (CC) at 344G–345A.
[3] 2015 (5) SA 600 at para 28.

mala fides and wilfulness.[4] A Respondent can defend himself by satisfying the court that there is a *reasonable possibility* that he did not act wilfully or *mala fide*. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established. See: *Pheko supra* at 621B–C.

36. In *Heg Consulting Enterprises (Pty) Ltd v Siegwart*'s 2000 (1) SA 507 (C) at 518H–I, the court held that intention in the form of *dolus eventualis* is sufficient for criminal contempt of court. It is thus sufficient if the contemnor subjectively foresaw the possibility that his actions may possibly have contravened the court order and was reckless as to the result.

37. In *Heg*'s case the following is stated: "Counsel's opinion, it appears, was being sought in a search for ways of escaping the effect of the Court orders". The court held that it was not open to a party, in interpreting a Court order, to do so. At 522B, the following is stated: "Katzeff...relies on a defence of 'legal advice' to disprove 'wilfulness' on his part. The defence requires a proper setting out of the circumstances under which the advice was given. It is incumbent upon a party relying upon such defence to...testify in regard to all the circumstances relevant to the giving of such advice (See *S v Abrahams* 1983 (1) SA 137 (A) at 146H). In motion proceedings, it means that all the relevant circumstances have to be set out on affidavit."

38. Proof beyond reasonable doubt has been described by Lord Denning in *Miller v Minister of Pensions*[5] as follows:

"It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The

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[4] Ibid *Fakie*. See too: *Heg Consulting Enterprises (Pty) Ltd v Siegwart* 2000 (1) SA 507 (C) at 518G.
[5] [1947] All ER 372 at 373.

law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt."

Declaratory relief

39. Our courts have held that civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief.[6] In *Faki supra* at 345B, it was held that 'a *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities'.

40. The question which then arises is whether or not contempt of court has been proved beyond reasonable doubt in this matter (for committal) or on a balance of probabilities (for a declarator).

The meaning, ambit and import of the court order

41. Counsel for the applicant submitted that the wording of the court order is clear and unambiguous. And further that the essence or import of the court order is such as to prohibit contact with existing clients of the second applicant for purposes of marketing the business of the second respondent. This means that

[6] See Pheko *supra* at 621D.

existing clients are clients of the second applicant as at the time of the transgression.

42. It was further submitted on behalf of the applicants that the very purpose of marketing is to persuade the second applicant's clients to transfer their service agreements to the second respondent. Stated differently, the purpose of marketing on behalf of the second respondent is to obtain further contracts and further clients for the second respondent. If the respondents therefore indulged in marketing in respect of the second applicant's clients, they would have been acting in contravention of the court order. The court order was made to prohibit marketing in respect of the second applicant's clients precisely because the first respondent was found to have a malicious motive to destroy/harm the second applicant. In the present application, it was demonstrated that in several instances, persons contacted by functionaries of the second respondent were asked for email addresses. The necessary and only inference is that they intended to market the second respondent's products by way of aggressive email marketing.

43. It bears mentioning that in the urgent application that was heard before Louw J, the respondents contended that they were lawfully competing with the business of the second applicant in marketing the second respondent's services, which they did by way of bulk email advertising to potential clients and which included the second applicant's clients. The respondents there alleged that the only manner in which clients were approached, was by way of email advertisements. Louw J rejected the defence of lawful competition when adopting a robust approach to the determination of the dispute.

44. In the present application, the respondents contend that prayer 1 of the court order requires interpretation. It was submitted on behalf of the respondents that

even if clients of the second applicant were approached by functionaries of the second respondent, the application must fail as the second applicant failed to put up evidence that those clients were the second applicant's clients at the relevant times, being clients as at the date of the court order and as at the date of the approach. This argument is premised on an interpretation of the scope of the court order as constricted by the word 'existing' in relation to the clients that were not to be approached and influenced to utilize the second respondent's services (as opposed to the services of the second applicant).

