



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

CASE NO: M104/21

In the matter between:

**FPM BUSINESS SOLUTIONS (PTY) LTD  
JACOB LESETSA THELELE**

**FIRST APPLICANT  
SECOND APPLICANT**

and

**FREDAH MOTHEPANE MASILO  
THABO ALEX MEKGWE  
ELISABETH MEISIE MASILO**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT**

<b>DATE OF HEARING</b>	:	11 MARCH 2021
<b>DATE OF JUDGMENT</b>	:	16 MARCH 2021

<b>FOR THE APPLICANTS</b>	:	MR H. S. EISER
<b>FOR THE RESPONDENT</b>	:	ADV. C. GOOSEN

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time of the handing down of judgment is deemed to be 13h00p.m. on 16 March 2021.

**ORDER**

- (1) The forms and service set forth in the rules of this court are dispensed with in terms of rule 6(12), and this application is heard as a matter of urgency.

- (2) Each of the first, second and third respondents are declared to be in contempt of the order of this Honourable Court dated 22 December 2020 under case number UM 180/2020.
- (3) Each of the first, second and third respondents is sentenced to a period of three (3) months imprisonment, which is suspended on condition that the first, second and third respondents henceforth fully comply with the terms of paragraphs 2.1 and 3 of the order of 22 December 2020, which reads as follows:

2. **THAT:** *Pending the finalisation, including all appeals, of an action to be issued by the applicant as plaintiff within 30 days of the grant of this order against the first respondent as defendant, declaring her to be delinquent and removing her as a director of the second respondent in terms of section 162 of the Companies Act 71 of 2008:*

*2.1 The first respondent is interdicted and restrained from exercising any of the powers and functions vested in her as a director of the second respondent and/or of exercising or receiving any benefit as a director of the second respondent and/or of entering into any premises of the second respondent in the North West Province, the Limpopo Province and/or any other place where the second respondent may conduct its business in the future and/or of her having any contact with any of the employees of the second respondent related to or connected with the business of the second respondent;*

3. **THAT:** *Pending the finalisation of disciplinary proceedings to be instituted within 5 Court days of the grant of this order including the exhaustion of all reviews and/or appeals based on her alleged fraudulent and other criminal conduct and attempted prevention of the applicant performing his role as director and/or Chief Executive Officer of the second respondent, the first respondent is suspended as an employee of the second*

*respondent on full pay, but is interdicted and restrained from having any contact at all with any of the employees of the second respondent save for purposes permitted by the Labour Relations Act.*

- (4) The relief sought in prayer 3 of the supplementary notice of motion is dismissed.
- (5) The first and second applicants are ordered to pay the wasted costs of 04 March 2021, jointly and severally, the one paying, the other to be absolved.
- (6) Each of the parties is to bear its own costs of the application of 11 March 2021.

## **JUDGMENT**

### **PETERSEN AJ**

#### **Introduction**

[1] This is an opposed application brought on supplementary notice of motion as an urgent application. The applicants seek an order in the following terms:

“1     *The forms and service set forth in the rules of this court are dispensed with in terms of rule 6(12), and this application is heard as a matter of urgency.*

2     *That the relief sought by the applicants in paragraph 3 of the notice of motion in this matter dated 11 February 2021 is granted now the said relief being*

*“Each of the first, second and third respondents are declared to be in contempt of the order of this Honourable Court dated 22 December 2020 under case number UM 180/2020 and each of the first, second and third respondents are committed to jail for a period of six months, none of the said periods to be suspended.”*

3. *Each of the first, second and third respondent is hereby interdicted and restrained from:*

*3.1 Making available to any natural person, corporate entity, partnership trust or any other entity which carries on business whether directly or indirectly as a provider of security services as defined in the Private Security Industry Regulation Act, 2001, any documents whether in hard copy paper or electronic form;*

*3.2 Orally or in writing whether in hard copy paper or electronic form divulging to any natural person, corporate entity, partnership trust, any other entity which carries on business whether directly or indirectly as a provider of security services as define in the Private Security Industry Regulation Act, 2001, any information;*

