**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, JOHANNESBURG**
**(COMMERCIAL COURT)**

**CASE NO: 29652/2017**

[1] REPORTABLE: ~~NO~~
[2] OF INTEREST TO OTHER JUDGES: YES
[3] REVISED.

29/11/18
**Date**

**WHG VAN DER LINDE**

**In the matter between:**

| | |
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| Transnet Second Defined Benefit Fund | Applicant |
| and | |
| Regiments Fund Managers (Pty) Limited | 1st Respondent |
| Regiments Capital (Pty) Limited | 2nd Respondent |
| Regiments Securities Limited | 3rd Respondent |
| Magandheran Niven Pillay | 4th Respondent |
| Litha Mveliso Nyhonyha | 5th Respondent |
| Coral Lagoon Investments 194 (Pty) Limited | 6th Respondent |
| Ash Brook Investments 15 (Pty) Limited | 7th Respondent |
| Ergold Property No 8 CC | 8th Respondent |
| Marcytouch (Pty) Limited | 9th Respondent |
| Legae Securities (Pty) Limited | 10th Respondent |
| Capitec Bank Holdings Limited | 11th Respondent |

| | |
|---|---|
| Kgoro Consortium (Pty) Limited | 12th Respondent |
| Cedar Park Properties 39 (Pty) Limited | 13th Respondent |
| K2017377463 (South Africa) (Pty) Limited | 14th Respondent |
| Registrar of Deeds: Pretoria | 15th Respondent |

**JUDGMENT**

Van der Linde, J:

Introduction

[1] There are required for decision applications for discovery, for contempt of court, and for substituted security. The hearing commenced on Wednesday 5 December 2018 when the bulk of the discovery application was argued, and then continued on Monday 11 December 2018 when the remaining aspects of the discovery applications, and the other two applications, were argued.

[2] These interlocutory applications are but further battles in a greater war between the applicant as plaintiff and thirteen defendants. The plaintiff instituted action against the defendants in 2017 for claims in excess of R230 million based on various causes of action arising from a contractual relationship between the plaintiff and some of the defendants in terms of which the latter managed the plaintiff benefit fund. On the plaintiff's case the management was in fact a mismanagement. I will refer to the parties, mostly, by their designations in the pending action, and will indicate later which of the defendants are joined as respondents in these proceedings.

[3] The history of the relevant earlier interlocutory proceedings between the parties is set out in the affidavits. This includes an interim security application before Adams, J in March 2018; an anti-dissipation application in April 2018 before Tsoka, J who gave an order on 20 July

2018 restraining the principal defendants from dissipating their assets; and an urgent *ex parte* application by the plaintiff for Anton Piller relief on 17 August 2018 before Keightley, J who gave an order with immediate effect but in the form of a rule *nisi* returnable to an ultimately extended date in February 2019. There also currently pends an urgent full court appeal ostensibly in terms of s.18(4) of the Superior Courts Act 10 of 2013 against a part of the order that Tsoka, J made on 23 August 2018 when he granted the principal defendants leave to appeal his restraint order of 20 July 2018.

The discovery application: the parties' positions

[4] The first application to be discussed is that brought by the 1st, 2nd, 3rd, and 4th respondents (1st, 2nd, 3rd and 10th defendants in the action) ("*the defendants*") to enforce their Rule 35(14) notice dated 11 September 2018. That notice requires the plaintiff in terms of Rule 35(14) "*to make available for the purposes of pleading*" a list of nine categories of documents. The first prayer in the defendants' application is a prayer for relief in terms of Rule 35(13), meaning an order that the provisions of Rule 35 of the Uniform Rules of Court relating to discovery should apply, with the necessary changes, to the pending Anton Piller application.

[5] If discovery in terms of Rule 35(13) for purposes of the Anton Piller application were ordered now, the effect will be akin to early discovery in the pending action, given the potential overlap of issues. Essentially therefore it is an application brought by the defendants to compel discovery by the plaintiff both for purposes of the pending Anton Piller application, and for purposes of pleading in the pending trial action. Self-evidently the defendants have not yet pleaded in the pending action. In fact, they have excepted to the plaintiff's particulars of claim, and that exception is pending.

[6] The plaintiff's primary attitude to the defendants' application was that no relief can be granted on it since the defendants are in contempt of the restraint order granted by Tsoka, J

on 20 July 2018. As indicated, that order restrains the defendants from disposing of their assets pending the action so that, were the plaintiff successful in the action, it would obtain satisfaction of its judgment debt.

[7] The plaintiff also opposed the discovery application on the basis that it is premature for the defendants' failure first to have obtained the prior permission of the court to invoke Rule 35(14) in an application before serving a notice. The permission referred is said to flow from Rule 35(13), in terms of which the provisions of Rule 35 relating to discovery generally apply to applications, but only "*in so far as the court may direct*".

[8] Here reliance is placed on the judgment of Sutherland, J in *Investec Bank Ltd v Blumenthal, NO and others,* [2012] JOL 28596 (GSJ) paras 5 to 7, in which, following two judgments by Southwood, J in the now Gauteng Division, Pretoria, he held: *"There is therefore no room for applications to be brought at the same time under Rule 35(13) for leave to procure discovery, and to compel a reply to a Rule 35(14) request."*

[9] The plaintiff submitted further that in any event no proper case is made out under either Rule 35(13) or (14). As to the plaintiff's defence on the merits to the discovery application, the plaintiff contended: that the documents are not necessary for the purposes of pleading; the Rule 35(14) notice lacks the required specificity; and finally, no case has been made out for the provisions of Rule 35(14) to apply in application proceedings.

[10] The essence therefore of the opposing positions in the present matter is first, that the defendants' asserted contempt of the Tsoka, J order persists and therefore precludes them from obtaining any relief; second, whether Rule 35(13) should in principle be made applicable to the Anton Piller application; and third, whether the documents specified in the Rule 35(14) notice ought to be compelled despite their asserted lack of specificity.

The discovery application: defendants' submissions

[11] In argument before the court, Adv Morison, SC who appeared with Messrs Horn and Scott for the applicant defendants, addressed the following issues: First, the plaintiff's argument that since the defendants are in contempt of the order of Tsoka, J they ought not to be afforded any relief; next, the prematurity point raised by the plaintiff, that unless a court will first have given a direction under Rule 35(13), a notice under Rule 35(14) is incompetent; third, the plaintiff's argument that the documents sought by the defendants are not necessary for the defendants to plead; fourth, the plaintiff's attack on the specificity of the documents listed in the notice in terms of Rule 35(14); and finally the question of the discretion of the court under Rule 35(13) to permit the application of Rule 35(14) to the Anton Piller proceedings.

[12] Mr Morison submitted that the asserted contempt is in any event not an absolute bar; he referred to *Di Bona v Di Bona and Another* [1993] 3 All SA 624 (C) in which Rose-Innes, JP said that the rule that a person in contempt of court will not be heard is not absolute. It applied only to the case where the person in contempt brings a voluntary application in which that person asks for relief from the court; but not to a case where the person in contempt is seeking to be heard in defence of a cause brought against that person.

[13] By parity of reasoning, Mr Morison submitted that in this matter it is – in substance - the defendants who are seeking to oppose the substantive Anton Piller relief sought by the plaintiff against them; and this discovery application is a step, necessary at that, in the legitimate process of defending themselves. Mr Morrison submitted that it followed that the defendants' striking out application was good (to strike out the contempt of court defence) and should therefore succeed under Rule 6(14), in terms of which a court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant.

