IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 13701 /13

In the matter between:

SKIN RENEWAL CC	APPLICANT
and	
BRIGIT FILMER SPA & SKIN (PTY) LTD	FIRST RESPONDENT
BRIGIT FILMER	SECOND RESPONDENT
HERCULES ASHLEIGH PRINSLOO	THIRD RESPONDENT

ORDER

A. Rule 6(15) Application to strike out

1. Orders are granted in terms of Annexure "A" hereto.
2. Each party is directed to pay its own costs occasioned by the hearing of such application on 4 and 5 September 2014.

B. First Contempt Application

1. The rule nisi granted on 21 February 2014 is discharged with costs.

C. Second Contempt Application

1. The rule nisi granted on 20 May 2014 is discharged with costs.

HENRIQUES J:

INTRODUCTION

[1] The applicant instituted two contempt applications seeking to hold the first to third respondents (the respondents) in contempt of various court orders issued in this court.

[2] Preference was allocated as a consequence of the applicant's legal representatives written request and one day was allocated for the hearing of the contempt applications.

[3] Subsequent to the contempt applications being enrolled for hearing on the opposed motion roll, the respondents on 17 July 2014, served an application in terms of Rule 6(15) seeking to strike out certain portions in the various affidavits filed by the applicant in the contempt applications. The applicant filed a notice to oppose the Rule 6(15) application on 29 August 2014.

[4] The argument in respect of the application to strike out lasted approximately two days, being 4 and 5 September 2014, and argument in the contempt applications commenced in the afternoon of 5 September 2014 after the long adjournment. Argument was not finalised and the matter was adjourned to 18 September 2014.

[5] Consequently, the applications took three full court days to argue. This is relevant to the aspect of costs, specifically those occasioned by the application to strike out as procedurally the application to strike out had to be dealt with prior to the contempt applications proceeding. In addition, the applicant had received sufficient warning of the inevitability of such application and had been invited to remove such offending matter from the affidavits.

FACTUAL BACKGROUND

[6] The parties are engaged in what can only be described as exhaustive and acrimonious litigation. The proceedings commenced on 13 December 2013, when the applicant instituted proceedings to prevent its ejectment from premises it indicated it had a right to occupy by virtue of a lease agreement. The respondents have instituted a counter application for the ejectment of the applicant.

[7] The premises, which are free standing are situated at 1 Old Main Road Gillitts and in close proximity to the residence of the second and third respondents. The third respondent is married to the second respondent who is the director of the First Respondent. The second and third respondents are trustees of the Prinsloo Family Trust which owns the immovable property on which the premises and their residence is situated.

[8] Initially only the first respondent was a party to the proceedings, the remaining respondents subsequently being 'joined' as a consequence of the orders issued.

[9] The issue in dispute in the main application and the counter application is the existence or otherwise of a lease agreement concluded between the applicant and the first respondent.

RELEVANT COURT ORDERS

[10] The first court order was granted on 13 December 2013 (first court order) pursuant to an urgent application instituted by the applicant against the first respondent. The return date for the *rule nisi* was 11 February 2014, such order also incorporated the relief sought in the counter application. On the return date, an order was granted referring the matter to trial and such court order included orders intended to regulate the business relationship between the parties pending the finalisation of the trial matter and included *inter alia* orders relating to additional parking bays being allocated to the applicant (second court order).

[11] On 12 February 2014 as a consequence of what it alleged to be the first respondent's breach of the first and second court orders, a third court order was issued in terms of which the first respondent and its agents were interdicted and restrained from unlawfully attempting to evict the applicant from the premises and to refrain from either directly or indirectly interfering with the business activities of the applicant (third court order).

[12] The *rule nisi* granted on 12 February was returnable on 5 March 2014. As such order was granted in the absence of the respondents, they sought to reconsider this order on 27 February 2014. Such reconsideration application, which was opposed, was argued on 27 February 2014 and was dismissed with costs.

[13] As a result of various contraventions of what the applicant alleges to be the respondents breach of the first, second and third court orders, two contempt applications were instituted. The applicant was granted orders in both contempt applications and now seeks final orders for contempt[1].

[14] Prior to dealing with the contempt applications, procedurally this court has to finalise the application to strike out.