*3.3 Rendering advice and guidance or any other form of assistance at all to any natural person, corporate entity, partnership trust or any other entity which carries on business whether directly or indirectly as a provider of security services as define in the Private Security Industry Regulation Act, 2001, any information which constitutes a trade secret and/or confidential information of the first applicant;*

4. *That each of the first, second and third respondents pays the costs of the applicant in connection with this application as well as the application under this case number in the notice of motion dated 11 February 2021 the scales between attorney and own client jointly and severally the one paying the others to be absolved.*

5. *Further alternative relief.”*

[2] The application was initially enrolled on 04 March 2021, but struck from the roll as the index and pagination of the file was not complete and the practice note referred the Court to two files UM 180/2020 and UM 267/2020 which the Court was invited to read but not furnished to the Court.

## **The order in respect of which the present relief is sought**

[3] On 22 December 2020, Gura J, having heard Mr H.S Eiser for the applicant (the second applicant in the present application) and Adv. P.A. Myburgh for the respondents (the first to third respondents in the present application being the first, third and fourth respondents and the first applicant as second respondent), handed down the following order in UM 180/2020 heard with UM 267/2020, which is relevant to the present application:

### **UM 180/2020**

*“1. **THAT:** The forms and service prescribed in the Rules of this Court are dispensed with in terms of Rule 6(12) and this application is heard as a matter of urgency;*

*2. **THAT:** Pending the finalisation, including all appeals, of an action to be issued by the applicant as plaintiff within 30 days of the grant of this order against the first respondent as defendant, declaring her to be delinquent and removing her as a director of the second respondent in terms of section 162 of the Companies Act 71 of 2008:*

*2.1 The first respondent is interdicted and restrained from exercising any of the powers and functions vested in her as a director of the second respondent and/or of exercising or receiving any benefit as a director of the second respondent and/or of entering into any premises of the second respondent in the North West Province, the Limpopo Province and/or any other place where the second respondent may conduct its business in the future and/or of her having any contact with any of the employees of the second respondent related to or connected with the business of the second respondent;*

3. **THAT:** *Pending the finalisation of disciplinary proceedings to be instituted within 5 Court days of the grant of this order including the exhaustion of all reviews and/or appeals based on her alleged fraudulent and other criminal conduct and attempted prevention of the applicant performing his role as director and/or Chief Executive Officer of the second respondent, the first respondent is suspended as an employee of the second respondent on full pay, but is interdicted and restrained from having any contact at all with any of the employees of the second respondent save for purposes permitted by the Labour Relations Act.*

....”

### **The urgent application of 07 January 2021**

- [4] The respondents’ filed a notice seeking leave to appeal the order of Gura J of 22 December 2020. On 07 January 2021, in an urgent application launched by the applicants’, the first respondent consented to the following order before Snyman AJ:

- “1. **THAT:** *The forms and service prescribed in the Rules of this Court are dispensed with in terms of Rule 6(12) and this application is heard as a matter of urgency;*
2. **THAT:** *The two applications under numbers UM180/2020 and UM267/2020 are hereby consolidated into one application under case no. UM 180/2020.*
3. **THAT:** *In terms of section 18(1) of the Superior Courts Act 10 of 2013, the suspension of the orders granted by Gura J on 22 December 2020 as a result of the delivery by the Respondents of their Notices of Application for leave to Appeal in case numbers UM 180/2020 and UM 267/2020 is hereby set aside and the orders granted by Gura J in both the said cases remain of full force and effect until the finalization of any and all*

applications for leave to appeal to any Court and any appeals that may follow in any Court.

4. **THAT:** *The First Respondent, to the exclusion of the other Respondents tenders to pay the Applicants taxed or agreed costs on the scale as between party and party.”*

[5] The effect of the order of 07 January 2021 is that the orders of Gura J of 22 December 2020 which were stayed by the filing of the notice of application for leave to appeal were revived.