[14] As to the sequence of events leading to the plaintiff taking the contempt of court point, Mr Morison explained that there was an initial application by the plaintiff for contempt of court; that was withdrawn on the 19th November 2018 after the defendants had given notice under Rule 30 that the application was incompetent because it sought unilaterally to set the matter down before Tsoka, J. However, two days before the application was withdrawn, on 17th November 2018, the plaintiff re-launched the contempt of court application and that is the application which has been set down for hearing on Monday 10 December 2018.

[15] With reference to the full court judgment in the Gauteng Division, Pretoria on 18 August 2017 under Case Number 80978/2016 in the matter of *The Minister of Finance v Oakbay Investments (Pty) Limited and Others*, Mr Morison submitted that the irrelevant matter should be struck out because otherwise they threaten to derail the merits of the proceedings. That applies, according to the submission, squarely in this matter.

[16] At that step in the process I raised with Mr Morison whether it would not be appropriate to consolidate under Rule 10 the current discovery application – given the contempt of court defence raised by the plaintiff – and the substantive contempt application, and its counter-application, set down for Monday 10 December 2018. Both parties agreed that that would be an appropriate course, and so I made an order on 5 December 2018, in the course of the hearing, consolidating the two applications. This consolidation includes the interlocutory strike out application by the defendants in the discovery application and the defendants' counter-application for substituted security in the substantive contempt of court application.

[17] Mr Morison then addressed the specificity point. He did so with reference to their heads of argument in reply at page 6 paragraph 7. He also, from the Bar, limited the Rule 35(13) relief sought in prayer 1 of the notice of motion, to the documents listed in the Rule 35(14) notice; thus he eschewed general discovery relief.

[18] As to the history of the matter, he explained that the crux of the plaintiff's claim in the pending action against the defendants is for damages resulting from a payment which the plaintiff had made - at the instance of the Regiments defendants - of about R229 million to an adviser not of the plaintiff but of Transnet SOC Limited. But, explained Mr Morison, the interest rate swap transactions between the plaintiff and Transnet SOC Limited is being implemented and in terms of its implementation, Transnet SOC Limited is currently paying to the plaintiff not only the interest rate differential in respect of which the plaintiff sought protection in the interest rate swap transaction with Transnet SOC Limited, but also the fee which the plaintiff had paid to Transnet SOC Limited's adviser. In the end-result, Transnet SOC Limited will have paid the full fee to the plaintiff, and the plaintiff will not have suffered any loss.

[19] Mr Morison submitted that the documents specified in the Rule 35(14) notice will reveal the cogency of this fee agreement defence, namely that the payment of the fee is, by agreement with the plaintiff, occurring and therefore the plaintiff has, in fact and in law, suffered no loss. The argument is that the documents called for are not to show the *facta probantia,* but indeed the *facta probanda*, and in fact they constitute the "*material facts upon which he relies*" for the purposes of Rule 22(2). Mr Morison emphasized in this regard that it has throughout this litigation been known to the plaintiff the defendant's defence is that there is no loss because the plaintiff agreed with Transnet SOC Limited that the latter will pay to the former the R229 million disbursed by the former in respect of advice and advisory services relating to the interest rate swap transactions.

[20] As to whether the identified documents may be called for under Rule 35(14), the defendants submitted that the documents were "*necessary*" to enable the defendants to plead. Mr Morison pointed out that although, strictly speaking, the defendants were able simply to assert that agreement, the annotations on the documents will prove that the intention of

Transnet SOC Limited in paying the differentials to the plaintiff was not only in discharge of its own obligations under the Interest Rate Swap Agreement, but also in order to repay the advisory fee.

[21] He referred the court to page 230 of the discovery application, read with page 231, where the annotation "*structuring and arranging fee – 20 basis points*" appears, as an example of the annotation to which he refers. This supports the payment defence and proves, he submitted, that the repayment of the fee by Transnet SOC Limited to the plaintiff is occurring. Other examples appear at page 245, 259 and 273. He handed up a document headed "*20 Basis Point Payment*" which lists five instances in the answering affidavit in the Anton Piller application in which the defendants explained that the quote for the interest rate swap transactions included a spread of 20 basis points added to the fixed rate payable by Transnet SOC Limited to the plaintiff over the life of the swaps.

[22] As to the prematurity point raised by the plaintiff the defendants, although accepting the obligation to show the existence of "*exceptional circumstances*" before a court acting under Rule 35(13) will direct discovery in application proceedings, submitted that this has been shown. Mr Morison pointed to paragraphs 6.8.1 through 6.8.9 of the defendants' heads of argument in reply. Included within those nine points is the submission that the payment defence raised by the defendants was not disclosed by the plaintiff in its founding papers when it launched the Anton Piller proceedings.

[23] All that was disclosed there was in paragraph 21 of the founding affidavit (page 29) of the Anton Piller application where the following is said:

*"The respondents do not dispute that Regiments Fund Managers removed these amounts from the fund bank account over which it had signing powers pursuant to the portfolio management agreements. Their version is that the amounts were legitimately appropriated to pay the fees of Transnet's transaction advisers in relation to four tranches of interest rate swap transactions that*

*Regiments Fund Managers purported on behalf of the fund to conclude with Transnet to hedge the floating interest risk assumed by Transnet in respect of a series of loans described as 'the club loan'."*

Also, at page 54 paragraph 62 the deponent said that:

*"Rather than attempting to put words into the mouths of the respondents, I have been advised to draw the attention of this court to the defences and versions advanced by the respondents in the restraint application, the respondents' application for leave to appeal against the (restraint order) judgment of Tsoka, J ..., and the respondents' suspension application. (Under section 18(3)."*

[24] Finally, Mr Morison referred to the judgment of Binsward, J in *Matthias International Limited and another v Baillache and others,* 2015 (2) SA 357 (WCC) at paragraph [45]. Concerning the "*exceptional circumstances*" that would be required for the exercise by the court of a discretion under Rule 35(13), Mr Morison referred also to the judgment of Plasket, AJ (as he then was) in *Premier Freight (Pty) Limited v Breathetex Corporation (Pty) Limited* 2003 (6) SA 190 (SE) at paragraphs [13] to [22]. He stressed that, as in that matter, in this matter the claim is for a substantial amount of money.

The discovery application: plaintiff's submissions

[25] Mr Chaskalson, SC, who appeared with Mr Luthuli for the plaintiff, began by dealing with the striking out application and the question of contempt of court. He submitted that the striking out application was an abuse. The discovery application was launched on the 20th October 2018 and set down for the 23rd October 2018, long before any application for contempt of court was brought by the plaintiff. The discovery application was then again set down for the 30th October 2018.

[26] There was, so submitted counsel, a clear attempt to have the discovery application heard before the contempt of court application. The submission was that the court has a discretion whether or not to non-suit an applicant for relief who is in contempt of court. There is, in any event, no necessity for the contempt of court application first to have been

decided before an innocent party is entitled to raise the contempt of court of an applicant for relief, as a defence to such relief. It follows, so submitted counsel, that the strike out application is fatal and irrespective of what happens on the plaintiff's application for contempt of court, that strike out application must be dismissed with costs.

[27] Before dealing with the defences to the merits of the defendants' discovery application, counsel dealt with three preliminary points: The first, that the plaintiff allegedly withheld documents from the court in the Anton Piller application; the second, the swap transactions and the question of the fee being repaid; and the third, the point that the discovery application is a mere interlocutory application to enable the defendants properly to oppose the Anton Piller application.