45. The respondents contend that the court order only prohibits contact with 'existing' clients of the applicant corporation with the object of persuading them to replace the service agreements with service agreements with the respondent corporation, as interpreted above. To put it differently, the court order does not prohibit the outright communication or contact with the second applicant's clients who are not clients at the time of the court order but happen to be clients at the time of the approach. In addition, the order does not prohibit outright communication or contact with clients of the second applicant, being clients at the relevant times, where the object of the contact was not to 'persuade' them to enter into service contracts with the second respondent. To this end, various dictionary meanings of the word 'persuade' were provided, amongst others, the following: '*to prevail on, talk to, coax convince, induce, influence, sway, sweet talk etc.*'

46. On the respondent's construction of the court order, any client whose business the second applicant either secured after the grant of the court order or to whom the respondents sought to market the second respondent's business would not fall foul of the prohibition contained in the court order.

47. Counsel for the applicants submitted that the respondents' interpretation of the court order is not correct and if accepted, would lead to absurd results. For example, if two days after the court order, a new client was listed by the second applicant, would the respondents be free to approach such client even with a malicious intent? The answer must be a resounding no! 'Existing' clients could only mean clients at the time of the transgression.

48. I will deal with the dispute between the parties in regard to the meaning of prayer 1 of the court order on the basis that it requires interpretation. In this regard, I am constrained to adopt an interpretation of the court order that does not lead to absurd results. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F the following was stated:

"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

49. In *Trustees, Bus Industry Restructuring Fund v Break through Investments CC and others* 2008 (1) SA 67 (SCA) at paragraph [21] Brand JA stated that "...the statement relied upon can only hold true if the commercially nonsensical meaning appears so clearly from the wording of the contract that it cannot be avoided; that is, if the provision under consideration is not reasonably capable of any alternative interpretation. If an alternative interpretation is available, the court will not accept a meaning which would lead to absurd practical and

commercial consequences (see eg *Cape Provincial Administration v Clifford Harris (Pty) Ltd* [1996] ZASCA 115; 1997 (1) SA 439 (A) at 446H-I)".

50. On the factual matrix before Louw J, it was alleged by the applicants that the first and third respondents were targeting all the second applicant's existing clients and that they were inducing those clients to cancel their contracts with the second applicant. Furthermore, that the applicant corporation's clients were being specifically targeted by the first and third respondents in furtherance of the first respondent's vow to ruin the first applicant financially. This much appears from the detailed judgment of Louw J, which was annexed to the papers.

51. Regard being had to the legal authorities quoted above and the relevant backdrop to the grant of the court order, particularly the findings of Louw J concerning the first respondent's malicious intent in soliciting clients of the second applicant, I am constrained to agree with counsel for the applicant that the order cannot be given the construction contended for by the respondents. The purpose of the order was to prevent respondents from carrying out their drive to destroy the second applicant's business by preventing them from marketing their services to existing clients (being clients at the time of the transgression) especially because they were advancing the second respondent's business at the expense of the second applicant with malicious intent.

52. The construction contended for by the respondents would allow the respondents 'open sesame' to solicit clients of the second applicants who were secured by the second applicant after the grant of the order, and thereby to further their malicious intent. And this is not what the court order sought to achieve.

53. Pursuant to the order, the first to third respondents noted an appeal, which was not pursued. A notice of application for leave to appeal was filed, however, it

was not prosecuted as it was withdrawn. The order of Louw J therefore stands and needs to be observed and complied with.[7]

54. In the event that the respondents assert that there is a difference between the parties about the import of the court order, they should have clarified it and not waited until contempt proceedings to assert their construction. A party cannot ignore a court order because of the party's own construction of the court order.[8] A party is obliged to make serious good-faith endeavours to comply with a court order, not to see where the consequences of the court order can be avoided.[9] For as was stated in *Meadow Glen Home Owners Association v Tshwane City Metropolitan Municipality and Others*[10] "...if there were a dispute between them [respondent] and the appellants regarding the scope of the order and what needed to be done to comply with it, it was not for the municipality [respondent] to wait until the appellants came to court complaining of non-compliance in contempt proceedings. It should have taken the initiative and sought clarification from the court..."