### **Urgency**

[6] On 11 March 2021, I heard Counsel on the issue of urgency and ruled that the application be heard on an urgent basis. It is widely accepted that contempt of court is inherently urgent. The ratio is clear, contempt of court strikes at the heart of the effectiveness of the judiciary as it impacts directly on its orders. In *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T), 673D-E, Kirk-Cohen J held that '[c]ontempt of Court is not an issue inter partes; it is an issue between the Court and the party who has not complied with a mandatory order of Court'. Undoubtedly the public has an interest in cases where it is alleged that a party has wilfully failed to comply with a court order and this lends itself to the urgency of such applications.

### **The basis of the applicants' contempt of court complaint**

[7] The applicant approaches this Court alleging certain events which are said to have occurred on 10 February 2021, 17/18 February 2021, 19 February 2021, 22 February 2021 and 23 February 2021.

- [8] The events are sketched in brief as an introduction thereto in the supplementary founding affidavit of the second applicant. According to the second applicant, he on Wednesday 10 February 2021 received an unsolicited email from Gliss Projects and Security (Pty) Ltd, a subcontractor of the first applicant at Kusile (a power plant run by Eskom). The e-mail spoke of contact from one of the employees of the first applicant and subsequent direct telephonic contact from the first respondent to the subcontractor, requesting documents which were relevant to two Eskom tenders which would close on 4 February 2021 and 9 February 2021, respectively. The second applicant later established that the said documents were not furnished to the first respondent. The second applicant contends that this behaviour of the first respondent is in direct defiance of paragraphs 2 and 3 of the order of 22 December 2020. The second applicant ventures an opinion that the request for the said documents by the first respondent is for another purpose.
- [9] In pursuing the narrative that the request for the documents is for another purpose, the second applicant states that Eskom, during January 2021, issued two tenders for its Limpopo installations and one for Kusile in Mpumalanga. The first of the tenders closed on 4 February 2021 and the first applicant submitted tenders for both, in which was included the Gliss documents which the first respondent sought to obtain from Gliss. The second applicant did not refer to this incident in the main founding affidavit according to him, as he first wanted to establish from Eskom if the first respondent's son who conducts business under the name Vick Pule Construction and Projects CC ("Vic Pule CC"), has tendered for either of the Eskom tenders as aforesaid. To date he has not been able to establish this, but maintains that he is still pursuing it.



- [10] The second applicant goes on to allege that during January 2021, the North West Health Department issued a tender for the provision of security services which also closed on 4 February 2021.
- [11] The erstwhile attorneys of the three respondents withdrew as their attorneys of record on 22 February 2021, having been their attorneys since 1 September 2020 and furnished the last known addresses of the first to third respondents as being 171A Kerk Street, Rustenburg, which is the address at which the first respondent's son Lentswe Noah Maeme carries on business as Vic Pule CC. The second applicant alleges that the aforesaid close corporation in addition to construction projects conducts business as a security service provider in competition with the first applicant. The second applicant premised on this event, opines that the sole purpose of the first respondent seeking the Gliss documents, was in all probability to assist her son and in particular Vic Pule CC to compete with the first applicant.
- [12] The narrative is advanced by the second applicant alleging that the first respondent has access to the rates which the first applicant has quoted to Eskom and the North West Department of Health which is secret and confidential and not to be disclosed or made available to anyone. To this end the second applicants avers that although the first respondent has been interdicted and restrained from exercising any of her powers and functions as a director, she continues to have her fiduciary duties to the first applicant and through her actions she is flouting these statutory and common law obligations.