[28] As to the first point, counsel submitted that the plaintiff did not put up the documents in the Anton Piller founding papers, because they were not relevant. They were attached to the plaintiff's earlier amendment of May 2018; the judgment of Tsoka, J was only handed down on 20 July 2018, so that there was ample time for the defendants to place these documents – had they so wished – before that court.

[29] As to the swap transactions and the fee payment defence, counsel pointed out that the first two swap transactions were between the plaintiff and Nedbank and not between the plaintiff and Transnet SOC Limited. Only the third and the fourth swap transactions were between the plaintiff and Transnet SOC Limited. As regards the first two swap transactions, Nedbank pays the plaintiff a fixed interest rate, and the plaintiff pays Nedbank the variably interest rate, both on the nominal amount. There is no contract between the plaintiff and Transnet SOC Limited on these.

[30] The plaintiff has indeed ratified the Nedbank swaps. But as regards the third and fourth swap transactions, these were not ratified; they were renegotiated between the plaintiff and

Transnet SOC Limited. There is now a written agreement with different terms, including obligations on Transnet SOC Limited, as well as, importantly, a provision whereby "*Party A and Party B shall each bear its own costs and expenses associated with the negotiation, conclusion and implementation of confirmation A, confirmation B1, confirmation B2, confirmation B3, the agreement, the credit support annex and any other transaction document and any related arrangements, including all legal fees and any advisory fees, commissions or the like*". The point was that Transnet SOC Limited assumed responsibility for its own advisory fees.

[31] On the third preliminary point, that is the interlocutory nature of the discovery application, counsel submitted that the reach of the Anton Piller order was very narrow. He referred to the Anton Piller papers at page 881 paragraphs 2.1 to 2.7 and further. The point about referring those paragraphs was to stress the protection built in for the defendants in relation to the documents obtained upon the execution of the Anton Piller order. The object of the Anton Piller application was thus to preserve, not observe, evidence. There is therefore no prospect of any harm being suffered by the defendants, according to the argument. That being so, no "*exceptional circumstances*" as would be required to invoke Rule 35(13) in these proceedings, have been shown to exist.

[32] Further, counsel submitted with reference to the Anton Piller founding papers at page 54 paragraph 61 and following, as well as the restraint application at page 594 and following (which form part of the Anton Piller papers), that the entire defence of the defendants was there set out. There can therefore be no issue about non-disclosure on the part of the plaintiff. This applies also to the application for leave to appeal which forms part of the Anton Piller papers.

[33] Counsel then turned to deal with the argument concerning Rule 35(14). He submitted that the judgment in *Sanlam Limited v Group 5 Limited* [2018] ZAGPJHC54 was bound by

precedent to have followed *Cullinan Holdings Limited v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F unless it could be concluded that the earlier judgment was clearly wrong – which the court in *Sanlam* did not set out to do.

[34] But in any event, on the submission the request for discovery in terms of Rule 35(14) is outside of the scope of that rule for two reasons: First, the notice in terms of Rule 35(14) was filed at a time when there was as yet no obligation at all on the part of the defendants to plead; and, in any event, such an obligation may never arise because of the pending exceptions that the plaintiff's particulars of claim are said to disclose "*no cause of action*".

[35] Further, the submission was that the documents were not "*necessary*" to enable the defendants to plead. There were principally two issues in the trial action: The first was whether the amount of R229 million was authorised to be dispersed out of the plaintiff's bank account and, second, whether it was being repaid by Transnet SOC Limited to the plaintiff. But, submitted counsel, the defendants have in the affidavits fully pleaded their cases on both these defences.

[36] As concerns the authority defence: This was pleaded in great detail as appears from the Anton Piller papers page 453 paragraph 30 (re the authority defence); page 455 para 39, and also page 459 para 52 and 53, so far as concerns the defence that a new contract was entered into or that ratification has occurred.

[37] So far as concerns the payment defence, it is alleged by the defendants that payments have occurred by means of the collateral security through Nedbank and also by means of repayment by Transnet SOC Limited to the plaintiff. This has been pleaded at page 457 paragraphs 47, 48 and 50. The defendants are therefore fully able to formulate their pleading.

[38] So far as concerns the collateral payment defence, this appears in the restraint application page 607 paragraph 9.2, page 608 paragraph 10.4, page 610 paragraph 11, and paragraphs 12.1 to 12.13. Counsel referred to page 1414 of the restraint application, explaining that the schedule reflects accounting between Nedbank and the plaintiff in respect of the interest rate swap transaction between them. Page 1414 reflects the fixed rate payable by Nedbank, and page 1415 reflects the variable interest rate payable by the plaintiff.

[39] Counsel pointed to the supplementary affidavit by the plaintiff's attorney Mr Kanyane dated 19 October 2018, in which Mr Kanyane explains that the sum of 20 basis points of the notional amounts used in calculating each Nedbank swap payment made to the plaintiff up to 31 August 2018 comes to R46 986 668-39. Compared to that, the payments that are to be made to the plaintiff by Transnet SOC Limited in connection with the swap transactions between the plaintiff and Transnet SOC Limited up to 31 August 2018, comes to R50 722 656.90. It followed, went the submission, that it is fanciful to suggest that the defendants still need the documents sought in Rule 35(14) to enable them to plead either to the pending action or to the Anton Piller application. The plaintiff's position is that the payments by Transnet SOC Limited to the plaintiff therefore cannot include repayment of the R229 million which was dispersed from the plaintiff's account.

[40] Counsel submitted that in the current application the defendants in fact do not say why they need more information or documents. The closest they come is at page 379 paragraph 22.3.2(f) where they criticised the use of the word by Mr Kanyane of "*notional*", which they say "*conceals and underplays the true extent to which the fund is being paid and thus suffering no loss*". But, submitted counsel, the word "*notional*" comes from the contents of the swap transactions themselves, and not from Mr Kanyane. The same nomenclature is used at page 243 of the discovery application.

[41] Counsel therefore submitted that there was no dispute that amounts were being paid by Transnet SOC Limited to the plaintiff, so documents cannot be *"necessary"* to plead that defence. The defendants really want the documents so that they can use it in the Anton Piller application to enable them to argue non-disclosure on the part of the plaintiff.

[42] On this note the application was postponed to Monday 10 December 2018 at 10h00 to receive the end section of Mr Chaskalson's submissions on the discovery application and thereafter for the hearing to be continued in respect of the contempt application by the plaintiff and the counter-application for substituted security by the defendants.

[43] On Monday 10 December 2018, concerning the discovery application, Mr Chaskalson referred further to the plaintiff's heads of argument in the contempt application at page 41 paragraph 67, where there is reliance on the founding English case of *Hadkinson v Hadkinson* [1952] 2 All ER 567 (which has repeatedly been followed in our courts as appears from the footnote 65 at page 41 of the plaintiff's heads of argument in the contempt application), the essential *dictum* of which is the following:

*"The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt."*

[44] Concerning the attack on the lack of specificity in the defendants' application for relief under Rule 35(14), Mr Chaskalson relied on *Cullinan,* the judgment by Van Dijkhorst, J at page 247, where the learned Judge stressed the specificity requirement in Rule 35(14) which is different from the description of documents required to be disclosed under Rule 35(12). In Rule 35(14) the target is "*a clearly specified document*", whereas under Rule 35(12) the target is "*any document*" to which "*reference is made*". Mr Chaskalson submitted that if this test were applied, then all that remains available for disclosure of the documents listed in items 1 and 3 of the defendants' Rule 35(14) notice but not the remainder.

The contempt of court application: background

[45] Dealing now with the contempt application, the relief sought is to declare the 1st to 5th respondents (*"the defendants"*) in contempt of court in respect of both the Tsoka, J order; to declare the 2nd respondent/defendant in contempt of the order of Adams, J; and to interdict the defendants from concluding certain transactions in breach of the restraint order granted by Tsoka, J. The order of Adams, J directed the defendants to put up certain security pending the judgment of Tsoka, J. In other words, when the Tsoka, J judgment was given on 20 July 2018 the Adams, J order lapsed. In the contempt application there is a counter-application by the defendants to vary the order of Tsoka, J by substituting for the restraint a pledge of shares.

[46] The essential timeline necessary to appreciate the issues arising in this application is the following. The plaintiff sued the defendants in August 2017. In February 2018 the plaintiff applied to interdict the defendants from dissipating their assets and to oblige them to disclose assets. The parties agreed that the defendants would furnish security pending finalisation of the restraint application but they could not agree the form and amount of such security.

[47] They went to Adams, J in an interim hearing to fix the amount and form of the security. It is this "*interim security hearing*" which led to the order of Adams, J on 15 March 2018 directing the 2nd defendant, being Regiments Capital (Pty) Limited, to furnish security to the plaintiff in the amount of R430 million by placing Capitec shares to the value of R430 million in escrow. I will return to this aspect more fully below, but it is the plaintiff's case that the 2nd defendant never complied with the order of Adams, J.

[48] What the 2nd defendant did instead was to place in escrow shares in a company called Ash Brook Investments 15 (Pty) Limited (who is not sued in the action, but is the 7th respondent

here), a private company that held the entire issued share capital of the 6th respondent, Coral Lagoon Investments 194 (Pty) Limited (also not sued in the action), which in turn held Capitec shares. It is the plaintiff's case that this form of security was expressly debated before Adams, J, considered by him, and expressly rejected by him. This then founds the alleged contempt of the order of Adams, J.

[49] The restraint application was argued before Tsoka, J on 17 April 2018 and on 20 July 2018 he granted the plaintiff's application. In terms of the restraint order by Tsoka, J the defendants were interdicted from in any way diluting any of their assets except in the ordinary course of business. And, apart from orders aimed at giving effect to this principal restraint, each of the Regiments defendants were to furnish an affidavit within 15 days (by 13 August 2018) providing details of all assets held directly and indirectly by them.

[50] This order was not complied with and instead the Regiments defendants applied for leave to appeal that order and also brought an urgent application declaring that the operation of the order of Tsoka, J was suspended as contemplated in section 18(1) of the Superior Courts Act 10 of 2013, alternatively that the order was suspended as contemplated in section 18(3) of that Act, since *"exceptional circumstances"* as there envisaged, prevailed. That ("suspension") application was set down for 13 August 2018, but was struck from the roll for want of urgency by Keightley, J. That was not the end of the suspension application, because there appears to be some debate between the parties as to whether Tsoka, J, when he granted leave to the defendants to appeal his restraint order, also considered aspects of this urgent suspension application.

[51] On 17 August 2018 the plaintiff launched urgent contempt proceedings. On 23 August 2018 Tsoka, J granted the Regiments defendants leave to appeal, and expressly stated that the restraint order was to continue to operate pending the appeal. There is a difference between the parties as to whether Tsoka, J in so doing made an order in terms of s.18; or

whether he was simply clarifying that his order was in fact interlocutory as envisaged in s.18(2). The plaintiff argues that it was the latter, and that the defendants' application in terms of s.18 ("the suspension application") did not, as a fact, serve before Tsoka, J. That application was initially struck off the roll for lack of urgency, and then – at the hearing of the application for leave to appeal before Tsoka, J – the defendants resisted the incorporation of the suspension application in those proceedings.

[52] Either way, on 31 August 2018 the defendants noted an automatic appeal ostensibly under s.18(4) against that part of the order of Tsoka, J of 23 August 2018 which directed that the restraint order was to continue to operate pending the appeal. In the meantime the plaintiff's contempt of court application was met by the Regiments defendants serving a Rule 30 notice, on the basis that the plaintiff's notice of application conveyed that the application would be heard by Tsoka, J.

[53] From 21 September 2018 to 7 November 2018 the parties were locked in settlement negotiations relating to the restraint order, but these came to nought. The plaintiff withdrew its contempt of court application to which the defendants objected, and on 12 November 2018 launched the current contempt of court application which now cited other parties as well, having regard to information that came to light in the period 21 September 2018 to 7 November 2018.

[54] The current contempt of court application included fresh dissipation assertions, and these found the interdictory relief now claimed. They include: that the Regiments defendants were negotiating, in breach of the restraint order of Tsoka, J, a transaction known as the Kgoro property transaction in which Regiments Capital (the second defendant) was indirectly interested, which development was sold for R1.2 billion. There was also a restructure of the indirect Capitec holding of Regiments Capital worth approximately R1 billion, to render that interest more liquid.

[55] Further, the Regiments defendants disclosed what is called the Tropical Trade transaction, which the plaintiff asserted had been negotiated in breach of the restraint. The plaintiff argued that the Tropical Trade transaction evidences clear dissipatory conduct in conflict with the order of Tsoka, J. What it entails is the following. The Regiments defendants explained that Coral Lagoon has an option to buy further Capitec shares, until 15 December 2018, with Capitec's consent. Capitec was not prepared to give the consent. The option particulars are as follows. The strike price per share is approximately R440. The current trading price of the share is R1100. The option pertains to 240 000 shares. The purchase price of 240 000 shares at the option price is R105 600 000 whereas the aggregate of the list price is R264 000 000, meaning that the value of the option is R158 400 000.00.

[56] Therefore there is an upside in exercising the option of R158 400 000, but R105 600 000 would have to be found to pay the option price. The option has been sold for R25 000 000, in effect meaning that asset value of R158 400 000.00 was sold for R25 million.

[57] The plaintiff challenged the exposition of the Tropical Trade transaction as set out by the Regiments defendants. In fact, said the plaintiff, the actual transaction is that Coral Lagoon sells 240 000 Capitec shares with an aggregate market value of R264 million for R130 600 000 to Tropic Paradise Trading 527 (Pty) Limited. Therefore this sale is substantially below value and, said the plaintiff's deponent, it appears to be an attempt to shift value from the Regiments defendants to Tropical Paradise.

[58] Despite a detailed setting out in the plaintiff's replying affidavit of the loss in value to Coral Lagoon of R133 400 000 resulting from the sale of the option, in the Regiments defendants' replying affidavit in the counter-application for substituted security, this exposition was not challenged. It was the case of the plaintiff that this illustrated clear breach of the order of Tsoka, J and contempt of court.

The contempt of court application: the plaintiff's submissions

[59] The plaintiff's case for contempt of court in respect of the orders of Adams, J and Tsoka, J was as follows. As regards the order of Adams, J, the proposition is that Regiments Capital (the 2nd defendant/respondent) was directed to place Capitec shares in escrow but did not do so. Importantly, submitted Mr Chaskalson, although the initial defence by Regiments Capital was that it could not place Capitec shares in escrow since it did not own them - Coral Lagoon did - hours after Tsoka, J handed down his order in the application for leave to appeal on 23 August 2018, the Regiments defendants conveyed that it was possible that they "*could negotiate that Capitec shares were placed in escrow*". The plaintiff's contention was that this *volte face* by the Regiments defendants has never been explained.

[60] The order of Tsoka, J has already been referred to above. The argument for the plaintiff was that that order was not complied with (the first order): in that the Regiments defendants have disposed of their interest in the Kgoro development; in that they have negotiated a restructure of their billion rand interest in Capitec shares; and in that they have concluded the Tropical Trade transaction whereby an option worth some R158 million was sold for R25 million. It was submitted that the third transaction (Tropical Trade) was certainly dissipatory; and although the first and second transactions may not have been dissipatory, the Regiments defendants have in any event failed to comply with the sixth order which obliged them to furnish on affidavit within 15 days details of all assets held by them directly or indirectly.

[61] So far as concerns the contravention aspect of the case for contempt of court. The plaintiff's submissions concerning the legal aspects follow below. But the plaintiff also submitted that in August 2018 it transpired that the Regiments companies, and Messrs Pillay and Wood in particular, have been involved in a wide-ranging money-laundering scheme to divert public funds from state-owned enterprises and public sector pension funds to entities associated

with the Gupta family, and to launder these funds through the bank accounts of the Regiments companies. Those submissions essentially come down to the proposition that the Regiments defendants are plainly exposed to massive claims from organs of state, public sector pension funds, and SARS; and that being so, it is essential that the restraint order issued by Tsoka, J should be enforced to its full extent because otherwise the plaintiff as concurrent creditor for its damages claim could conceivably be left without any recompense in respect of its loss.

[62] Concerning the legal principles applicable to contempt of court, the plaintiff referred to judgments in the Constitutional Court that have affirmed what is by now the iconic judgment in point of *Fakie NO v CCII Systems (Pty) Limited* 2006 (4) SA 326 (SCA) at paragraph [42]. The substance of the submissions here was that for contempt proceedings all that an applicant need show was that an order was granted against the respondent; that the respondent had knowledge of the order; and that the respondent either disobeyed it or, in fact, simply neglected to comply with it. Then wilfulness and mala fides are inferred. And wilfulness includes *dolus eventualis.*

[63] Once this has occurred, there shifts to the respondent not an *onus* but an evidential burden in relation to wilfulness and *mala fides*. A respondent wishing to discharge that evidential burden should advance evidence that establishes a reasonable doubt as to whether or not the non-compliance was wilful and *mala fide*. If such evidence is advanced, then the applicant will have failed to prove beyond a reasonable doubt that the respondent disobeyed the court order wilfully and with *mala fides.* If such evidence is not advanced, then contempt of court will have been established beyond a reasonable doubt.

[64] Importantly however, the standard of proof beyond a reasonable doubt applies only should the applicant press for committal for criminal contempt of court. If lesser relief is sought, such as a declaratory order and other appropriate remedies, these remain available by proof

on a balance of probability. Here reliance was generally placed on *Meadow Glen Homeowners Association v Tshwane Metropolitan Municipality*, 2015 (2) SA 413 (SCA) at para [16].

[65] It was argued by Mr Chaskalson that the order of Tsoka, J was clearly one as envisaged in section 18(2) of the Superior Courts Act, since it was an interlocutory order not having the effect of a final judgment, and therefore it was not automatically suspended pending the application for leave or an appeal. Here the argument was that anti-dissipation orders were by definition only interlocutory and not having the effect of a final judgment, because it was, on the authority of *Atkin v Botes* 2011 (6) SA 231 (SCA), open to the court that granted the anti-dissipation order to reconsider the order, and that court would be entitled to vary or even rescind the order, if this was in the interests of justice having regard to the practical experience of implementing the order. On that basis it was held in *Atkin* that such an order made in interdict proceedings cannot be said to have final effect.

[66] It was submitted that in fact the Regiments defendants implicitly acknowledge that the Tsoka, J order was subject to variation since this underlied their very counter-application to vary the restraint order by them putting up substituted security.

[67] The plaintiff argued also for so-called "*constructive contempt of court*" which applies where a party takes action which is calculated to render a hearing at first instance incapable of meaningfully granting the relief claimed. Here, contending that the Regiments defendants were guilty of constructive contempt, Mr Chaskalson relied on the irreversible disposal of the Kgoro development, the freeing up of the investment in the Capitec shares, and the value dissipation in the Tropical Trade transaction.

[68] The plaintiff relied squarely on the asserted *mala fides* of the Regiments defendants. Here the argument was that the Regiments defendants applied in their suspension application

under section 18 of the Superior Courts Act for an order declaring that the restraint order had automatically been suspended by the lodging of their application for leave to appeal (which would apply if section 18(1) applied meaning that it was a final order); but – importantly - in the alternative they applied conditionally for an order in terms of section 18(3) of the Act suspending the operation of the restraint order, thereby implying that they appreciated that the Tsoka, J order was an interlocutory order not having final effect.

[69] The argument was that by definition this illustrated *dolus eventualis*; in other words it illustrated that the Regiments defendants appreciated the possibility that, in law, the order of Tsoka, J was not suspended and therefore they were obliged to act in accordance with the restraint of 20 July 2018, but patently they had failed to do so. Mr Chaskalson also relied on an exchange which occurred during the application for leave to appeal hearing between him and Mr Morison, SC for the Regiments defendants, but I am not persuaded that this exchange is admissible.

[70] The plaintiff relied also on the failure of the Regiments defendants to take the court into their confidence concerning the Kgoro development, even in the present application; and also on the submission that they, despite a specific invitation, disclosed no facts relating to any steps they took in March 2018 in order to implement the order of Adams J. The plaintiff relied also on the Tropical Trade transaction to which I have already referred.

[71] The consequence of these facts concerning contempt of court, according to Mr Chaskalson, was that there is a complete defence to the discovery application referred to at the outset of this judgment; and equally a complete defence to the application by the Regiments defendants to substitute Capitec shares in pledge as security for the restraint – albeit that as pledgee of the Capitec shares, the plaintiff would be a secured creditor to the extent of the value of the shares.

[72] So far as concerns the counter-application, the plaintiff argued that the security tendered is inadequate; the plaintiff would require the pledge of 750 191 Capitec shares to provide it with adequate security for its claims.

The contempt of court application: the defendants' submissions

[73] The 1st to 9th, 12th and 13th respondents in the application for contempt joined in opposing the application. Of those respondents, the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th respondents are not joined as defendants in the action. The 5th respondent, Mr Nyhonyha, is the 11th defendant in the action and he was separately represented before me by Messrs Wasserman, SC and Ayayee.

[74] The overarching submissions of the other respondents (to whom I shall continue to refer as "*the defendants*") was that the plaintiff refused to accept adequate alternative security and was baselessly inflating the sum of security required to an extent that bears no relation to its claim. They submitted too that the Regiments defendants have tried to restructure the ownership of the Capitec shares so that they might directly own them and therefore pledge them, rather than through their interests in Ash Brook which owns the shares in Coral Lagoon, which in turn owns the Capitec shares.

[75] They contended also that if the court does not intervene this will result in the liquidation of the Regiments defendants in circumstances where the plaintiff has not yet proved its claim and where the plaintiff is, in any event, being repaid the capital amount of R229 million which forms the subject-matter of the bulk of its claim.

[76] As to the principles applicable to contempt of court proceedings they relied on the judgment of the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC), which affirmed that contempt of court will only be found where there was an unlawful and intentional

disobedience of a court order. They emphasized that, as was held in *Fakie*, a *"genuine disregard is not enough, since the non-complier may genuinely, albeit it mistakenly, believes 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 ..."*. Their submissions concerning the standard of proof echoed that of plaintiff, being that proof beyond a reasonable doubt is required for committal whereas for other relief in disobedience of court orders, the civil standard of proof is sufficient.

[77] As to the order of Adams, J, the argument was that the 2nd respondent could not comply with the order because it did not own Capitec shares; it submitted that the plaintiff was aware that the 2nd respondent could not comply with the Adams, J order, and instituted a flawed urgent application to declare the 2nd defendant in contempt of court, this was dismissed by Mudau, J. The defendants also pointed out that they applied to vary the Adams, J order and their affidavit said that that application would be handed up from the Bar at this hearing; regrettably this never occurred.

[78] In the Regiments defendants' answering affidavit in the restraint application, Mr Nyhonyha, now the 5th respondent, explained on behalf of the Regiments defendants that the 2nd defendant owned only 62% of the shares in Ash Brook which in turn owned 100% of the shares in Coral Lagoon which in turn owned 1 354 435 shares in Capitec Bank Holdings Limited, at a total value of R1.2 billion. The deponent explained that the value of Ash Brook's Investment in Coral Lagoon is therefore at face value 62% of R1.2 billion being R730 million. The argument was that it would therefore be sufficient if the Ash Brook shares were placed in escrow.

[79] That answering affidavit served as the defendants' answer in the interim security application; it was followed by the plaintiff's replying affidavit in which the plaintiff

explained why it considered that the offer which the Regiments defendants had made in relation to the Ash Brook shares was unacceptable.

[80] As regards the restraint order of Tsoka, J the Regiments defendants argued that this order is final in effect as envisaged in section 18(1) of the Superior Courts Act; that the order remained suspended despite Tsoka, J ordering on 23 August 2018 that it will be operative immediately, because section 18(4)(iv) of the Act provides that the Tsoka, J order will automatically be suspended pending the outcome of an appeal against an order putting into operation and execution a final judgment and order under exceptional circumstances, as envisaged in section 18(1) of the Act. The Regiments defendants pointed to their appeal on 31 August 2018 against the immediate operation of the enforcement order by Tsoka, J in his judgment of 23 August 2018.

[81] The Regiments defendants tackled an important difference between the plaintiff and the Regiments defendants: this is whether Tsoka, J when he made his order on 23 August 2018 found the existence of exceptional circumstances under section 18(1) of the Act (the Regiments defendants' argument); or whether Tsoka, J was simply providing clarity in respect of his order of 20 July 2018, implying that it was an interlocutory order not having the effect of a final judgment, as envisaged in section 18(2) of the Act (the plaintiff's argument).

[82] Whichever argument holds, the effect of the order of 23 August 2018 is of course that the order of 20 July 2018 remained in operation and subject to execution, and therefore not suspended. In answer to the argument that Tsoka, J was simply providing clarity, the Regiments defendants attack this as tautology, which would run into the trite presumption against tautology.

[83] Substantively, the Regiments defendants argued that the anti-dissipation order is final in effect because paragraphs 1 and 2 irreversibly invade their privacy and freedom to conduct their economic lives. The Regiments defendants submitted that the plaintiff has not made out a case for the final interdictory relief they seek. They submitted also that the plaintiff failed in showing that it did not have an alternative remedy, because the Regiments defendants have offered appropriate alternative security, this being the subject-matter of the counter-application.

[84] The Regiments defendants explained that they are currently engaged in negotiations to restructure the Capitec shares so that one-third of the Capitec shares held by Coral Lagoon would have no restriction against disposal (as currently exists in respect of all of the shares held by Coral Lagoon); and the other two-thirds would be repurchased by Capitec Holdings. They submitted that the net effect of this would be that Coral Lagoon would be able to transfer the 451 478 Capitec shares that it will be retaining, up into its holding company, Ash Brook, proportionate to the shareholding of the shareholders in Ash Brook. This would have the effect that the shareholders of Ash Brook will be holding unencumbered Capitec shares. Since one of the shareholders in Ash Brook is the 2nd defendant, the 2nd defendant would therefore hold those Capitec shares direct, and would be able to place them in escrow.

[85] As to the counter-application, the Regiments defendants submitted that they were not seeking to vary the Tsoka, J order; they were entitled to substitute the restraint order, as of right, with appropriate security. They relied on two bases: the first is the alleged concession by the plaintiff; and the second, that as a matter of law they were and should be entitled to substitute the security with adequate alternative security. In this latter regard they submitted that whether or not the security that they offered in substitution was adequate, must be determined with reference to the nature and purpose of the order that was being substituted by security; the security need not go beyond that.

[86] In their supplementary heads of argument the Regiments defendants submitted that the plaintiff has not shown *mala fides* for purposes of contempt of proceedings since the Regiments defendants were acting on legal advice. Here they relied amongst others on *Maccsand CC v Macassar Land Claims Committee and others,* 2005 (2) All SA 469 (SCA) at paragraphs [26], [27].

[87] As to the adequacy of the security offered, the Regiments defendants, adopting the position of the plaintiff's expert, Mr Winter, and especially at page 1231, submitted that it was more than adequate. That page contains in table form M Winter's summary and recommendations; in it he projects the value of the Capitec shares into the future over variously a six month period, a one year period, a two year period, a three year period and a four year period. Over the six month period 750 191 Capitec shares at the current trading price of R1 100 per share reflected a downside of 52.62% to the plaintiff for it to be collateralised.

[88] This projection is based on an increasing expected return on the Capitec shares, it provides for standard deviations of returns, and it discounts for liquidity. Mr Winter therefore opined, based on his six months' anticipated realisation (so instructed), that 430 000 Capitec shares would not be adequate collateral, but 750 191 Capitec shares would be adequate collateral. Mr Morison submitted that a more realistic period for when the security would potentially be required to be realised, would be two years; then there would be no downside but in fact an upside to the plaintiff of 14.95% to the Capitec shares being collateralised.

[89] The submissions by Mr Wasserman for the 5th respondent (11th defendant in the action) were limited to the case for contempt. He submitted that in effect the plaintiff is claiming R1.5 billion as security as is evidenced by the plaintiff's letter of 25 August 2018, paragraph 3.7. As concerns the Adams, J order he submitted that it has come and gone and has

historical value only, to be dealt with in accordance with the usual law of criminal procedure, and there was no need for it to be revisited in these proceedings.

[90] As to the section 18(4) appeal he submitted that there was a viable argument that will be considered by the full court in the pending appeal, and it would be inappropriate for this court now to engage upon that debate. And, regarding *mala fides*, he submitted that this cannot be inferred because the client was simply acting on legal advice.

Discussion

Background

[91] The urgent circumstances under which these applications were heard, and under which a judgment and order are required to be delivered, compel a judgment that will have been more comprehensive had more time been available.

[92] The departure point is that the plaintiff is a defined benefit fund who holds funds earmarked for payment to members of the fund. These members are individuals who did not acquire their membership as a high-risk commercial speculation, but to the contrary acquired their membership as a conservative long term investment in their retirement, as Tsoka, J observed. As a general proposition the plaintiff has, in these circumstances, a legal duty to ensure that the funds are safeguarded and responsibly protected and invested.

[93] The next proposition that informs a consideration of the present matter is that it is self-evidently not possible to decide whether the plaintiff's claims against the defendants in the pending action are good. Given their complexity, being related as they are to the recovery of a sizeable fee related to interest rate swap transactions, particularly given the defence of payment included within the interest rate differential payments by Transnet SOC Ltd, it is challenging to decide on affidavit whether the defendants' defence of payment is spurious

as the plaintiff would have it, or self-evidently dispositive of the plaintiff's claims, as the defendants would have it.

[94] At this stage of the litigation what has engaged my colleagues Adams, J and Tsoka, J has been the appropriateness and, if so, the extent of security that ought to be provided for the event that the plaintiff is successful in preferring its claim against the defendants. In that exercise no discount is allowed for the eventuality that the plaintiff's claim is bad. The alleged breach of those orders, and the offer of security in substitution of what has already been ordered, together with the discovery application, are what come before this court. The point is, and this becomes pertinent later, the orders of Tsoka, J are pivotal to what has to be decided here.

[95] Ultimately, when the contentious opposing positions in these many papers are considered, the essential questions are, as I see it, whether: the judgement and order of Adams, J was clear; whether there is a credible argument to be made that Tsoka, J issued a restraint (and disclosure) order that qualifies as a (final) decision under section 18(1) or whether that argument is deliberately opportunistic; whether the discovery relief should be granted at this stage; whether substituted security should be ordered as an alternative and, if so, in what number of Capitec shares; and, finally and inevitably, the question of costs. I address these topics below.

Contempt of court: the test

[96] The offence of contempt of court and its scrupulous enforcement by the courts is indispensable for our rights order. Without it, respect for the administration of justice through our courts and for the rule of law will not hold. The application for contempt of court is a unique phenomenon in our law, combining as it does the elements of criminal conduct with a civil enforcement process. And it is primarily left to civil litigating parties to

enforce it, although criminal prosecution is not precluded. The applicant for relief, being a party in whose favour an order was made, not the prosecuting authority, brings the cause before the court, usually by way of application procedure.

[97] The criminal element of the offence, that which potentially carries committal, must be proved on the usual criminal law standard, that is beyond a reasonable doubt, but then in a civil court. But if less coercive relief is claimed, like a declaratur and other appropriate remedies, these remain available on proof on a balance of probabilities.

[98] The elements of the offence are a court order, the respondent's knowledge of it, breach of the order by the respondent, and wilfulness and *mala fides*. The parties in this matter were agreed about the way the onus works in contempt proceedings and, with respect, I agree. But it is necessary to say something more about the requirement of wilfulness and *mala fides*.

[99] As I see it, what is required for criminal contempt of court is disdain for the court's order, and not mere obduracy in the *bona fide* belief that it is justified. This element is put as follows by the Supreme Court of Appeal in *Fakie* (emphasis supplied, footnotes omitted):

> *"9. 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).*
> *10. 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 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."*

Contempt of court: the order of Adams, J

[100] It is necessary now to look more closely at the judgment and order of Adams, J. It records that the 2nd defendant had tendered interim security in the form of 879 Ash Brook Investments 15 (Pty) Limited shares to be placed and kept in escrow with its attorney pending the outcome of the main application before Tsoka, J. The judgment expressly records that the 2nd defendant owns 62.13% of the shares in Ash Brook, which owns all of the shares in Coral Lagoon, which in turn owns approximately 1.3 million shares in Capitec Bank Holdings Limited. It records further that according to the plaintiff, the 2nd defendant's indirect share in Capitec as of the end of February 2018 was worth R730 million. It also records that the plaintiff argued for a pledge of cash or of the underlying Capitec shares.

[101] Having expressly recorded and considered these submissions, Adams, J: directed the 2nd defendant immediately to place Capitec Bank Holdings Limited shares to the value of R430 million with its attorney, to be placed and kept in escrow; restrained the 2nd defendant from dissipating the value of these shares in escrow; directed the 2nd defendant in the alternative to provide interim security to the plaintiff in the amount of R430 million by way of a bank guarantee or other form of security determined by the Registrar; and directed the costs be in the cause of the main anti-dissipation application.

[102] It seems to me that, given the papers that came before Adams, J, and given the terms of his reasoning, there can be no doubt that the very issue, or at least one of the very issues, before him was whether the 2nd defendant, Regiments Capital (Pty) Limited, ought to be directed to put up as security pending the anti-dissipation application before Tsoka, J, Capitec shares and, if so, in what number of shares. Adams, J specifically considered the contentions before him and he directed the 2nd defendant to put up the Capitec shares.

[103] It seems to me that it does not really matter whether or not the 2nd defendant was the owner at that time of Capitec shares. It could procure them, even if on loan from Coral Lagoon, and put them up as security. The 2nd defendant's answer, that it could not comply with the order because it did not own those shares, was argued to the court, was considered by the court, and rejected by it. The 2nd defendant did not avail itself of the alternatives referred to in the court order. Instead, it put up the Ash Brook shares. That response was to brush aside the order and to offer precisely that which the learned Judge had rejected. The 2nd defendant's version therefore does not, in my view, disturb the inference of wilfulness and *mala* breach of the court order.

[104] The 2nd defendant's operating mind was that of the 10th and 11th defendants, being the 4th and 5th respondents here, who controlled the Regiments companies. That allegation was expressly made in paragraph 90 of the plaintiff's founding affidavit and not disputed by the Regiments defendants. The inference is thus justified that the 2nd defendant's conduct was informed by their decision.

[105] The 2nd defendant and the 4th and 5th respondents have not discharged their evidential burden of placing facts before the court that would disturb a conclusion that, on a balance of probability, their conduct in failing to comply with the order of Adams, J was wilful and *mala fides*. I conclude therefore that the 2nd defendant, controlled by the 4th and 5th respondents, acted in contempt of court of the order of Adams, J.

[106] The plaintiff does not in prayer 2.1 of its notice of motion ask for criminal contempt of court sanctions against the 4th and 5th respondents following on a finding of contempt of the court order of Adams, J. It asks only for a declaratur that the 2nd defendant was in contempt of that court order. Such an order will issue below.

Contempt of court: Tsoka, J

[107] I now deal with the order of Tsoka, J. It is necessary to start with the debate concerning the nature of the 20 July 2018 restraint order of Tsoka, J that is being appealed, because it is relevant not only in the context of the contempt of court relief claimed in prayers 2.2 and 3 of the notice of motion, but also in the context of the interdictory relief claimed by the plaintiff in prayers 4 to 10 of its notice of motion.

[108] If Tsoka, J's restraint order was a final order or, more correctly put, an order having the effect of a final judgment, then – as was the position at common law – the operation and execution of such an order which is subject to an (application for leave to) appeal, are automatically suspended pending the decision of the (application for leave to) appeal. The successful party (usually the winner) in such a matter could however under the then Rule 49(11), and can now under s.18 of the Superior Courts Act, apply to the court to put such a final order into operation and execution despite the fact that it is subject to an appeal.

[109] Under the Superior Courts Act the applicant for relief must show the existence not only of exceptional circumstances but also that on a balance of probability he or she will suffer irreparable harm if the order remains suspended, and that the other party will not suffer irreparable harm if the operation and execution of the order were put into operation.

[110] Where the impugned order is an interlocutory order not having the effect of a final judgment, then despite the noting of an appeal, the operation and execution of the interlocutory order are not suspended, and the order goes into operation forthwith. Again, the court now has the power to order otherwise under exceptional circumstances, but the applicant for relief (this time usually the loser) must show that the balance of irreparable harm were the order to continue in operation and execution, weighs heavier on its side than on the side of the other party were the order suspended.