55. The respondents contend that the applicant failed to prove that the 14 or so entities out of nearly 6000 people who were contacted by representatives of the second respondent corporation (including the first and third respondents) were existing clients of the second applicant at the relevant times.

56. The applicants' attorneys addressed correspondence to the respondents' attorneys prior to the launch of the application in which they complained about several

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[7] See: *Gauteng Province Driving School Association & others v Amaryllis Investments (Pty) Ltd & another* (006/11) [2011] ZASCA 237 (1 December 2011) at para 19. See too: *The Master if the High Court v Motala NO* 2012 (3) SA 325 (SCA) at para 11 .
[8] See: *Lin v Minister of Home Affairs* 2015 (4) SA 197 at 217 para 84.
[9] See: *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA) at para 8.
[10] Ibid *Meadow Glen Home Owners Association* at para [8].

transgressions of the court order. In an extensive reply thereto, the respondents' attorneys denied that the respondents disobeyed the court order. In it, they, *inter alia,* specifically mentioned which of the clients the applicants complained of were *not* on their client's blacklist. The necessary inference is that the respondents knew that the other clients mentioned by the applicants' attorneys in their letter were clients of the second applicant. It was never disputed on behalf of the respondents in any correspondence preceding the launch of the application that the clients referred to therein were indeed clients of the second applicant.

57. The facts reveal that the first respondent had previously conducted business in joint partnership with the first applicant, which partnership included the business of the second applicant. He would therefore have had knowledge of the second applicant's clients at least until such time as the said parties parted ways. The first respondent would also have known who the clients of Mpumalanga Rental CC had been. The third respondent was previously employed at the second applicant and had intimate details of who the first applicant's clients were. Having regard to the correspondence that had been exchanged by the parties' attorneys, the respondents would also have known, for purposes of preparing their answering affidavit, which of the clients with whom contact was made, were clients of the second applicant at the time of the contact.

58. The dispute sought to be created by the respondents concerning who the clients of the second applicant were when they were contacted by representatives of the respondent corporation is, in light of the aforegoing, not genuine.

59. The respondents admit knowledge and notice of the court order. The next issue for consideration is whether the applicants have established that the court order was transgressed.

Has the court order been transgressed intentionally and with *mala fides*?

60. That the relevant representatives of the respondent corporation knew (or ought to have known) who the clients of the second applicant were, has been established as indicated earlier. Notwithstanding their knowledge, functionaries of the second respondent made advances to several of the second applicant's clients to promote the second respondent's business.

61. The purpose of the majority, if not all the calls made by Loraine, was to establish the identity of the contact person at the client, to enquire about the client's telephone system and to make an appointment for a representative of the second respondent to make a presentation to the client. This is apparent from the transcripts of the calls attached to the answering affidavit. In relation to the call made to RI&D, Loraine arranged for the first respondent to make a presentation to the client. The purpose of the presentation was to market the second respondent's business with a view to secure a service agreement with the client. This could only have been the purpose of all other calls which the fourth respondent avers were made by Loraine for 'market research' purposes. In her call to CMR, Loraine requested the client's email address. This shows a clear intent to market the respondent's business via email. As regards the client 'Advance Home Solutions', the transcript of the conversation between Loraine and the client reveals that she proceeded to ask for the client's email address even after being informed that it was a client of the second applicant. This demonstrates a clear wilful and *mala fide* intent to transgress the court order. The purpose thereof was to market the second respondent's business so as to secure the second applicant's client for the second respondent.