- [13] On 18 February 2021, when attending to the renewal of the first applicant's registration with the Private Security Industry Regulatory Authority (PSIRA), the second applicant learnt that the first respondent, the previous day, 17 February 2021, applied for the renewal of the first applicant's registration and was issued the renewal certificate. The erstwhile attorneys of the respondents were sent an e-mail in which the certificate was demanded but as a result of an issue with the e-mail system of the attorneys, the email was sent via Postnet. The second applicant was informed telephonically that the attorneys mandate had been terminated, resulting in the e-mail being forwarded directly to the first respondent demanding delivery of the certificate which was delivered to the first applicants' business address on Monday, 21 February 2021.
- [14] The second applicant contends that by attending at the offices of PSIRA, the first respondent made a fraudulent misrepresentation that she was entitled to apply for and receive the renewal certificate of the first applicant. This he submits could only have been done in her capacity as a director of the first applicant and not as a shareholder and constitutes a brazen, wilful defiance of the orders in paragraphs 2 and 3 in case UM 180/2020.
- [15] The second applicant alleges that he discovered that the second respondent had stolen confidential information in the form of police security clearance certificates for certain members of the first applicant's staff, which was sent to Vick Pule CC. The second applicant further alleges that the information was stolen to enable Vic Pule CC to include the information in its tender to the North West Health Department which closed on 4 February 2021. He further alleges that the police clearance certificates may have been used by Vic Pule CC for its tenders to Eskom for Limpopo which closed on 4 February 2021, for which the first applicant had tendered.

[16] The second applicant labels the aforementioned allegations as establishing serial criminal conduct by the first respondent and defiance of court orders by the first and third respondents after they had been served with the said orders, thereby prejudicing the first applicant.

**The first to third respondents' defence to the applicants' allegations in the contempt of court charge**

[17] I deal with the answer of the respondents' relevant to the specific allegations of the second applicant. The first respondent in the answering affidavit to the supplementary founding affidavit makes the assertion that she is the 100% shareholder of the first applicant. It is noted that this is at variance with her evidence at her disciplinary hearing that she is a 70% shareholder.

[18] The first respondent, premised on the assertion that she is the only shareholder of the first applicant, defends her actions as follows in the statement at paragraph 2.9 of the answering affidavit:

*"I respectfully point out that the said court orders relied on by the Applicants herein; have no impact and/or bearing on my rights and interests as the majority (at least) shareholder in the company. No orders had been made restricting my rights as a shareholder."*

[19] The first respondent relying on her allegation that she is the only shareholder of the first applicant makes the further statement relevant to the allegations of the second applicant, at paragraph 2.15 and 2.16 that:

*"2.15...consequent to the court orders of 22 December 2020, I had no insight in the financial records of the company. Therefore, although I am for all practical*

*purposes the owner of the company; I have no input, say or even access, to the financial records of the company at present.*

*2.16 In the absence of any oversight of the affairs of the company; including its financial affairs; I fear greatly for the well-being of the company...”*

- [20] The first respondent's reliance on her assertion that she is the only shareholder of the first applicant and therefore owner of the company perpetuates the emphasis on her shareholding by stating at paragraph 2.19 that:

*“If the company does not survive, I stand to suffer substantial and tremendous financial and other harm; both in the financial sense as well as reputational sense. Consequently, as the owner of the company (through my shareholding), I have a direct and material interest on how the company is run; and how the company (as my asset), is being mismanaged by Thelele.”*

- [21] The respondents deny the allegation that they are colluding with Vic Pule CC to compete with the first applicant. The first respondent states that her actions to date have been to ensure the survival of the first applicant rather than to compete with it. The respondents categorically deny any involvement with any competitors of the first applicant or of submitting any tender bids/documentation on behalf of the company to Vic Pule CC.

- [22] The respondents deny any wilful breach of the court order/s dated 22 December 2020 and in fact deny any breach at all. The first respondent at paragraph 2.24 once again repeats her reliance on her shareholding in the first applicant for her actions which form the basis of the second applicant's allegations.

[23] The fact that the first respondent had access to documents of the first applicant subsequent to the order of 21 December 2020, which the applicants were not aware of until mentioned in the answering affidavit, is evident at paragraph 2.28 of the answering affidavit where it is stated:

*“I consider it prudent to mention, that Thelele, currently operating as the company’s sole director, failed to renew the company’s registration for UIF; as required by law; which exposes the company to substantial risk.”*

The first respondent attaches a document to the affidavit in confirmation of the allegation, which could only have emanated from a person in the employ of the first applicant.

