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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 22/08/2022

A Maier-Frawley

CASE NO: 2019/24007

In the matter between:

JACO CORNELIUS JUHL JURGENS — First Applicant/ (1ST Respondent in counterclaim

BOTHA AND JURGENS INC t/a RUIMSIG MEDIESE SENTRUM & DIABETIESE KLINIEK — Second Applicant/ (2nd Respondent in counterclaim

BOTHA AND JURGENS INCt/a RUIMSIG MEDIESE SENTRUM & DIABETIESE KLINIEK — Third Applicant/ (3rd respondent in counterclaim)

and

CHRISTOFFEL JACOBUS BOTHA — Respondent/ (Applicant in counterclaim)

J U D G M E N T

MAIER-FRAWLEY J:

1. Pursuant to the launch of a main application in the urgent court, an order was made by consent between the first applicant and the respondent on 23 July 2019.[1]

[1] The main application was instituted by the 3 applicants in these proceedings against the respondent cited in these proceedings together with 3 others. In Part B of the urgent application, Jurgens sought inter alia, an order declaring Botha as a delinquent director, alternatively, that he be removed as a

2. The first applicant (hereinafter 'Jurgens') and the respondent (hereinafter 'Botha') are medical doctors who were previously employed together with other medical practitioners in the two medical practices conducted under the vehicle of the second and third applicants (hereinafter, 'the companies' or the second and third applicants respectively).

3. Jurgens and Botha are co-directors and 50% shareholders in each of the companies. For convenience, they will be referred to jointly as 'the parties' in the judgment, save where the context requires otherwise.

4. At a certain point in time, the business and personal relationship between Jurgens and Botha began to sour, resulting in Botha discontinuing working together with Jurgens in the two practices and taking up employment with Healthworx in Krugersdorp for purposes of continuing practice as a medical doctor. To that end, and for the sake of peace, Botha handed over the reins of the management of the practices[2] - hitherto conducted by them jointly under the auspices of the second and third applicants - to Jurgens, but retained his directorship and shareholding in the companies. These steps did not alleviate the discord that continued to brew between them, as is apparent from the contents of a letter addressed by Botha to Jurgens on 27 August 2017,[3] which discord ultimately culminated in the urgent application

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director of the companies. Part A was for interdictory relief which culminated in the order to which these proceedings relate

[2] This appears from annexures 'L' at p010-37 a letter dated 28 July 2017, which was written on the letterhead of the second applicant and which was signed by both Jurgens and Botha in their capacity as directors. It reads as follows:
"*Dr Jaco Botha sal vanaf 28 Julie 2017 geen verdure besluite neem jeens finansies of personeel van Jurgens & Botha Inc of Botha & Jurgens Inc nie.*
Jaco Botha het ooreengekom om nie enige betalings of transaksies uit enige bankrekening wat verband hou met enige bogenoemde praktyke aan te gaan nie."

[3] See: Annexure "M' at p 010-38, being the letter dated 27 August 2017 addressed by Botha to Jurgens in which Botha pointed out that he had not abdicated his responsibilities as a director in the companies by virtue of annexure 'L', and in which he reiterated that he retained a financial interest in the operations of the companies for purposes of ensuring that they remained profitable, not least of all because his personal assets were on the line in relation to the security provided by him for the

referred to above, in which proceedings both parties accused one another *inter alia* of withdrawing funds or making payments from the bank accounts of the practices and misappropriating such amounts, each for their own personal gain.[4]

5. Pragmatism prevailed during the course of those proceedings and the parties were able to reach an agreement which was made an order of court by V/d Linde J in the urgent court on 23 July 2019 ('the order'). Regrettably, any semblance of agreeability or hope for future peaceable business relations between the parties was short lived.

6. It is not in dispute that Botha had stood surety for the obligations of the second and third applicants to creditors, including Absa Bank, where the respective companies held banking accounts and enjoyed overdraft facilities. Jurgens, on the other hand, did not sign surety or provide any other form of security for the fulfilment by the companies of their obligations to the bank or other creditors.

7. In these proceedings,[5] Jurgens accuses Botha of having breached the terms of the order. He seeks, amongst others, an order declaring Botha to be in contempt of court and further interdictory relief and in the alternative, the committal of Botha to jail for a period of one year, suspended on certain conditions. Botha has likewise accused Jurgens of breaching the terms of the order, and in a counterclaim launched by him in these proceedings, he seeks

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overdraft and other obligations of the companies. To this end, he requested that Jurgens at least keep him informed of any decisions taken by Jurgens that involved personnel and finances in the practices.