62. The second applicant's client 'AJ Safety' was contacted by Loraine, notwithstanding that this client was on the second respondent's blacklist. Loraine

sought to establish who the contact person at such client was. There would have been no reason for her to have done so unless it was to market the second respondent's business. The transcript of her conversation with the representative of this entity reveals that the person to whom Loraine spoke, indicated that they were with 'Telkom'. The respondents contended that the call did not transgress the court order in that this client was obviously contracted with Telkom and not with the second applicant. As pointed out by counsel for the applicants, Telkom must have been involved because Telkom supplied the lines. The tendered explanation is to my mind, a fatuous one, which is disingenuous and falls to be rejected.

63. When Loraine made a call to WWS, she was specifically informed that this was a client of the second applicant. She nonetheless proceeded to ask if the second respondent could provide a quotation to such client and attend at the client to make a presentation. This again demonstrates a wilful and *mala fide* intent to transgress the court order.

64. The third respondent contacted Johan venter of the WWS group. The respondents contend that she did not transgress the court order in that she did not attempt to persuade Johan Venter to transfer his service agreement to the second applicant. The transcript of the conversation reveals that the third respondent was asked by Johan Venter if she had not previously worked at another business. Her answer was 'no' – being an untruth, as she had previously had interactions with this specific client during her period of employment with the second applicant. In the urgent application, heard before Louw J, a quotation that the third respondent had sent to WWS was attached to the papers. The respondents can therefore not be heard to say that they did not know that 'Johan Venter Makelaars' (being part of

the WWS group of companies) was a client of the second applicant. In the present matter, the applicants referred to an email,[11] in which it was indicated that the third respondent had sent a contract to this client for signature. This was noticeably done to secure WWS as a client of the second respondent. The third respondent baldly denied such allegations in the answering affidavit. The allegation in the answering affidavit that the third respondent placed the call to Johan Venter Makelaars 'without thinking' and 'realised too late' that she should not have done so, is, to put it bluntly, inane and absurd in light of all the underlying circumstances described above, particularly, considering the fact that she had purposefully lied about her previous employment during this call. In these circumstances, the allegation that the call was not made to persuade the client to transfer its service agreement to the second respondent is so untenable and implausible that it falls to be rejected.

65. As regards the calls made by the first respondent to Konica Minolta Witbank, Benicon and S & J Radio of the WWS group, the first respondent denies that he disobeyed the court order in making these calls because he did not seek to persuade them to transfer their existing service agreements to the second respondent. According to the first respondent, he responded to a call from Mr Deyzel of Konica Minolta Witbank to assist in repairing their telephone system, which he duly repaired. All conversations with Benicon allegedly took place after Mr De Jager of Benicon, of his own volition, requested the first respondent to provide a quotation for telephone services without first having been contacted by the respondents. According to the first respondent, he is still in ongoing negotiations to secure Benicon's business. The calls to S & J radio were allegedly made to obtain a price for a new DSTV Explora decoder for the first respondent's personal use. All these entities are clients of the second applicant. The

[11] A copy of the email was attached to the founding affidavit.

coincidence of it all, having regard to the backdrop to the grant of the court order, is just too good to be true.

66. Significantly, no transcripts were provided of the first respondent's calls to Benicon and S & J Radio of the WWS group and no confirmatory affidavits were furnished from the representatives of these entities in support of the allegations made by the first respondent. No explanation was provided for the failure to do so. Yet the respondents provided a confirmatory affidavit from the representative of Konica Minolta Witbank in support of the allegations as to the first respondent's interactions with that client. The first respondent was well aware that Benicon and S & J Radio were clients of the second applicant in that they appeared on the second respondent's blacklist. The respondents baldly denied that the first respondent had contacted the second applicant's client, 'Federale Stene' in the answering affidavit.