APPLICATION TO STRIKE OUT

[15] In their additional practice note dated 28 August 2014, the respondents make reference to their practice note dated 24 June 2014, in which they had invited the applicant to remove argumentative and irrelevant aspects from its affidavits filed in the two contempt applications. In July 2014, when no response was forthcoming, the respondents served a formal application in terms of Rule 6(15) for striking out. The notice informed the applicants of the respondents' intention to apply to court at the hearing of the opposed application on 4 September 2014 for orders in the following terms:

> "1. that the portions of the founding affidavit of Jenna Broom deposed to on 18 February 2014, as detailed on annexure "A" hereto be and are hereby struck out;
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> 2. that the portions of the replying affidavit of Jenna Broom deposed to on 10 March 2014 and as detailed on annexure "B" hereto be and are hereby struck out;
>
> 3. that the portions of the replying affidavit of Tamlyn Jane Gertzen deposed to on 12 June 2014 and detailed on annexure "C" hereto be and are hereby struck out; and
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> 4. costs of this application."

[16] The grounds of objection are set out in the notice and the relevant portion reads as follows:

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[1] Court Order of 21 February 2014, Seegobin J: First Contempt Application, page 130; Second Contempt Application: Court Order of 20 May 2014, Chili J, page 24.

"*The portions of the affidavits referred to above are argumentative, and or hearsay, and or attack the credibility of the Second and Third Respondents and are therefore irrelevant to the merits of the matter and further are prejudicial to the Respondents*."

[17] At the hearing of the matter, the parties' legal representatives made submissions relating to the various paragraphs in the affidavits which they objected to and could not reach agreement on and those on which agreement was reached.

[18] It appeared that the parties had not performed such an exercise prior to the hearing, and consequently much of the court's time was taken up by this. This is despite an opportunity being afforded to them to do so at the hearing. Time could have been saved had the court only been asked to deal with those matters upon which there was no agreement.

[19] Rule 6(15) reads:

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

[20] Rule 23(2) also contains a similar pre-emptory provision. The test being that the court must be satisfied of prejudice to an applicant if orders are not granted.

[21] The courts have ascribed the following meaning to the expression 'scandalous', namely allegations that may or may not be relevant but that are so worded as to be abusive or defamatory. Vexatious matters are allegations that may or may not be relevant but are so worded as to convey an intention to harass or annoy. Irrelevant matters are described as allegations that do not apply to the matter at hand and do not contribute in one way or another to a decision in the matter[2].

[22] This list is not intended to be exhaustive as to the grounds upon which a court will strike out certain allegations as a court still has inherent jurisdiction where the rules of court do not make provision for it[3]. Courts have struck out matters that are argumentative, allegations that attack the credibility of a party and evidence referred to in settlement negotiations as these are usually considered irrelevant matters.

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[2] Vaatz v Law Society of Namibia 1991(3) SA 563 (Nm);[1991] 2 All SA 30 (NM) at page 48.
[3] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974(4) SA 362 (T).

[23] Jacob and Goldrein[4] states as follows:

> "*A pleading is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense."*

[24] In so far as irrelevant averments are concerned, there is not much difference between argumentative and irrelevant matters. Matters that can be struck out on the grounds that they are "argumentative" would be equally open to a challenge that it is 'irrelevant'. 'Irrelevant' in the context of meaning irrelevant to the issues raised on the pleadings. In *Rail Commuters Action Group v Transnet Limited* [5] Thring elucidated the test for relevancy as follows:

> *"All that concerns the Court is whether or not the passage or passages sought to be struck out is or are relevant in order to raise an issue on the pleadings."*

[25] In bringing the application to strike out the notice must indicate precisely which passages are being objected to and must briefly state the grounds for such objection. An applicant must direct the court and its opponent to the specific allegations objected to and must not expect the court to wade through a mass of material in order to discover what matter is irrelevant and the grounds upon which it sought to have it struck out[6].

[26] At the hearing of the striking out application, among the submissions made was that such matters were irrelevant, argumentative, defamatory and/or scandalous, opinion evidence and/or not relevant to the proceedings. An overall submission which Mr Shepstone made on behalf of the respondents was that it was inappropriate for an employee to depose to affidavits which contained matters which were argumentative, scandalous and which in some instances was opinion evidence bordering on being defamatory in nature.