[4] Botha had signing powers on the bank accounts of the practices and authorisation to conduct electronic transactions, for example, to effect electronic payments, on the accounts. He did not relinquish such signing powers and authority but continued to make payments/perform transactions on the accounts, which led to the accusations made by Jurgens against him in the urgent application.

[5] The main application for contempt was brought by Jurgens and the companies against Botha. The counter-application was brought by Botha against Jurgens and the companies.

an order declaring Jurgens to be in contempt of court together with a committal order along the same lines as that sought by Jurgens, suspended on certain conditions. Each party seeks a costs order against the other on the scale as between attorney and own client.

8. Jurgens alleges that Botha breached the order in two respects:-

8.1. By withdrawing his suretyship in a letter addressed by his attorney to Absa Bank, dated 17 October 2017; (*'withdrawal of suretyship'*) and

8.2. By effecting electronic payment from the bank account of the second applicant to Caxton Publishers in respect of the cost of two advertisements placed for purposes of filling posts for the employment of medical doctors at the two practices conducted by the second and third appliaants. (*'payment of advertising costs'*).

9. Botha alleges that Jurgens breached the order in two respects:[6]

9.1. By securing payment, on a recurring monthly basis as from January 2021 from the bank account of the second applicant, in respect of an increase in rental payable by the second applicant to the landlord (Manatech (Pty) Ltd) ("Manatech') in respect of premises leased by the second applicant from Manotech, with Jurgens acting both in his capacity as co-director of Manotech [landlord] and co-director of the second applicant [tenant] (*'increase in rental'*); and

9.2. By securing repayment to him on 1 July 2021 of an amount of R639 500.00 by way of electronic transfer of funds from the bank account of the second applicant to a personal account of Jurgens, being in respect of a personal loan made by Jurgens to the second applicant sometime prior to the launch of the urgent court proceedings (*'repayment of loan'*).

[6] Whilst two other instances of breach were alleged in the counter-claim, these were not pursued at the hearing of the matter.

10. In relation to the allegations aforesaid, both Jurgens and Botha deny that their actions amounted to a breach of the provisions of the order, however, if it were to be found that same contravened the order, both aver that they did not do so wilfully or with *mala fides.*

In limine point

11. Botha contends, *in limine,* that Jurgens lacks authority to represent the Second and third applicants in his application against Botha. Botha and Jurgens are co-directors of the second and third applicants. Botha did not consent to the launch of the application by the second and third applicants.

12. The power to act on behalf of a company vests in the board of dirctors and not a single director.[7]

13. On 24 March 2020, a notice in terms of rule 7 was delivered on behalf of Botha in which he disputed the authority of CVM attorneys to act on behalf of the second and third applicants. No response was received to this notice. Jurgens has accordingly failed to establish the requisite locus standi in respect of the second and third applicants. The second and third applicants ought more appropriately to have been cited as respondents in their capacity as t interested parties.

14. For purposes of judgment, I will regard the application as having been brought by Jurgens in his personal capacity against Botha.

Discussion

Relevant legal principles

15. The requirements of contempt of court where a committal order is sought are trite. An applicant must prove, beyond a reasonable doubt:- (i) the

[7] See: section 66 of the Companies Act, 71 of 2008; *Ganes and Another v Telecom Namibia Ltd* 2001 (3) 615 (SCA) at paras 18-19.

existence of the order; (ii) service of the order on the respondent or that the respondent obtained notice thereof; (iii) that the respondent has not complied with the order; and (iv) that this was done wilfully and *mala fide.*[8] Once the applicant has proved the order, service or notice thereof and non-compliance, wilfulness and *mala fides* are assumed and the respondent bears an evidential burden to advance evidence that establishes a reasonable doubt as to whether his or her non-compliance is/was wilful and *mala fide.*[9]

16. The first two of the requirements above are not implicated in these proceedings. What is in issue is whether or not the actions of Botha on the one hand and Jurgens on the other hand amounted to a breach of any of the provisions of the order and if so, whether the breach was committed both deliberately and *mala fide*.

17. In *Fakie supra,*[10] the court stated the following:

> "The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or -herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).
>
> These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and

[8] See: *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at par 42 ("Fakie'); *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at par 36 ('; *Secretary, Judicial Commission v Zuma* 2021 (5) SA 327 (CC) at par 37.
[9] Id, *Fakie* and *Pheko.*
[10] Id *Fakie*, paras 9 &10.

intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent. " [Footnotes omitted] (emphasis added)

18. Whether a breach of the order was committed by either Botha or Jurgens in turn depends on an interpretation of the order.

19. A passage that has become a standard for interpreting contracts is the oft quoted extract from the case of *Endumeni.*[11] More recently, the passage has been explicated by Unterhalter AJA in *Capitec Bank Holdings,*[12] as follows:

"[25]... The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*[13] offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.[14]

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[11] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni*), para 18 at p. 603F, where the following was said:
"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." (emphasis added)

[12] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at paras 25, 26 & 51.

[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) at 18.

[14] *Endumeni, par 18.*

[26]... *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable." (footnotes included) (emphasis added)

20. The order in question reads, in relevant part, as follows:

"1. *The First Applicant* [Jurgens] *and the First Respondent* [Botha] *is* (sic) *interdicted and restrained from conducting any banking or financial transactions in respect of the bank account held by the Second and Third Applicants* [the companies] *and will not open any further bank accounts;*

2. *The First Applicant* [Jurgens] *is interdicted from diverting any income and business from the Second and Third Applicants;*

3. *Mynardt Boshoff Professional Accountants of Tax Accounting Secretarial Financial Services and/or a duly* (sic) *representative of the said company is ordered (authorised) to:*

3.1 *attend the practices of the Second and Third Applicants when same is necessary in order to confirm all cash transactions and cash deposits and the billing of patients of the Second and Third applicants and all other financial documentation required by him;*

3.2 *determine the nature of and the amount of any and all expenses to be paid on a bi-weekly basis with the assistance and co-operation of Renita van der Merwe;*

4. *In the event of a dispute as to the nature of and the amount and identity of the creditors to be paid, Mynardt Boshoff personally will liase with Nick Claasens of Nick Claasens Financial Management in order to determine the said amount to be paid and the validity of such payment;*

5. *The First Applicant will receive on a monthly basis his monthly salary, calculated at 50% of his fees generated and no profit sharing will be paid in the interim or any personal expenses of the First Applicant or First Respondent unless agreed in writing by the First Applicant and the First Respondent."*

21. It is common cause that Renita V/d Merwe was employed as the financial manager in the medical practices of the second and third applicants. It is also

common cause that Mynardt Boshoff (*'Boshoff'*) was generally looking after the interests of Botha whilst Nick Claasens (*'Claasens'*) was generally looking after the interests of Jurgens. They were appointed because Claasens was initially instructed to conduct an investigation into Botha's conduct and Boshoff was instructed by Botha to look after his interests.

22. The second and third applicants each held bank accounts at Absa Bank. These accounts were referred to in the papers as *'accounts 1 and 2'*.

23. It is convenient to deal first with Botha's alleged breach of the order, as contended for by Jurgens.

Case for Jurgens in relation to Botha's alleged breach of the order

Re Withdrawal of suretyship

24. It is common cause that Botha caused his attorney (Scholtz) to address a letter to Absa Bank on 17 October 2019, in which the following was said:

> "We are acting for and on behalf of DR CHRISTOFFEL JACOBUS BOTHA ... who stood surety and provided security by way of an immovable property, NO. 1 DE BEER STREET, STRAND, for and on behalf of the indebtedness of the aforesaid two practises including but not limited to the overdraft accounts of the aforesaid account numbers. This withdrawal of surety is for any and all accounts at ABSA for and on behalf of Dr Botha.
>
> We place on record that at the date and time of presentation of this letter and instruction hereof, both the accounts are in credit. Our client hereby withdraws his surety in respect thereof, which includes his surety on the overdraft as from 17 October 2019 and advise the bank accordingly.
>
> We place on record that should th[e] accounts be allowed to proceed into overdraft, our client will not be held responsible due to the negligence of the bank to comply with this letter.

Finally, it is our instructions that we have been advised that Dr Jurgens are (sic) of the intention to liquidate the aforesaid Companies and our client refuses to be liable for debts of the Company."[15]

25. It is not in dispute that the withdrawal by Botha of his suretyship, coupled with his letter of 4 December 2019, eventually led to the bank terminating the companies' overdraft facilities.

26. The thrust of the orders made by his Van der Linde J is that both Jurgens and Botha were interdicted from and restrained from conducting any banking or financial transaction in respect of any of the bank accounts held by the Second and Third Applicants and from opening any further bank accounts, as envisaged in par 1 of the order. Furthermore, Mynhardt Boshoff Professional Accountants were to attend to the practices of the Second and Third Applicants and were tasked to (i) confirm certain cash transactions/deposits and the billing of patients and to (ii) authorise or approve *'the nature of and the amount of any and all expenses to be paid'*, as envisaged in par 3 of the order. In other words, Mynhardt Boshoff (Botha's agent) had to consent to business related expenses being paid before such expenses could be paid.