67. It bears reiterating that Louw J found in October 2014 that the first respondent had the malicious intent to destroy the second respondent's business. As early as August the following year, the applicants confronted the respondents about transgressing the court order in making contact with the second applicant's clients with a view to marketing their business. In September 2015, the present application was launched. As pointed out earlier, the respondents' defence of lawful competition had been rejected by Louw J.

68. It ill behoves the respondents to contend that everything has changed since the grant of the order or that they are now lawfully competing with the business of the second applicant, that is, that they are not doing anything unlawful by approaching the second applicant's clients in order to market the second respondent's business. In light of the aforegoing, the failure to provide confirmatory affidavits from representatives of Benicon, S & J Radio and

'Federal Stene' leads me to conclude that representatives of these entities would not have supported the allegations made in the answering affidavit. Benicon was allegedly dissatisfied with the second applicant's services. If that were true, Benicon would have had no hesitation in providing the necessary confirmation.

69. If those clients of the second applicant who signed contracts with the second respondent after the grant of the court order had not been lured away from the second applicant by the respondents, but had transferred their business to the second respondent voluntarily, one would have expected them to support what the respondents alleged in this regard. Yet confirmatory affidavits were not provided. The allegations that the first respondent did not approach either Benicon or S & J Radio in order to secure service agreements for the second respondent is simply not believable in the circumstances of the matter, especially when viewed in conjunction with the relevant backdrop to the granting of the court order.

70. To suggest that the contract occurred for reasons other than to solicit service contracts in favour of the second respondent is all too convenient, bearing in mind the history of the animosity and the threats to destroy the first applicant and the findings made by Louw J. The exonoratory allegations in respect of the first respondent's contact with Benicon and S & J Radio are 'not in the least probable' as expounded in Miller *supra*. There is an overwhelming degree of probability that contact occurred to secure their business. In view of the finding of malicious intent by Louw J and the third respondent's written undertakings not to contact clients or future clients of the second applicant, the respondents can never be heard to say that they did not act without *dolus eventualis* or *mala fides* when marketing the second respondent's business to clients of the second applicant.

71. On the respondents own version, they sought advice from a senior counsel on ways how to avoid the court order. On the facts of the matter, it cannot be found that the respondents *bona fide* made serious endeavours to comply with the court order. I am also not convinced that full details of the circumstances relevant to the giving of such advice was provided by the fourth respondent.

72. It was submitted on behalf of the applicants that it would be expected of someone who was acting *bona fide* to have reacted in a different way to that in which the first respondent reacted – even if the first respondent was approached by a client of the second applicant, the reaction of a *bona fide* person would be to say 'sorry, there is a court order against us and under the circumstances I cannot help you'. Instead, the respondents grabbed every opportunity to secure the second applicant's clients for the benefit of the second respondent, as in the case of Benicon, based on their unilateral and wrong construction of the court order.

73. For all the reasons given, I find that the applicants have succeeded in proving the requirements of contempt. The respondents have failed to discharge the evidentiary burden of showing that they did not act wilfully and without *mala fides*.

74. The applicants gave notice that they would seek a punitive costs order against the first to the third respondents. In light of my findings of wilfulness and *mala fides*, such an order is warranted.

75. In the result, I make the following order:

Order

1. The first and third respondents respectively are committed to imprisonment for a period of three (3) months for contempt of court, which period of

imprisonment is suspended for a period of three (3) years on condition that either they do not disobey the terms of the court order granted by this court under case number 73254/2014.

2. It is declared that the second respondent is in contempt of the court order granted by this court under case number 73245/2014.

3. The first, second and third respondents are ordered to pay the costs of this application on the scale as between attorney and own client jointly and severally, the one paying, the other to be absolved.

MAIER-FRAWLEY AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	02 December2016
Date of judgment:	12 December 2016
Judgment delivered	14 December2016
Counsel for the applicants:	Adv Bergenthuin SC
Attorneys for the applicants	Van den Berg Koekemoer Attorneys, Wonderboom, Pretoria
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