[24] The first respondent proceeds to make a plethora of allegations against the second applicant, on information or the provision of documents on which she relies to make the allegations, which could only have emanated from an employee/s of the first applicant. These allegations are set out at paragraph 2.29.1 of the answering affidavit, as follows:

“2.29.1 pay the employee’s provident fund, PSSPF on time, which resulted in the First Applicant having to pay a penalty of R1 711.60 (One Thousand and Eleven Rand and Sixty Cent) ... Failure by the First Applicant to pay the required statutory payments, i.e. the provident fund, UIF and VAT results in the First Applicant being unable to tender for contracts at the state.

2.29.2 Enter an appearance to defend summons issued by the Johannesburg High Court under Case Number 94/2021. A copy of such summons is annexed hereto, ....

2.29.3 make payment of the UIF on time which resulted in the First Applicant having to pay a penalty of R42 448.27 (Forty-Two Thousand Four Hundred and a

Forty Rand and Twenty-Seven Cent.) Proof of the penalty is annexed hereto marked ....

2.29.4 make payment of VAT on time which resulted in the First Respondent having to pay a penalty of R145 000.00 (One Hundred and Forty-Five Thousand Rand). Proof of payment of the penalty is annexed hereto marked annexure...

2.29.5 to make payment of petrol garages where the First Applicant has accounts which resulted in these garages refusing to provide petrol to the First Applicant to provide services to the clients of the First Applicant.

2.29.6 provide employees of the First Applicant with payment of bonuses in January 2021. Proof of this failure is annexed hereto in the form of a memorandum by the First Applicant, marked as...

2.29.7. To defend a CCMA matter where an erstwhile employee of the First Applicant referred an unfair dismissal dispute to the CCMA where such employee was unfairly dismissed for sexual harassment after only being in the employ of the First Applicant for approximately 7 (seven) months. Instead he elected to enter into a settlement agreement with the said employee which resulted in financial damages to the First Applicant amounting to R120 000 (One Hundred and Twenty Thousand Rand). A copy of this settlement is annexed hereto...

2.29.8 give Mekgwe access to files required to complete tenders on behalf of the First Applicant where *Mekgwe* was tasked to complete such tender documents." (my insertion: *Mekgwe* being the second respondent)

[25] In answer to the specific allegations by the second applicant, the first respondent provides the following evidence. She contacted Mr Khumalo of Gliss to safeguard her material financial and other interests, to enquire if the second applicant engaged with the subcontractor in a manner he was

supposed to ensure that all the relevant tender documents were prepared accurately and as required by Eskom.

- [26] The first respondent admits that she on 17 February 2021 applied for the renewal of the first applicant's PSIRA registration, which was about to terminate on 26 February 2021. She attended to her own registration as a director and on the basis of her shareholding, and on learning that the first applicant had not renewed its registration she requested registration of the company as well. For obvious reasons, the first respondent was suspended a director by virtue of the order of 22 December 2020 and could not attend to her registration with PSIRA as a director and most certainly not as a shareholder. In this regard, she had already violated the order.
- [27] The respondents' admit the last known address of 171A Kruger Street, Rustenburg but deny all allegations in addition thereto. Further the respondents deny that Vic Pule CC is a competitor of the first applicant and allege that Vic Pule CC has instead worked with the first applicant.
- [28] The second respondent denies stealing any confidential information from the first applicant and sending same to Vic Pule CC. To this end the allegations of the second applicant is challenged through absence of any evidence that such information was used and/or utilised by the aforesaid to tender to the North West Department of Health for a tender which closed on 4 February 2021.
- [29] The certificates the second applicant relies on, maintain the respondents had expired and could not be of any use in any tender process.

[30] The second respondent is said to have printed the documents in question at the premises of Vic Pule CC, as he often works from that premises, as do other employees.

### **The legal position in respect of contempt of court**

[31] Civil contempt of court constitutes a criminal offence, which more often than not is accompanied by a criminal sanction. A person makes him/herself guilty of civil contempt when he/she unlawfully and intentionally violates the 'dignity, repute or authority of a judicial body' .... (See Milton *South African Criminal Law and Procedure* (Vol II: Common Law Crimes) (3ed) Cape Town, Juta and Co: 1996, 164.