[27] He made submissions in respect of all matters dealt with in the application to strike out specifically in annexures A, B and C thereto. Similarly, Mr Pietersen placed on record those matters which the applicant conceded fell to be struck out and

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[4] Pleadings: Principles and Practice at page 223.
[5] 2006(6) SA 68 (C) at 83-84
[6] The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa 1997(1) A 614 (SWA) at 621 G-J.

addressed the court in respect of those on which no agreement could be reached between him and Mr Shepstone.

[28] In essence the respondents sought to strike matters on the basis that it was argumentative, scandalous, vexatious, irrelevant, defamatory, intended to harass and annoy and was an opinion of the deponent. Mr Pietersen in opposition submitted that such matters did not fall within the categories argued by the respondents and had to be seen in the context of the applicant making out a case for contempt. To the extent, that I agreed with these submissions and Mr Pietersen was not able to convince me otherwise, I granted such orders as evident from Annexure A to the judgment.

[29] Given the application to strike out so as to not make the judgment unduly prolix I have not deemed it necessary to set out all the individual submissions of the parties in respect of annexures A, B and C as these are a matter of record. I have only done so in certain circumstances where I deem it necessary. A party aggrieved by any of the individual orders made in the strike out application may request detailed reasons for an individual order pursuant to a request in terms of the rules of court.

[30] In respect of paragraphs 4 to 42 of the replying affidavit of Jenna Broom in the first contempt application and paragraphs 4 to 11 of the replying affidavit of Tamlyn Gertzen in the second contempt application I agree that these submissions were argumentative but also unnecessary and repetitive. It is for the court to determine the respondents' *mala fides.*

[31] I agree with Mr Shepstone's submission that it was inappropriate for Ms Jenna Broom to depose to the affidavits on behalf of the applicant in the manner that she did. I accept that she is in the employ of the applicant and had personal knowledge of the contraventions of the court orders and to some extent was best placed to contextualise matters, in my view the extent of the repetition in the affidavits was unnecessary and evinces an intent to harass and annoy. More so the "legal conclusions" which she drew ought not to be contained in affidavits and are matters best left for argument by legal representatives.

[32] One final matter in respect of the Rule 6(15) application is the aspect of costs. It is trite that the court exercises a discretion when it comes to an award of costs and

such discretion must be exercised judicially considering the particular facts unique to such matter. The general rule is that a successful party is entitled to its costs but there may be circumstances warranting a departure from such rule.

[33] Inasmuch as the respondents were substantially successful in their application I agree with Mr Pietersen's submission that given the circumstances of the matter, the most appropriate order would be to direct each party to pay its own costs.

[34] I now turn to consider the contempt applications in the context of the application to strike out which does not in my view significantly impact on the contempt applications considering the orders granted in annexure A.

CONTEMPT PROCEEDINGS

[35] Despite the fact that wilful disobedience of a court order in civil proceedings constitutes a criminal offence, a practice exists in the high court in terms of which proceedings are instituted by way of an application on notice of motion for committal of a respondent for contempt of court. In Van Loggerenberg, 2nd Edition, volume 1, 'Erasmus Superior Court Practice' the authors summarise the position as follows[7]:

> *"(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
>
> *(b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.*
>
> *(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice, noncompliance, and wilfulness and mala fides) beyond reasonable doubt.*
>
> *(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to*

[7] A2-169.

wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

Contempt of court in this context is defined as "the deliberate, intentional (i.e. wilful) disobedience of an order granted by a court of competent jurisdiction".

[36] The *locus classicus* in respect of contempt of court is the decision in *Fakie NO v CC II Systems (Pty) Ltd*[8]. It is useful to refer to certain passages from such case as these are relevant to this matter. In *Fakie supra* the court, per Cameron JA indicated the following:

[36.1] "……the essence of contempt of court … lies in violating the dignity, repute or authority of the court "[9]. The offence has been approved by the constitutional court as the rule of law requires the dignity and authority of the courts to be maintained[10];

[36.2] "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)[11]";

[36.3] "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

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[8] 2006(4) SA 326 SCA at 344G-345A.
[9] Fakie *supra* paragraph 6 page 332.
[10] S v Manabolo (ETV & Others intervening) 2001(3) SA 409 (CC) paragraph 14; Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison 1995(4) SA 631 (CC).
[11] Fakie *supra* paragraph 9 page 333.

manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."[12];

[36.4] The onus is that of the criminal standard of proof being proof beyond reasonable doubt[13];

[36.5] Once an applicant shows an order in existence and that it came to the notice or attention of a respondent, that the respondent had disobeyed or neglected to comply with the order, wilfulness and *mala fides* will be inferred and the applicant will then be entitled to a committal order. An evidentiary burden then rests upon a respondent in relation to the aspect of wilfulness and *mala fides.* A respondent must advance evidence that establishes a reasonable doubt as to whether non-compliance with such order was wilful and *mala fides*. A respondent does not bear a legal burden to disprove wilfulness and *mala fides*. If the respondent fails in discharging such evidentiary burden, contempt of the court order will be established beyond reasonable doubt[14].

[37] A respondent can escape liability if he/she can show he was *bona fide* in his disobedience of such court order, that he genuinely, though mistakenly, believed he was entitled to commit the act or omission alleged to be in contempt of such court order. In deciding this, an element of reasonableness enters the arena specifically in relation to determining the absence of *bona fides*. There are degrees of reasonableness and the mere fact that such conduct was unreasonable is not tantamount to an absence of *bona fides*.

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

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[12] Fakie *supra* paragraph 10 page 333.
[13] Fakie *supra* paragraph 19 at 337G; at 342B and 344D.
[14] Fakie *supra* at 344J-345A; paragraph 41 page 344.

[39] Paragraphs 55 and 56[15] Cameron JA deals with disputes of fact in contempt proceedings as follows:

> *"[55] That conflicting affidavits are not a suitable means for determining disputes of fact have been doctrine in this court for more than eighty years. Yet, motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fides' dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that failed to raise a real, genuine or bona fides dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*
>
> *[56] Practice in this regard has become considerably more robust, and likely so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence*."

[40] It is necessary to set out the facts on which the applicant relies for the contempt applications as well as to refer to the relevant court orders.

ISSUE

[41] The question to be decided is whether or not having regard to the instances of contravention which the applicant alleges the respondents' were in breach of such

[15] Pages 347 and 348 of the judgment

orders, and whether such non-compliance can be said to be wilful and *mala fide* beyond reasonable doubt.

[42] At the outset, having regard to the affidavits filed I must indicate that the respondents acknowledged service of the order and the fact that the orders came to their attention. They deny non-compliance, submit that in instances of non-compliance the orders were not applicable to the second and third respondents, alternatively that no orders were in place for which they could be said to be in breach of and such non- compliance was not wilful and *mala fide* beyond reasonable doubt.

[43] During 2013, the applicant and the first respondent concluded an oral lease agreement in respect of business premises situated at 1 Old Main Road, Gillitts, KwaZulu Natal. As a consequence of a dispute between the parties regarding such lease agreement, the applicant and first respondent obtained interdicts against each other on 13 December 2013.

[44] It seems that the purpose of such interdicts was to govern the future business relationship between the parties and would deter them from interfering with the others business activities and desist from conduct having the effect of preventing the other from conducting such business activities, until such time as the main dispute regarding the lease and the applicant's continued occupation of the premises was finalised. To this extent, interim orders were also made against the applicant at paragraphs 3.4, 3.5.1 and 3.5.3 thereof. Such orders remained in place until the 11 February 2014.

[45] As at 11 February 2014 the third respondent was not a party to the proceedings. The dispute relating to the existence of a lease agreement and a renewal thereof was referred for trial on 11 February 2014 and the order was amended. In terms of paragraph 4 thereof, it states that the *rule nisi* issued on 13 December 2013 was superseded by the order. The second order incorporated two further interim orders relating to the allocation of four additional parking bays and the order in addition made provision for the applicant to cease using the respondents' client data base and communicating with the respondents' clients on the respondents' data base.