[111] In my view an anti-dissipation order such as the one that Tsoka, J granted on 20 July 2018 is not a final judgment for purposes of section 18(1) of the Superior Courts Act, but an interlocutory order not having a final effect as envisaged in section 18(2) of the said Act. That conclusion founds mainly on two bases: first, the language of s.18(2), that of *"an interlocutory order not having the effect of a final judgment"*, harks back to the earlier requirement of *"finality"* for an appealable order, being that it should dispose of a portion of the relief claimed in the action.

[112] Here the anti-dissipation order does not have such effect. No part of the relief claimed in the main action is disposed of by the grant of such an order; it is, in a sense, ancillary or adjunctive to the main action, and is evidence of a court's inherent power under section 173 of the Constitution to protect its own process. The second basis on which my conclusion founds, is the notion that such orders may be altered by the court that gave them, depending on the practical effect of their implementation.

[113] It must be accepted that, as the plaintiff has argued, a breach of the order has been established. The real question here is whether the contrary contention by the Regiments defendants destroys or supports the inference of wilfulness and *mala fides* arising from that breach. That question is determined in turn, as I see it, by the extent of the inherent merits of the defendants' contention.

[114] Despite my own view, I cannot on these affidavits conclude that the opposite view is so devoid of merit that it can be concluded that it was cynically designed surreptitiously to draw a curtain across *mala fides* and wilfulness. A try-on argument is not per se contemptuous of the standard view, even if the standard view is embodied in a court order. It follows that in my view the defendants have placed sufficient before the court by way of explanation to disturb the inference of wilfulness and *mala fides,* and a finding of contempt of court beyond a reasonable doubt cannot be made. Prayer 3 of the notice of motion thus cannot be granted.

[115] This conclusion does not foreclose the argument that the defendants' contention does not meet the evidential threshold of disturbing the inference, on a balance of probabilities, of wilfulness and *mala fides.* And in my view the defendants' contention does in fact not meet that threshold, substantially for the reason that anti-dissipation orders will be denuded of any effect at all if the operation and execution of such an order could be evaded by the simple device of a notice of application for leave to appeal.

[116] It is no answer, as I see it, to suggest that it always remains open to the beneficiary of such an order to apply under s.18(1) to put the order into operation and execution pending the application for leave to appeal. The s.18(1), read with s.18(3), standard would in effect then require of the successful applicant for an anti-dissipation order to re-argue its case, and at a considerably higher standard, that despite the fact that the *"finality"* of the order resides – on the defendants' argument – in the self-serving notion that the order has some legal effect.

[117] After all, it is difficult to conceive of any order, even a declaratur, that does not of itself have an effect that can be considered as *"final"*, if *"final"* is to have the wide reach and unrestricted meaning which the defendants' submission necessarily implies. The concept of *"finality"* must, for it to have meaningful content, be circumscribed by another consideration. And as I see it, that consideration is whether it deposes of part of the relief claimed in the main proceedings.

[118] This conclusion does not affect the question whether the order which Tsoka, J issued on 23 August 2018 is currently suspended on the basis that the defendants' s.18(4) appeal has that consequence. If the conclusion to which I have come is correct, then the order of Tsoka, J of 20 July 2018 was interlocutory; then the operation and execution of the order was not suspended by the leave to appeal; then the order of Tsoka, J on 23 August 2018 to the effect that the restraints he ordered on 20 July 2018 remained in operation pending the appeal added nothing but clarity to what already applied; and then the noting of an appeal under

s.18(4) did not suspend anything that applied before 23 August 2018. After all, s.18(4) expressly refers only to an order made under s.18(1).

[119] The defendants will have remained bound to comply with the court order of 20 July 2018, but failed to do so. It follows that an order in terms of prayer 2.2 of the notion of motion will issue.

Interdictory relief

[120] The plaintiff has asked for interdicts in prayers 4 to 10 of its notice of motion. These interdicts are all in the nature of refinements - brought about by greater facts discovery – of the anti-dissipation order made by Tsoka, J on 20 July 2018; in fact, the interdicts all found on that order. The legal basis for such orders was considered by Tsoka, J and held to have been established. The factual basis of a case for the orders in terms of prayers 4 to 10 of the notice of motion has, in my view, been established of the affidavits and must then follow as a matter of course. Orders in terms of those prayers will follow.

The discovery application

[121] That brings me to the question of the discovery and the application by the Regiments defendants under Rule 35(13) and Rule 35(14). Concerning the former, the essential question as I see it is whether in a civil proceeding in which final relief is being sought in a trial action, relief under section 35(13) should be granted. I appreciate that that relief is being sought in relation to the Anton Piller application; but the Anton Piller application is itself merely adjunctive to the main trial action. It seeks to protect evidence for purposes of that action. It does not of itself result in final relief. I am therefore disinclined to grant the relief sought in terms of Rule 35(13).

[122] There are other reasons why I would not grant this relief. First among these is my conclusion that the defendants are in contempt of court of the order of Tsoka, j of 20 July 2018. That contempt has not been purged and persists. I also consider myself bound by *Blumenthal*.

[123] As regards Rule 35(14), I have sympathy for the argument of the Regiments defendants that throughout everyone knew that their defence to the main action has been and will be payment. But there are a number of reasons why this relief should not be granted. First, there is the contempt of court issue to which I have referred. Next, there is the *Blumenthal* judgment to which I am bound. Third, at this time the defendants' plea is some distance away, given the material and substantive exceptions which have not yet been resolved.

[124] And fourth, I have difficulties with the breadth of the relief claimed in the Rule 35(14) notice. I agree with Mr Chaskalson that the items are, overwhelmingly, too wide in their reach, and not of the kind of specificity demanded by Rule 35(14). The fact that two of them may be sufficiently defined does not save the notice, since I do not believe it is acceptable to wield a shotgun on the basis that, accepting that the spread of the shot is too wide, one or two pellets in the middle have great accuracy.

Substituted security

[125] That leaves the question of the counter-application of the Regiments defendants for substituted security as an alternative elective. Here I believe that the more conservative approach of Mr Winter is to be preferred. Although the trial action may only see a court in two years' time, the future of litigation is notoriously difficult to predict, and matters may take a dramatic turn much earlier, when the Capitec shares will, for the purposes of the present consideration, still be under the water. I believe the proposed draft order by the plaintiff is appropriate.

Order

[126] In the result I make the following order:

(a) An order issues in terms of prayers 2, and 4 to 11, of the notice of motion dated 12 November 2018.

(b) The counter-application for substituted security is granted, and the applicants in reconvention are permitted, as an alternative to the restraints and discovery obligations imposed by the order of Tsoka, J of 20 July 2018, to provide security to the Transnet Second Defined Benefit Fund in the terms set out in Annexures "FSA2" and "FSA3" of the answering affidavit of Transnet Second Defined Benefit Fund in the counter-application for substituted security, at pages 1183 to 1212 in Volume 14 of the papers.

(c) The applicants in reconvention are directed to pay the costs of the counter-application for substituted security, jointly and severally, such costs to include the costs consequent upon the employment of two counsel.

(d) The application dated 16 October 2018 for relief under Rule 35(13) and Rule 35(14) is dismissed with costs including the costs consequent upon the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

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| Date argument: | Wednesday 5 December 2018, and Monday 11 December 2018 |
| Date judgment: | Tuesday 18 December 2018 |