[32] The Constitutional Court in *Mathjabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd* 2018 (1) SA 1 (CC), confirmed the essential requirements for civil contempt as set out in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). An applicant who approaches a Court seeking a committal order must prove:

- (i) a court order;
- (ii) service or notice of the court order;
- (iii) non-compliance with the court order; and
- (iv) wilfulness and *mala fides*.

The standard of proof is proof beyond a reasonable doubt. The Constitutional Court further confirmed that once the order has been proved, there has been service or notice of the order, and non-compliance with the order, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. If the respondent fails to adduce evidence that establishes



reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

[33] In *Cathay Pacific Airways Ltd and Another v Lin and Another* [2017] 2 All SA 722 (SCA) at paragraphs [1], [34], [40] and [46], Majiedt JA as he then was, had the following to say regarding the powers of judicial officers, the content of a court order and the citing of a party either in the proceedings in which the alleged impugned order was made and in the contempt proceedings:

“[1] Judges wield enormous power in their courts. Judges decide, sometimes conclusively, the rights and obligations of the parties before them. They are independent, subject only to the Constitution and the law, which they are constrained to apply impartially and without fear, favour or prejudice. But these powers must be exercised with great responsibility and with abundant caution. The overriding consideration in every matter must indubitably be the interests of justice. The blindfolded Lady Justice balancing the scales in her left hand and holding a sword in her right hand personifies the moral force of justice. While all three of these attributes of our system of justice come to the fore in this matter, it is the balancing of the scales of justice that is paramount.

*[34] A court order should always be embodied in writing by the Registrar of the court. The reasons for this are self-evident: it constitutes the recordal of what the Judge had ordered and is the official document to be served by the Sheriff (Administrator, Cape & another v Ntshwaqela & others 1990 (1) SA 705 (A) at 715D). In addition, the order must not only be formulated carefully (since that is what may eventually be appealed against), but must also be clear and easily understandable. (SA Eagle Versekeringsmaatskappy Bpk v Harford 1992 (2) SA 786 (A); Minister of Water and Environmental Affairs v Kloof Conservancy (106/2015) [2015] ZASCA 177; [2016] 1 All SA 676 (SCA); [2016] 1 All SA 676 (SCA) para 14; Mazibuko NO v Sisulu & others NNO 2013 (6) SA 249 (CC) para 24).*

[40] ... No order can be made against a party who is not cited to appear (Lewis & Marks v Middel 1904 TS 291 at 303; cited with approval in Campbell v Botha & others 2009 (1) SA 238 (SCA) para 16). It is of course so that any person who, with knowledge of a court order, aids and abets the disobedience of a court order or is wilfully party to such disobedience, can also be held in contempt, even though such person is not cited as a party to the contempt proceedings. (Pheko & others v Ekurhuleni Metropolitan Municipality (No 2) (CCT 19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC) para 47).

[46] Convictions for civil contempt of court are axiomatically very serious. For this reason the standard of proof is one beyond reasonable doubt. Equally self-evident is the fact that a party must be cited before it can be convicted for civil contempt, unless that party is alleged to have aided and abetted the contumacious disobeying of a court order."

## **Discussion**

[34] Having regard to the requirements for civil contempt of court, it cannot be gainsaid that the evidence presented by the applicants proves beyond a reasonable doubt:

(i) the court order of 22 December 2021 under case number UM 180/2020,

(ii) that the order was served by the Sheriff of the Court personally on the first and third respondents' and in respect of the second respondent service was effected on the third respondent. It is further clear having filed a notice of application for leave to appeal against the order of 22 December 2020 and from the proceedings of 07 January 2021, that the first to third respondents had notice of the order of 22 December 2021.

The submission in respect of the second respondent is that the order was not served on him is accordingly without merit.

- [35] The first to third respondents dispute non-compliance with the order and by implication the requirement of wilfulness. The defence of the first respondent to the alleged non-compliance with the court order is based predominantly on her shareholding, whether it be 100% or 70%, and an assertion that as the owner of the first applicant she has a material interest in how her asset is being run.
- [36] The defence by the first respondent as a shareholder is at variance with various provisions of the Companies Act, in respect of the role of shareholders of a company. I do not propose to embark on an excursus of the various provisions relevant to shareholders, save to make the point that on an interpretation of every conceivable provision of the Companies Act relevant to shareholders, the first respondent's actions which she admits from date of the order of 22 December 2020, offends the statute which places the running of the company in the hands of the Board of the Company. The first respondent is, however, not without remedy in terms of the Companies Act as a shareholder.
- [37] The first respondent in my view failed to comply with the order of 22 December 2020. The wilfulness of her conduct in my view, however, merits closer scrutiny. To this end, the evidence of the first respondent is that she mistakenly believed that as a shareholder and 100% or 70% shareholder, she was the owner of the company and that as such notwithstanding being suspended as a director and interdicted and restrained from acting in such capacity, that she was still entitled to engage herself in the running of the company, acting in its best interests and to safeguard her interests in the

first applicant. The first respondent in my view did not overcome the duty to demonstrate that she did not act with wilfulness.

[38] The second applicant calls on this court to infer from the various acts of the respondents that they were or are engaging in behaviour calculated to bring about the demise of the first applicant by engaging in acts directed at competing with the first applicant. I cannot find on the evidence that this is the only reasonable inference to draw from the proven facts.

[39] The question ultimately is whether the first respondent through her alleged mistaken belief that she could still act in the interest of the first applicant, acted wilfully in doing so. The first respondent is clearly a very astute business woman. Whilst the first respondent retains rights in terms of the Companies Act as a shareholder, it is inexplicable how she could labour under the impression that as a shareholder she retained rights to be involved in the running of the first applicant. The first respondent consented to the order of 7 January 2021, which lifted the suspension of the order of 22 December 2020. This acquiescence of the first respondent in that order, makes it plain that she fully appreciated the consequences of the order of 22 December 2020 and her consent to the revival of the terms of that order. The only reasonable inference to be drawn from her actions in consenting to the order and then still engaging in the running of the business is that she acted wilfully in defiance of the order which suspended her as a director. I reiterate that her remedies lay in the Companies Act as a shareholder.

[40] The second and third respondents contend that the order of 22 December 2020 was not granted against them, but only the first respondent and beg

the question what the exact nature of the alleged breach of the said order would be against them.

- [41] It is clear that any person who aids and abets another in contempt of a court order, may be convicted of contempt of court if all the requirements are proven against them. The second and third respondents were cited in the application under case number UM 180/2020 and subsequently served with the order and/or were seized with the requisite knowledge of the order.
- [42] In respect of the second respondent, the first respondent directly implicates him in disclosing information about the first applicant to her, which is in direct contravention of the order of 22 December 2020. Similarly, the third respondent divulged information to the first respondent, which is not disputed, likewise in direct contravention of the order of 22 December 2020. The gist of the violation being, the injunction that the first respondent has no contact with any of the employees of the first applicant, except insofar as it may have related to engagements in terms of the Labour Relations Act. None of the acts of the second and third respondents falls within the ambit of the Labour Relations Act. The second and third respondents simply have no defence for their acts.
- [43] In my view, the applicants' have made a case on proof beyond a reasonable doubt on the complaint of civil contempt of the court order of 22 December 2021. I, however, cannot find that the narrative sketched by the second applicant for the disobedience was designed to compete with the first applicant or to share information of the company to its detriment. The first to third respondents are accordingly held to be in contempt of the order of 22 December 2020 insofar as the first respondent engaged herself in the running of the affairs of the first applicant and the second and third

respondents aided and abetted the first respondent in doing so by sharing information with her.

### **The appropriate sanction**

[44] The second applicant seeks incarceration of the first to third respondents', by differentiating the terms thereof based on the acts of each on the narrative which this Court has rejected. In my view, the acts complained of do not merit the incarceration of the three respondents. A sanction which will serve to reinforce the purport of the order of 22 December 2020 should suffice.

### **The interdictory relief sought by the applicants' in prayer 3 of the amended notice of motion**

[45] The relief sought by the applicants' is not clear in its terms. It bears the hallmarks of interdictory relief sought on the basis of a restraint of trade whilst incorporating elements relevant to fiduciary duties of a director and employees.