[46] In addition it read as follows:

> *"3.1. The respondent, its management and staff are hereby interdicted and restrained from:*
>
> *3.1.1. approaching the Applicant's staff attempting to offer them employment;*
>
> *3.1.2 making any derogatory and/or damaging remarks, comments or statements regarding the Applicant and the services and/ or products offered by it;*
>
> *3.1.3. unlawfully evicting the Applicant from the Leased Premises during December 2013 alternatively January 2014 or until the valid termination of the Lease Agreement; and*
>
> *3.1.4. offering any medical based treatments or products which cannot lawfully be administered by a somnatologist. ……*
>
> *3.4. The Respondent is required to instruct the Respondent's security provider not to enter the Applicant's premises to threaten and/or intimidate its staff and customers, making derogatory and defamatory statements about the Applicant, as well as to take photographs of vehicles belonging to the Applicant's customers and/or staff.*"

[47] On 12 February 2014, the applicant instituted an urgent application as a consequence of what it alleged to be the first respondent's breach of the first and second court orders. In consequence thereof a third court order was issued in terms of which the first respondent and its agents were interdicted and restrained from unlawfully attempting to evict the applicant from the premises and to refrain from either directly or indirectly interfering with the business activities of the applicant.

[48] The order was specifically amended to include the word 'agents' at paragraph 3.1. and adding paragraph 3.5 to the second order in terms of which the respondent was to cease directly or indirectly interfering with the business's activities of the applicant and/or allowing, procuring or permitting any third parties to do so. This had the effect of 'extending' the orders to specifically apply to the second and third respondents and or their agents and third parties.

[49] The rule nisi granted on 12 February 2014 (the third court order) was returnable on 5 March 2014. As the third court order was granted in the absence of the

respondents, the respondents sought to reconsider the third court order on 27 February 2014. Such reconsideration application, which was opposed, was argued on 27 February 2014 and was subsequently dismissed with costs.

[50] After the interim order of 12 February 2014 was made final, the applicant obtained an interim contempt order on 21 February 2014 as a consequence of the respondents' alleged contravention of such order.

[51] The third respondent attended at the applicant's premises on 19 May 2014 in the presence of officials of the eThekwini Municipality in order that a prohibition order be served which required the applicant to immediately cease its business activities at the premises as same was illegal due to the zoning of the property. Within minutes of the officials and the third respondent leaving the premises, the second and third respondents are alleged to have disconnected the applicant's water and electricity supply.

[52] In addition the respondents are alleged to have denied the applicant's patients access to its business premises for the remainder of the day. Alternative rooms for the next few days was sourced but when the applicant's employees attempted to remove certain medical equipment from the premises to treat patients, the third respondent prevented them from doing so. The third respondent informed them he had also arranged for a third person to clear out the premises during the afternoon of 19 May 2014. The equipment in the premises was estimated to be worth in excess of R2 million. This culminated in the second contempt application in which the applicant obtained an order on 20 May 2014.

CONTRAVENTION OF THE COURT ORDERS

[53] The applicant sets out in detail in the affidavits filed specific instances upon which it relies in the two contempt applications as well as its heads of argument.. These can be summarised as follows.

COURT ORDER OF 13 DECEMBER 2013 TO 11 FEBRUARY 2014

[54] The applicant relies on the following:

> [54.1] In January 2014, the Local Health Inspector attended unannounced at the leased premises to conduct an inspection.

[54.2] On 22 February 2014, the National Health Inspector conducted an inspection of the applicant's premises and confiscated products. This the applicant alleges was after attending at the home of the second respondent and after being requested by the second respondent to conduct such inspection.

[54.3] On 24 January 2014, despite the second respondent conducting an inspection of the premises in December 2013, she indicated she wished to once again do so.

[54.4] On 27 January 2014, the applicant's delivery trucks were refused access to the premises as they were alleged to be blocking the entrance to the property. On the same day the third respondent advised Ms Gertzen that he intended taking away four parking bays allocated to the applicant hereby limiting the applicant to eight parking bays. The applicant indicates it had unlimited use of nine parking bays on the right hand side of the entrance to the leased premises and four additional staff parking bays.

[54.5] From 28 January 2014, the first, second and third respondents and/or their employees and agents are alleged to have blocked off parking bays preventing the applicant's use thereof. Correspondence was exchanged, and on 30 January 2014, the applicant was informed in writing by the third respondent it would enforce the limited parking and the applicant had five minutes to respond. A tow truck acting on the instructions of the third respondent attempted to tow the vehicles and that of the therapist in the parking bays and that of two patients.