27. The case made out by Jurgens in his founding affidavit is that in terms of Scholtz's letter to Absa Bank (referred to in par 20 above), Botha's attorney instructed Absa Bank to withdraw the overdraft facilities in respect of accounts 1 and 2. In his replying affidavit he referred to Scholtz's letter of 4 December 2019, in which Botha informed the bank that he did not consent to the grant of overdraft facilities or loans whereby the moveable property of

[15] This was followed by a further letter addressed by Scholtz to the bank, dated 4 December 2019, in which he informed the bank on behalf of Botha that *"Dr Botha does not Consent for you to grant an overdraft and/or any loans to Dr Jurgens, Botha & Jurgens Inc. and Jurgens & Botha Inc. More specifically, our client does not agree that the moveable property of the practices be used as security to cover any overdraft facilities in respect of said practices."*

the practices would be used as security to cover any overdraft facilities in respect of the practices.

28. Jurgens contends that the withdrawal by Botha of the suretyship and his instruction to the bank to terminate the overdraft facilities on the accounts of the second and third applicants amounts to the *conduct* by him of a *banking or financial transaction* that is prohibited by paragraph 1 of the order. In this regard, he relies on a literal interpretation based on dictionary meanings of the words 'conduct', 'financial' and 'transaction' to support the construction contended for by him. He argues that the effect of Botha's withdrawal of his suretyship, namely, that the overdraft facilities would be and in fact were terminated by the bank, a consequence which was in the contemplation of Botha, coupled with his further action in instructing the bank to cancel the overdraft facilities on the bank accounts of the companies or not to allow the companies to have overdraft facilities in future, amounted to the conduct of a financial or banking transaction as envisaged in paragraph 1 of the order. Jurgens averred that Botha's actions aforesaid were malicious and mala fide, in that the termination of overdraft facilities seriously curtailed the freedom to obtain a loan from the bank and disenabled the companies from conducting business for which a loan or a loan facility would be required.

29. Dictionary definitions of the word '*conduct*' or '*Conducting*' include, inter alia, a person's consent to and performance of a transaction; *Conducting* in relation to a business, means operating, carrying on, engaging in, doing or pursuing a business transaction.[16] Definitions of the word '*conduct*' from the

[16] See; https://www.lawinsider.com/dictionary/conducting

Oxford languages,[17] include, *inter alia*: 'To organize and carry out, manage or direct, or be in control of'.

30. Dictionary definitions of the word *'transaction'* include, *inter alia*, 'a communicative action or activity involving two parties or things that reciprocally affect or influence each other';[18] 'a piece of business that is done between people';[19] 'The act of conducting or carrying out (business, negotiations, plans)';[20]

31. The Collins English dictionary defines *'financial transaction'* as: 'a piece of business, for example an act of buying or selling something, relating to or involving money.[21]

32. Seen from a purely literal perspective, it could be argued that par 1 of the order prevented any communicative action involving money in respect of the bank accounts of the companies. However, when the relevant background circumstances are considered for purposes of determining the intention of the parties, it appears that par 1 of the order was designed to prevent either party from performing unapproved transactions such as transfers, payments or withdrawals on the bank accounts of the companies for an illegitimate purpose, i.e., for the personal benefit of the one party at the expense of the other, in the context of both parties having previously allegedly withdrawn and/or misappropriated funds from the business accounts for personal gain. This interpretation is corroborated by par 3 of the order in terms whereof

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[17] See: https://www.google.com/search?rlz=1C1CHBD_enZA910ZA910&q=Conduct+meaning&sa=X&ved=2ahUKEwiiz6v3-tL5AhVDmqQKHd-KDrAQ1QJ6BAgyEAE&biw=1280&bih=913&dpr=1

[18] Per The Merriam-Webster dictionary

[19] Per The Oxford Learner's dictionary: https://www.oxfordlearnersdictionaries.com/definition/american_english/transaction#:~:text=%2Ftr%C3%A6n%CB%88z%C3%A6k%CA%83n%2F,transactions%20between%20companies%20commercial%20transactions

[20] Per Wiktionary

[21] See: https://www.collinsdictionary.com/dictionary/english/financial-transaction

payment of legitimated business expenses, as verified and approved by Mynhardt, could be effected at the instance of either party.

33. Botha was the only surety in respect of the overdrafts and his immovable property was encumbered to secure payment of any overdraft liability. In this context and bearing in mind that Botha was entitled in law to give notice of the withdrawal of his suretyship, Botha's action of withdrawing his suretyship at a time when the accounts were in credit can hardly be said to fall within the purview of paragraph 1 of the order. It did not amount to a transaction involving the payment, transfer or withdrawal of money. The fact that it may have resulted in the recall of the overdraft facilities, with money potentially being at stake, does not alter that fact.

34. Botha denies having instructed the bank to cancel the second and third respondents' existing overdraft facilities. He withdrew his suretyship at a time when the bank accounts of the companies were in credit. His reason for doing so is explained in his letter of 17 October 2019, namely, because he did not want to be held personally liable in terms of his suretyship for the liabilities of the companies in circumstances where Jurgens had professed the intention to liquidate the companies and, as further explained in the answering affidavit, in the context of not being included in the management of the businesses under circumstances where he had steadfastly been refused access to certain records[22] he contended he required for purposes of protecting his interests.

35. Botha also alleges that he was advised that nothing contained in the order precluded him from withdrawing his suretyships. This evidence is corrobotated in the confirmatory affidavit of Scholtz. In this regard, Botha's evidence was as follows:

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[22] A list of the records in question are set out in par 24 of the answering affidavit.

"I bona fide believed that the withdrawal of my suretyships would not amount to the conduct of any banking or financial transactions in respect of any bank account held by the Second and Third Applicants, which is prohibited in the Court Order. In the Urgent Application the Applicants relied on the alleged unlawful withdrawals and payments made by me from the banking accounts of the Second and Third Respondents which withdrawals and payments allegedly benefited me. t is clear from the context of the founding affidavit in the Urgent Application that the Applicants' sole intention was to prevent me from making such transfers or payments from the Second and Third Applicants' bank accounts. The question of the withdrawal of my suretyships was never raised in the Applicants' founding affidavit in the urgent application."

36. Jurgens did not dispute having warned on more than one occasion that he intended to liquidate the companies. He acknowledges in his papers that one of the consequences of signing a surety is that once an entity is liquidated, the creditor can call upon payment.

37. I am not persuaded that Jurgens has proved beyond a reasonable doubt that Botha deliberately transgressed par 1 of the court order, but even if I am wrong in this regard, I conclude that Botha has set out sufficient facts to prevent the conclusion, beyond reasonable doubt, that he acted *mala fide.*

Botha's payment of advertising costs

38. Jurgens' complaint is that Botha had placed two advertisements in a local newspaper in order to fill vacant positions that arose after medical doctors employed in the practices of the second and third applicants had resigned.

39. It is common cause that Botha had caused payments in the sums of R6 575.24 and R6 434.48 to be made from one of the banking accounts in question. He did so without first seeking the approval or authorisation from Mynhardt of such expenses, which constituted constitute legitimate business expenses, which Mynhardt subsequently ratified.

40. Even if I were to accept that these expenses comprised legitimate business expenses, there can be no gainsaying the fact that Botha's unilateral actions aforesaid were prohibited by and fell foul of par 1 of the order.

41. Botha's explanation in this regard is that the resignation of the doctors from the two practises affected the monthly number of consultations and thus the amount of income to be generated in the practices, and by extension, Botha's financial interest in the companies. As Jurgens had made no attempt to fill the vacant positions, he took it upon himself to advertise the vacancies during September 2019.

42. Botha's evidence is the following:

> "Realizing that the First Applicant has no intention to fill these positions and realizing the detrimental effect it has on the two practices and on my financial interests in the First and Second Applicants, I during September 2019 decided to place two advertisements in the Krugersdorp News and Roodepoort Northsider newspapers in which the vacant positions were advertised. ... By agreement with the publishers we would qualify for a discount and one third of the price if payment had been made immediately. When the accounts rendered by Caxton Newspapers were not paid, I took it upon myself to make these payments. In the process I made two transfers from one of the business accounts in the amounts of R6 575.24 and R6 434.48...
>
> I did not hide the fact that I had made these two payments. On 17 September 2019 Scholtz Attorneys inter alia advised Carol Van Molendorff Attoneys in a letter that I have placed an advertisement and that I shall be conducting interviews. ...I remain a director of both companies. By law I have a duty to act in good faith, for a proper purpose and in the best interests of the Second and Third Applicants. I at all times believed that I was acting in good faith and for a proper purpose and in the best interests of the Second and Third Applicants as required by section 76(3) of the Companies Act, 71 of 2008 and that I had a duty towards the Second and third applicant to do so...These expenses had been incurred for the benefit of the practices of the Second and Third Applicants. It was in the interests of both the Second and Third Applicants that the vacancies be filled. I managed to secure a substantial discount should payment be made speedily. However, the First Respondent deliberately delayed payment of these amounts and in order to avail ourselves of the discount, I made payment...After these payments had been made and upon the First Applicant questioning the validity of these payments, I discussed the matter with Mynhardt Boshoff, who confirmed that these payments are business related and should be paid."