[46] The case pleaded in the founding affidavit in this regard, in my view falls shy of making a proper case for the relief so sought, which appears further to be an extension of the terms of the order of 22 December 2020.

[47] The relief sought in prayer 3 of the supplementary notice of motion accordingly stands to be dismissed.

### **Costs**

[48] A successful litigant is ordinarily entitled to the costs of suit. The applicants' initially brought the urgent application in respect of the civil contempt complaint on very short notice to the respondents. Whilst this Court found urgency to entertain the application, the Court cannot lose sight of the question of degrees of urgency. In the *Cathay Pacific* matter *supra*, Majiedt JA had the following to say at paragraph 29 in respect of degrees of urgency:

*“[29] It is axiomatic that there are degrees of urgency. An applicant may, in a case of sufficient urgency, create its own rules subject only to the court’s control and insofar as possible in accordance with the Rules. Uniform Rule 6(12)(a) permits a court in an urgent application to dispense with the normal forms and service and to deal with the matter ‘as to it seems meet’. The degree of urgency will determine to what extent a departure from the rules will be permitted...Urgency is of course facts based...”*

[49] Civil contempt of court is an ongoing offence. On the peculiar facts of this matter, I can see no reason why the contempt application, could not be entertained on the allocated date for the opposed motion, being 11 March 2021.

[50] The urgent application could not be entertained on 04 March 2021, for reasons stated *supra* and was eventually heard on 11 March 2021. The wasted costs occasioned by the striking of the urgent application on 4 March 2021, should in all fairness be borne by the applicants’.

[51] In respect of the proceedings of 11 March 2021, the applicants have been successful in the contempt of court complaint and the respondents have been successful in the opposition of the interdictory relief sought. In the

exercise of my discretion in this regard, a fair order would accordingly be for each party to bear its own costs.

## **Order**

[52] In the result, the following order is made:

- (1) The forms and service set forth in the rules of this court are dispensed with in terms of rule 6(12), and this application is heard as a matter of urgency.
- (2) Each of the first, second and third respondents are declared to be in contempt of the order of this Honourable Court dated 22 December 2020 under case number UM 180/2020.
- (3) Each of the first, second and third respondents is sentenced to a period of three (3) months imprisonment, which is suspended on condition that the first, second and third respondents comply with the terms of paragraphs 2.1 and 3 of the order of 22 December 2020, which reads as follows:

2. **THAT:** *Pending the finalisation, including all appeals, of an action to be issued by the applicant as plaintiff within 30 days of the grant of this order against the first respondent as defendant, declaring her to be delinquent and removing her as a director of the second respondent in terms of section 162 of the Companies Act 71 of 2008:*

2.1 *The first respondent is interdicted and restrained from exercising any of the powers and functions vested in her as*



*a director of the second respondent and/or of exercising or receiving any benefit as a director of the second respondent and/or of entering into any premises of the second respondent in the North West Province, the Limpopo Province and/or any other place where the second respondent may conduct its business in the future and/or of her having any contact with any of the employees of the second respondent related to or connected with the business of the second respondent;*

3. **THAT:** *Pending the finalisation of disciplinary proceedings to be instituted within 5 Court days of the grant of this order including the exhaustion of all reviews and/or appeals based on her alleged fraudulent and other criminal conduct and attempted prevention of the applicant performing his role as director and/or Chief Executive Officer of the second respondent, the first respondent is suspended as an employee of the second respondent on full pay, but is interdicted and restrained from having any contact at all with any of the employees of the second respondent save for purposes permitted by the Labour Relations Act.*

- (4) The relief sought in terms of prayer 3 of the supplementary notice of motion is dismissed.
- (5) The first and second applicants are ordered to pay the wasted costs of 04 March 2021, jointly and severally, the one paying, the other to be absolved.
- (6) Each of the parties is to bear its own costs of the application of 11 March 2021.



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**A. H. PETERSEN  
ACTING JUDGE OF THE HIGH COURT,  
NORTH WEST DIVISION, MAHIKENG**