[54.6] On 5 February 2014, a patient of the applicant was denied access to the business premises.

SECOND COURT ORDER OF 11 FEBRUARY 2014

[55] The applicant alleges the following contraventions of the second court order:

[55.1] The terms of paragraph 3.2 of the second court order were not complied with as the additional parking bays were not made available by the first respondent.

[55.2] A patient of the applicant was turned away from the premises by a security guard employed by the first respondent as there was "no parking available".

[55.3] A 1.5m sign had been erected in clear view of the applicant's patients vehicle which read as follows: "*Skin Renewal given notice on 30/11/2013 to vacate premises".* Correspondence was exchanged in which the first respondent indicated the security guard had been advised to allow patients of the applicant to park in any available bays and would attend to the formal allocation of the bays at a later stage. It recorded that neither the first or second respondent gave instructions relating to the erection of the sign nor did anyone acting on their behalf do so.

THIRD COURT ORDER OF 12 FEBRUARY 2014

[56] The applicant alleges that:

[56.1] The 1.5m sign remained in place.

[56.2] Only two parking bays were made available to the applicant's patients.

[56.3] The applicant's patients were required to sign in on accessing the premises.

[56.4] the order was extended to include third parties and agents of the respondent.

[57] In addition, the respondents are alleged to have on no less than two occasions disconnected the electricity and water supply to the property.

[58] The respondents in their respective heads of argument and answering affidavits deal with the incidences of alleged non-compliance with the various court orders as follows. In addition they allege that there are disputes of fact in the papers.

[59] The allegation that the respondents refused the applicant's patients access to the premises is denied and constitutes a dispute of fact. Likewise is the allegation that the respondents attempted to remove the applicants' medical equipment.

[60] The applicant submits that the respondents refused access to the applicant's delivery trucks on 27 January 2014. The respondents deny same and submit that such conduct complained of has been dealt with in the answering affidavits of the respondents and in addition such conduct can never constitute a breach of the order of court that was in place at the time being the court order of 13 December 2013. The respondents submit that large vehicles were required to park outside the property as same constituted a safety risk to their daughter and smaller vehicles were allowed access save that they had to turn at the parking area and not at the circle.

[61] The applicant alleges that the respondents breached the court order of 13 December 2013 by removing some of the applicants allocated parking bays on 27 January 2014. The respondents submit that this is not a breach of an existing court order in that the issue of parking was only dealt with in the orders of court on 11 February 2014. In addition there was no formal arrangement with respect to the parking bays. The respondents also indicate that the 4 parking bays were allocated as per the order of court.

[62] The applicant alleges that the respondents breached the orders of court by employing the services of a tow truck to remove their vehicles parked in the respondents parking bays including belonging to the applicant's employees. In addition it is alleged that certain vehicles of patients of the applicants were also attempted to be moved by the respondents. Same is alleged to have occurred on the 30 January 2014 at time when the first court order was in place.

[63] The respondents deny this and allege that apart from there being disputes of facts on the papers this does not constitute a breach of the order of court The order of 13 December 2013 does not make reference to the parking bays and same was only specifically mentioned by the court order of 11 February 2014. The respondents, specifically the third respondent acknowledges that he called the tow truck driver to remove Jenna Broom's vehicle only as it was parked in the second respondent's allocated bay and despite a request for her to remove same she did not do so and only reacted when the tow truck arrived. In his defence he submits that he acted in anger and out of sheer frustration and same was in his capacity as trustee.

[64] In addition he has denied interference with other vehicles and has also dealt with the issue in relation to the capacity in which he acted. I cannot find that his admission constitutes *mala fide* conduct.

[65] The issue relating to the erection of a sign on the premises is dealt with by the respondents in their answering affidavits, explanations have been provided. The second respondent indicates she had no knowledge thereof and that same was erected by the third respondent in anticipation of a contravention notice being issued by the Municipality which was eventually issued.

[66] The applicant further alleges that the respondents are in contempt because the applicant's patients were required to sign in when visiting the premises. The respondents submit that such conduct cannot constitute a breach of any orders of court as same has not been included moreover same constitutes a security measure and further did not only apply to the applicant's patients.