43. Jurgens disputes that it was necessary to fill the vacancies. Whether or not he is correct is not the issue in these proceedings. The issue is whether or not Botha's evidence is sufficient to dispel an assumption of wilfulness and *mala fides*. Accepting that Mynhardt subsequently ratified the payments as being a legitimate business expense, and although the amounts involved in respect of advertising costs were small, Botha's actions should not be trivialised and did not entitle him to disregard the order. I am unable, however, to find that he acted *mala fide* in seeking to sustain the financial well-being of the practices for the benefit of both shareholders. This leads to the ineluctable conclusion that contempt has not been established beyond a reasonable doubt.

Case for Botha in relation to Jurgens's alleged breach of the order

Re Increase In Rental

44. It is not in dispute that Jurgens, acting in his capacity as co-director and 50% shareholder of Manatech, being the landlord in respect of premises occupied by the second applicant as tenant, concurred with the decision of his co-director (one, Roelof Venter) that rental payable by the practice should increase from R22 220.49 to R45000.00 per month, commencing on 1 January 2020. In his capacity as co-director of the lessee, Jurgens acceded to the increase in rental without the knowledge or consent of Botha. Payment of rental had previously always been effected by way of monthly debit order.[23]

45. Botha's complaint is that payment of increased rental amounted to a financial transaction in respect of the bank account of the second applicant and that Jurgens breached par 3.2 of the order in that Boshoff was not asked to determine and approve the amount of the increased rental. He was

[23] That the increase in rental would likely redound to the benefit of Jurgens financially, given his shareholding in Manatech, whilst at the same time likely impacting adversely upon him financially, given his shareholding in the second applicant, seems fairly obvious.

merely informed thereof in an email sent by Renita Van der Merwe on 21 December 2020.

46. According to Botha, either Jurgens or Van der Merwe must have increased the debit order from R22 220.69 to R45 000.00. If it was Van der Merwe, she would have done so on the instructions of Jurgens. In either event, Jurgens increased or caused the adjustment of the debit order whilst knowing that he was interdicted and restrained from conducting any banking or financial transactions in respect of any bank account of the Second Applicant in terms of paragraph 1 of the order. By increasing the monthly rental by more than 100%, the First Respondent gained a personal financial benefit, through his shareholding in Manatech, to the detriment of the Second Applicant.

47. According to Jurgens, Venter was the person who was running the business of Manatech and it is he who took all financial decisions. In a letter dated 10 December 2020, he informed the second applicant that the monthly rental payable by the second applicant would increase to R45 000 per month as from 1 January 2021, and called upon the directors of the second applicant to provide suretyships in respect of the company's rental payment obligations. According to Jurgens, the rent payable by the second applicant had not increased since 2011 and an increase was implemented with a view to bring the rental charged in line with comparative rentals being charged in respect of premises such as those occupied by the second applicant. These allegations were confirmed by Venter in a confirmatory affidavit.

48. Jurgens denies having acted in breach of the court order. His evidence is to the effect that Mynardt was not required to authorise or approve an increase in rent required by the landlord in circumstances where nothing contained in the relevant lease agreement precluded the landlord from increasing the rental and nothing therein contained either obliged it to

negotiate any increase or the amount thereof with the lessee. Mynardt would not have been able to prevent the increase in rent, although nothing prevented him from approaching the directors of Manatech to request them not to increase the rent. He did not do so, but accepted the increase or at least did not voice his objection thereto or dissatisfaction therewith. According to Jurgens, 'it does not matter who caused the increase in the debit order as such increase simply followed the decision to increase the rent.' In any event, Jurgens avers that it was Renita v/d Merwe who caused the debit order to be adjusted at the bank. She does not ever put monthly recurring payments such as rent in respect of the premises of the second and third applicants on a list that was given to Boshoff monthly by her for his approval. She would forward the invoices received from creditors during the course of the month to Boshoff for his approval. These allegations were confirmed by V/d Merwe in a confirmatory affidavit. Jurgens alleges that no dispute was raised in respect of the increased rental until the counter-claim was launched in May 2021, some three months after Botha had acquired knowledge of the increase in rent.

49. Jurgens sought to distance himself from the decision to charge increased rental by Manatech and the payment of increased rental to be made by the second applicant. On the objective facts, however, he was in control of the management of the practice and would have had to accede to an increase in rental on behalf of the second applicant. Any suggestion by Jurgens to the effect that V/d Merwe caused the debit order to be adjusted without his knowledge or instructions, is far-fetched. As Jurgens himself alleged, if the tenant was unhappy with the extent of the increase imposed by the landlord, such tenant would have had to find other premises from which to trade.

50. I am inclined to agree with Botha that an increase of more than 100% in rental amounts to a financial transaction in respect of the bank account of

the second applicant, not only because it involved a change of the existing bank debit order in respect of the monthly rental payable but because it resulted in payment of increased expenditure by the practice, which was to be debited against the bank account of the practice on a monthly basis. In my view, it matters not that it was to be a recurring payment. The increased rental comprised a new business expense and it required Boshoff's approval in terms of par 3.2 of the order. Yet Boshoff's approval was not sought, in contravention of the order. He was simply advised of the increase, that it would be implemented as from January 2021, and the amount thereof.

51. The issue then arises as to whether the order was deliberately contravened with *mala fides.* Even if I were to accept that Jurgens authorised the adjustment of the debit order pursuant to the increase in rental, neither party provided a copy of the relevant lease agreement in their papers. It is thus not possible to find that Jurgens' allegations regarding the landlord's unilateral entitlement to increase the rent are incorrect. According to Jurgens, he genuinely (albeit mistakenly) believed that the increase in rent did not require Boshoff's approval, firstly, because his approval was not required or ever previously sought in respect of monthly recurring payments which were not put on the list that is given by V/d Merwe to Boshoff as envisaged in par 3 of the order. Secondly, because Jurgens believed that Boshoff would not have been empowered to determine the legal validity of the increase in rent or to prevent it from being put into effect by the landlord. Whilst it is correct that Boshoff's approval in respect of the increased rental payable was not sought, it seems doubtful that he would have had the power to do anything about it other than to verify the landlord's decision as it pertained to the nature of the expense and the amount of the expense. He was indeed informed of the increase and the amount thereof. Botha first obtained knowledge of the increased rental

payment in mid-January 2021 when he perused the relevant bank statement, but did not at that juncture raise a dispute such as to require Boshoff to liase with Claasens in terms of par 4 of the order. Although Boshoff confirmed that he would not have authorised the increased rental payment, had his approval been sought, he also did not object to or prevent the payment from going through. In these circumstances, I conclude that Botha has not established beyond a reasonable doubt that Jurgens breached the order deliberately and with *mala fides* and there can thus be no finding of contempt of court in respect of this complaint.

Re Repayment of Loan

52. This complaint relates to a payment in the amount of R639 500.00 that was made from the bank account of the second applicant to the personal bank account of Jurgens. According to Jurgens, this was a repayment of a loan he had made to the second applicant in April 2019, i.e., prior to the grant of the order on 23 July 2019, and at a time when the practice needed funds in order to pay its business expenses, including staff salaries. Jurgens states that the amount was required by him at the time because he owed money to SARS.

53. On 23 June 2021 Van der Merwe requested Boshoff to approve the repayment of the loan by the second applicant to Jurgens. Boshoff took the view that he lacked authority to approve or ratify any transaction which occurred prior to June 2019, stating that his task was to authorise (or refuse) payment of business expenses arising after June 2019. V/d Merwe then approached Claasens on the matter.

54. Having verified the loan with reference to documents provided by Van der Merwe, and having satisfied himself as to the nature of the transaction, i.e. the repayment of a short-term loan to Jurgens as creditor of the second

applicant, Claasens then authorised the transaction and informed Van der Merwe that she may proceed to make payment to Jurgens.

55. Repayment of the loan to Jurgens, which took place by means of a transfer of funds from the bank account of the second applicant to a personal account of Jurgens, undoubtedly amounts to a banking or financial transaction as envisaged in par 1 of the order. Botha's complaint is that despite Boshoff not authorising the payment, the payment was nonetheless effected, in breach of par 3.2 of the order, and in circumstances where Claasens lacked the authority to authorise payment of any expense on a proper construction of par 4 of the order.

56. There is no dispute between the parties that par 3.2 of the order required Boshoff to determine the nature of any and all business related expenses of each practice and the amount of any and all business expenses owing to creditors of each practice, with the assistance and co-operation of Van der Merwe.

57. In his heads of argument, counsel for Botha submits that the fact that Boshoff's approval for the loan expense was sought, is confirmation that Jurgens knew that the approval of Boshoff was required therefore. Despite the knowledge that Boshoff did not authorise payment, the payment was nevertheless made. He submits that on a proper construction of par 4 of the order, no authority was bestowed on Claasens to authorise any payment. He further submits that Jurgens, in the absence of approval from Boshoff, wilfully decided to continue with the transaction well knowing that this would amount to a breach of the terms of the order.

58. It bears mention that Jurgens disputes that he approached either Boshoff or Claasens for approval for the repayment of the loan. He states that Van der

Merwe did so of her own accord, a fact that is confirmed by her in her confirmatory affidavit. There is nothing to refute the evidence of Jurgens that he had loaned and advanced funds to each practice; that he was a legitimate creditor of each practice in respect of the loans; and that the second and third applicants were liable to repay same to him.

59. Jurgens's evidence is to the effect that he understood that Boshoff had absolved himself from the matter on the basis that it fell outside the scope of his authority, as a result of which Van der Merwe then approached Claasens for approval to repay the loan. I cannot conclude that either Jurgens or Van der Merwe acted mala fide in approaching Claasens. Van der Merwe could not herself authorise payments in terms of the order. Boshoff could do so but exempted himself from even considering the request for approval in relation to what was ostensibly demonstrated by Van der Merwe to be a legitimate debt, owed by the second applicant to a known creditor (Jurgens), in respect of an apparent authentic loan transaction. Even if I were to accept that Van der Merwe approached Claasens with the acquiescence and collaboration of Jurgens or that Jurgens was the driving force behind the repayment, it is clear from a contextual reading of Jurgens' affidavit in conjunction with Van der Merwe's affidavit, that it did not occur to either of them that Van der Merwe was doing anything wrong by approaching Claasens to sanction the repayment of the debt. Nor did they do so whilst knowing that Claasens was not empowered to authorise payment in terms of par 4 of the order, as contended for by Botha. In other words, even if the actions of Van der Merwe are to be imputed to Jurgens, I cannot find, on the evidence put up by Jurgens, that he deliberately disobeyed the order or that he did so with *mala fides*. The order is silent about what is to happen in circumstances where Boshoff believes he has no authority to participate in the exercise of determining the nature and amount of an expense that arises

for payment, particularly in circumstances where there appeared to be no dispute about the nature of the expense, the amount of the expense or the identity of the creditor to be paid.

60. It is common cause that Boshoff's approval was sought for the repayment of the loan. On the evidence submitted by Jurgens, there was clearly a genuine intention and effort to comply with the terms of the court order. Far from refusing to authorise payment, Boshoff merely declined to consider the request at all, adopting the view that any decision on the matter fell outside the scope of his authority, simply because the loan in question had been advanced prior to June 2019.

61. On a proper construction of par 4 of the order, in the event of a dispute arising as to the nature of a expense incurred by the second or third applicants or the amount thereof or the identity of the creditor to be paid, Boshoff is to *liaise* with Claasens in order to determine the amount to be paid and the validity of such payment. The clause in my view clearly envisages a resolution of the dispute by agreement between Boshoff and Claasens regarding the authenticity of the expense and the amount that is required to be paid to a verified creditor in respect of such expense. In other words, in the event of a dispute, Boshoff is not empowered to unilaterally act for purposes of authorising (or refusing to authorise) payment. He has to confer with Claasens (as opposed to V/d Merwe) for purposes of resolving the dispute in order to settle the issue of whether the expense is to be paid and if so, the amount thereof and/or the identity of the creditor who seeks payment and/or the validity of the debt, before he is empowered to authorise payment.

62. In all the circumstances, I am not persuaded that Botha has established a case for contempt of court on the part of Jurgens. Put differently, Jurgens

has set out sufficient facts to prevent the conclusion that he acted *mala fide* in procuring repayment of his loan from the second applicant in the circumstances under which it occurred.

63. For all the reasons given, both the application for contempt of court by Jurgens and the counter-application by Botha both fall to be dismissed. As neither party succeeded in obtaining relief, I consider it fair and just for each party to pay their own costs.

64. Although Jurgens sought an order that Botha be interdicted from 'directly or indirectly providing any instructions to any third party, including but not limited to Mynhardt Boshoff Professional Accountants of Tax Accounting Secretarial Financial Services in respect of any banking or financial transactions in respect of any bank account held by the Second and/or further Applicants', this relief was not seriously pursued at the hearing of the matter and I am not persuaded that such relief is warranted on the facts of the matter.

65. Accordingly, the following order is granted:

ORDER:

1 Both the application instituted by the first applicant (Jaco Cornelius Juhl Jurgens) and the counter-application instituted by the respondent (Christoffel Jakobus Botha) are hereby dismissed.

2 Each party is to pay his own costs.

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	10 May 2022
Judgment delivered	22 August 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 22 August 2022.

APPEARANCES:

Counsel for Applicants:	Adv. JJW Hayes
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Counsel for Respondent	Adv MA Kruger
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