[67] Mr Shepstone submitted on behalf of the respondents that where there are disputes of fact raised on the papers, the *Plascon Evans* rule applies as the disputes are genuine and not far-fetched. The version of the respondents must be accepted as no request for the matter to be referred for the hearing of oral evidence has been made. In addition in instances where the respondents have admitted the conduct complained of same can never constitute contempt as the respondents have provided explanations to demonstrate not only that such conduct did not amount to a contravention of the court orders, was not wilful and or *mala fides* and/or raised reasonable doubt as to whether they acted wilfully and *mala fides*.

[68] Regarding the allegations that the water and electricity supply to the premises were disconnected on more than one occasion, the second respondent deals with this in her answering affidavit filed on her behalf and that of the first respondent in the second contempt application as does the third respondent. She denies any knowledge of the events leading up the second contempt order and denies that either she or the third respondent disconnected the supply of utilities or prevented the patients accessing the premises. The third respondent is alleged to have acted of his own accord in respect of the notice annexed to the gate and the security guards.

[69] The third respondent indicates that he was required by law in terms of the prohibition order to erect notices and to also comply with such order failing which he and the second respondent as trustees would be held liable. He submits that he was thus acting in terms of such prohibition order and not wilfully and mala fide disobeying an order of court.

[70] Mr Shepstone who appeared for the respondents submitted that having regard to the answers given by the second and third respondents in their affidavit same constitutes a genuine dispute of fact and in light of the fact that the applicant has not sought orders to refer the contempt applications to oral evidence, this issue must be decided in terms of the *Plascon Evans* rule. This view finds support as indicated earlier on in this judgment in *Fakie's* case[16].

[71] If one considers the affidavits filed the prohibition order was in place on 20 May 2014 when the second contempt application was instituted and an order obtained. Two prohibition notices appear to have been served. Whilst it appears that the prohibition notice was withdrawn as against the applicant, the replying affidavit suggests it was only on 28 May 2014 that the municipality confirmed that the prohibition notice was also withdrawn as against the respondents as trustees. Consequently, the respondents cannot be said to be in wilful and *mala fide* breach at the time of the granting of the order on 20 May 2014 as some reasonable doubt exists on their version. Alternatively, even if is argued that the third respondent's conduct may be considered objectively unreasonable, I do not believe it to be *mala fide* and wilful.

[72] In addition there is a dispute of fact on the papers specifically in relation to the disconnection of the water and electricity supply . As the applicant has not requested the referral of the matter for oral evidence, in terms of *Plascon Evans* and *Fakie* I cannot find that the version of the respondents so far-fetched so as to be untenable falling to be rejected.

[73] I agree with the submission of the respondents that disputes of fact are evident on the papers in most if not all instances of the alleged contraventions. In the

[16] Fakie's decision in relation to oral disputes of fact was confirmed in the Supreme Court of Appeal decision in National Scrap Metal (Cape Town) v Murray & Roberts 2012(5) SA 300 at paragraphs 21 and 22.

absence of a request for a referral to oral evidence, the version of the respondents is not so far-fetched as to be rejected.

[74] Consequently, the applicant has not been successful in both the contempt proceedings and the *rule nisi's* issued in both matters fall to be discharged with costs.

[75] In the premises I grant the following orders:-

A. Rule 6(15) Application to strike out

1. Orders are granted in terms of Annexure "A" hereto.
2. Each party is directed to pay its own costs occasioned by the hearing of such application on 4 and 5 September 2014.

B. First Contempt Application

1. The rule nisi granted on 21 February 2014 is discharged with costs.

C. Second Contempt Application

1. The rule nisi granted on 20 May 2014 is discharged with costs.

Date of Hearing:	4, 5 and 18 September 2014
Date of Judgment:	26 January 2016
Counsel for Applicant:	WJ Pietersen
Instructed by:	Schindlers Attorneys c/o Tatham Wilkes 200 Hoosen Haffagee Street, Pietermaritzburg Ref: NR/Tatham/Michelle/06G0387/13 Telephone: 033 3453501 email: nigel@thathamwilkes.co.za
Counsel for Respondents:	SM Shepstone
Instructed by:	JH Nicholson Stiller & Geshen c/o Stowel & Co. 295 Pietermaritz Street Pietermaritzburg Ref: GJ Campbell/JHN/0043/LN Telephone: