

The first application resulted in an agreed mediation process before Keightley J during or about November 2019; the parties entering into the Settlement Agreement subsequently made an Order of Court on 2 December 2019 (“Settlement Order”).

- [2] The Applicants now seek an order that the Respondent, the Club be declared in Contempt of Court for non-compliance with the provisions of the Settlement Order for failing to comply with paragraphs 1.1 (in respect of the Respondent’s Annual Financial Statements for the year ending 2017), 1.2, 2.1.1, 3.1 to 3.9, 4.3 and 5.1 thereof (“Settlement Order Provisions”) and that the Respondent be directed to comply with those paragraphs of the Settlement Order within 30 days of this Order.
- [3] The Applicants further seek that the Respondent be directed to file a complete written report under oath with the Registrar within 60 days, setting out all steps taken by it to comply with the Settlement Order Provisions and that it be directed to pay the costs of this application including the first application that resulted in the Settlement Order, on the attorney and client scale.

Condonation

- [4] The second application was launched on or about 2 March 2023 with service via email on the Respondent’s attorney on 3 March 2023, the filing of a Notice of Intention to Oppose on 17 March 2023 and subsequent thereto, on 19 April 2023 the Applicant caused to be filed with a reminder that the answering affidavit was due on 12 April 2023, affording the Respondent five additional days to file its answering affidavit, failing which the matter would be enrolled on the unopposed motion roll.
- [5] On 16 May 2023, the Respondent’s attorney undertook to file the required affidavit on Monday, 22 May 2023, but it was not filed because of family matters and a “*considerable amount of time spent at the hospital.*” The Applicant subsequently applied for a date on the unopposed roll on 5 June 2023, with the

subsequent filing of the Answering Affidavit on 20 June 2023 and a Replying Affidavit filed on 3 July 2023.

- [6] The Club did not address the issue of condonation in its answering affidavit and requested condonation during the argument, which was tardy to say the least. However, the dispute between the parties commenced, from considering the papers already during 2017, and it appears, at present, continue with bitter factionalism in the Club and in the conduct of the business of the Club, that the dispute be settled on its merits rather than on the version of the Applicant only.
- [7] Rule 27 (3) provides that the Court may, on good cause shown, condone any non-compliance with the Rules which is a wide discretion. The word “any” emphasises the absence of any restrictions on the powers of the Court to do so if an interested party is not prejudiced by it.¹ In this matter, if the merits are not dealt with, with reference to the versions of both parties, the parties to this dispute and the membership of the Club as a whole would be prejudiced, the Court is obliged to entertain the dispute on its merits.
- [8] In addition, it is trite that the Rules of Court exist for the Court, and not the Court for the Rules² and any non-compliance with the Rules, however serious, may be condoned with the exercise of the inherent jurisdiction of the Court to condone non-compliance with the Rules, apart from the authority to do so in terms of Rule 27(3).³
- [9] Consequently, the absence of any prejudice and to ensure that the matter is dealt with on its merits, and however unfortunate the remiss of the Respondent in not applying for condonation for the late filing of the answering affidavit in the usual course, condonation is granted for the late filing of the answering affidavit.

¹ *Mynhardt v Mynhardt* 1986 (1) SRA 456 (T) at 463G

² *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A - B; *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA)

³ *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329F - I, *Krugel v Minister of Police* 1981 (1) SA 765 (T) at 767A - D; *Minister of Prisons and Another v Jongilanga* 1983 (3) SA 47 (E) at 52C - D. As was said by Schreiner JA in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F - G, F 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits'. *Copalcor Manufacturing (Pty) Ltd and another v GDC Hauliers (Pty) Ltd (Formerly GDC Hauliers CC)* 2000 (3) SA 181 (W)

History of the matter

[10] The First Applicant was a Committee member of the Club shortly before 2017. He, in such capacity, was fully aware of all non-compliances, that committee and previous committees not complying with the requirements regarding annual financial statements and the committees being derelict in their duties, it being common cause that there were no Annual Financial Statements for the year ending February 2016, there being a possible concession that the 2017 Annual Financial Statements existed.⁴

[11] During or about 4 April 2019, the then First to Third Applicants, as ordinary members in good standing of the Respondent, the Sandton Sports Club (“the Club”) launched the first application against the Club seeking access to certain records of the Club in terms of the Promotion of Access to Information Act 2 of 2000 (“PAIA”) which application was settled by way of the aforementioned mediation resulting in the Settlement Order dated 24 November 2019, with the provision of Confidentiality Undertakings by the Applicants on or about 30 November 2019 in order to obtain and view the information and agreements of the Club.

[12] At the time, the Club was led by a chairperson, Grant Richardson (“Richardson”), who was party to the Settlement Order and after obtaining it, and before the Covid-19 pandemic, he committed suicide, leaving the Club rudderless, the Club being run by a voluntary committee without remuneration, there being some oversight with the Committee engaging professional services from both accounting and legal perspectives to assist and ensure compliance with legislative and accounting requirements.

[13] On Monday, 24 February 2020, a review meeting, as envisaged by paragraph 4.3 of the Settlement Order⁵ was held at which meeting Applicants were furnished with management agreements to consider, with the resulting

⁴ replying affidavit paragraph 35 "*I deny that there are any concession in the founding affidavit by us that the annual financial statements for the year ended 2017 do not exist.*"

complaint that some of the annexures in the management agreements were not appended to the relevant agreements, those being annexures to the Milk Bar agreement, the annexures reflecting plans and specifications, and the Letter of Support from the Sandhurst Community Club for the establishment of the soccer club and the erection of the soccer grounds as referred to in the New Shelf agreement, the parties legal representatives engaging on those issues on 4 March 2020.

[14] During the course of 2020, and due to COVID-19, the Club's activities were interrupted and effectively closed for several months. Overall, the Club's administration was difficult due to the regulations applicable at the time. The Club was not in a position to deal with the outstanding issues raised by the Applicants, so they granted several unknown extensions to the Club regarding compliance with the Settlement Order.

[15] During this period, a Transparency Committee was established in compliance with the requirements of the Settlement Order, and a draft Transparency Policy, draft Paia Manual and draft transparency sub-committee saw the light. The Applicants nominated one member of the Transparency Committee, making proposals and vetting amendments to the documents, the draft Constitution with its effects being problematic. The Applicants further complained that they did not know if the Club adopted the Manual or which version of the Manual was adopted.

[16] The Applicants drafted a Constitution for the Transparency Committee which became a point of dispute between the parties in that the Applicants sought to have a competitive and parallel sub-committee acting *sui generis* to the Club and empowered with the same abilities and powers as the Club's Main Constitution, the Transparency Committee then being entitled to act completely independent of the main Committee and positioned to act as a sub-committee reporting to the main Committee, the Applicants attempting to create a parallel "ruler ship" for the Club which could not be permitted, nor would be Club able to

⁵ "4.3. The respondent has agreed to make available for inspection in full, copies of the agreements identified in paragraphs 11.4, 11.5, 11.7 and 11.8 to the founding affidavit, to allowed sight of the documentation during a review meeting at which representative(s) of the respondent and representatives of third-party managers will be present to answer any questions arising from the review of the agreements, subject to the applicants' signature of a non-disclosure agreement."

function effectively. This dispute appears to be ongoing, which dispute has an impact on various of the Settlement Order obligations.

[17] During 2020 and 2021, attempts to call meetings, including a Special General Meeting or Annual General Meeting, resulted in further disputes between the parties, the Club alleging that the Applicants disputed the validity thereof, the Applicants causing delayed meetings. The Applicants admitted to raising disputes in attempts to organise meetings aimed to ensure that Club Committee members were in full compliance with the Club's Constitution and the Settlement Order. In addition, and by way of example, Norton Rose Fulbright, at some point in time representing the Club, confirmed by way of correspondence annexure D a threat by the Applicants to launch interdict proceedings to either interdict a proposed Special General Meeting or to subsequently apply to the Court to have the resolutions taken, set aside, apparently enforcing compliance on the Club and its Committee.

[18] The apparent inability to call meetings did not allow committees to be formalised, which hamstrung the Club altogether. The Club called a Special General Meeting during or about the beginning of 2022. As a counterattack, eleven members described as "*Concerned Club Members*", including the First Applicant, retired Judge Nkola Motata and Second Applicant, Dušan Mitrović drafted a notice to convene a meeting to: "1) *To elect an Interim Committee members to regulate the affairs of the Club.* 2) *To collate and consolidate all documentation pertaining to the Club.* 3) *To obtain from the defunct committee members itemised bills of charges from attorneys Knowles Hussein and Taitz and Norton Rose Fulbright South Africa.* 4) *To comply with provisions of the long outstanding High Court Order.* 5) *To report to all general members in a general meeting within a month from the date of the Special General meeting.* 6) *To arrange an Annual General Meeting 02 April elect club committee members. Designated as part more on February, 08, 2022.*"

[19] Subsequently, the Club's proposed meeting was cancelled, and the Applicant's meeting continued. This was met with member resistance, and an interim committee comprising Leonard Jourdaan (the Deponent to the answering

affidavit on behalf of the Club) and other committee members were eventually elected.

- [20] The Club alleged that during this time, all service provider's details, agreements and documents were provided to the Applicants and that the Applicants personally met with the service providers and inspected the contents of the agreements, which the Applicants denied, contrary to the facts, because the Club did not specifically plead the service providers details as provided nor when, and by whom it was provided.
- [21] Further, during this period, despite the lack of a formal finance committee, an allocated treasurer, accountant, and auditor were appointed to ensure financial compliance with all aspects of the financial regulations and legislation and the compiling of Annual Financial Statements.
- [22] On 12 August 2022 the Club's current legal representative provided a Report to all the members of the Club with reference to the Settlement Order expressing the view that all issues were dealt with and addressed in the Report, under various headings; 1) Annual Financial Statements, 2) Outstanding Membership Fees, 3) Transparency and Accountability, 4) Service Providers and 5) Employees, also attaching; i) the Club's trial balance sheet for the period ending 28 February 2018 including 2017, ii) the Annual Financial Statements ending 28 February 2018 including 2017 financial numbers, iii) the Minutes of the Transparency Sub-Committee dated 26 August 2021, iv) a Notice to all members that "*all committee members are paid up and we have documentary proof if anyone would like to see it*", v) a clause 4.2.1 closure because of the Settlement Order regarding the Newshelf 883 (Pty) Ltd management agreement with the Club, vi) the 12 August 2022 Disclosure Report, Annual Financial Statements ended 28 February 2019, vii) Annual Financial Statements ended 29 February 2020, viii) Customer Transaction Report (with reference to Rea Simon, Looyen Rogers, Grant Richardson, Len Jordaan, Marc du Chenne, Gia Sinclair, Eric Jacobson, Amamlia Bene, Donald Peddie, reflecting Committee paid-membership), ix) resignations from the Committee (dated the 1 February 2021 from Simon Rea, Eric Jacobson, Donald Peddie, Roger Looyen, Gia Sinclair (dated 3 December 2020)), x) Restore Archive

Payments Reflecting paid-up UIF payments, xii) Minutes of the Committee Meeting held on 21 June 2017, and xiii) a disclosure that the Milk Bar African Coffee (Pty) Ltd ("Milk Bar") exclusively operates the food and beverage service for the Club under a service provider agreement with the Club, the Club receiving a percentage of turnover for the right to provide the services.⁶

[23] The Club, in the aforementioned August 2022 Report under the heading "1. *Annual Financial Statements*" stated that the Annual Financial Statements for the periods ending February 2017, 2018 and 2019 were submitted at various annual general meetings, February 2017 not being attached, but it being reflected in the various columns of the February 2018 Annual Financial Statement with reference to; Statement of Financial Position as at 28 February 2019, Statement of Comprehensive Income, Statement of Changes in Equity, Statement of Cash Flows. In addition, it was stated that "*No finance sub-committee was set up at the time of this order and the committee was finally constituted in April 2020 first on an interim basis and thereafter the appointments were confirmed.*" Further, in paragraph 1.8 it was stated that "*In the event that, becomes necessary to establish a financial sub-committee orders with the Constitution, Messrs Motata and Mitrovic are herewith invited to join in the event of it being set up.*"

[24] The August 2020 Report under the heading, "2. *Outstanding Membership Fees*" confirmed that from the records it appeared that all members of the Committee were in good standing and that all current club members were in good standing, confirmed in terms of the letters of the Club's Secretary attached to the Report.

[25] Under the heading "3. *Transparency and Accountability*" it was stated that the transparency committee was established and provided draft policies and manual content and had "*complied in as much as it is able to give effect to the order and any non-compliance is due to the ongoing dispute as opposed to the willfulness of contemptuous conduct of the committee.*"

⁶ answering affidavit annexure "C", replying affidavit annexure "RA6"

- [26] Under the heading “4. Service Providers” a disclosure of the various service providers were made with a confirmation that the Applicants had sight and inspected the contracts and “*to the belief of the committee, copies were provided to them directly by such service providers*” and that there was a dispute in respect of the SA Cricket Academy.
- [27] Under the heading “5. Employees” it was confirmed that the Club had two employees, that only one of those two employees was employed prior to 2019 and that the Club was UIF compliant, attaching a schedule of payment relating to the UIF.
- [28] The Club, in paragraph 6 of the Report confirmed “*that all clauses have been complied with in terms of the order*” and in paragraph 7 that “Any outstanding issues are as a result of the disputes arising and not due to willful default or disregard of the order”, further stating in paragraph 8 that “*Such dispute centered around the transparency policy and manual and the nature of these disputes were not envisaged at the time of the order.*” The Committee further acknowledged, in paragraph 9, that “*such submissions are true and correct and accurately reflect the records as correctly held and, in the possession, thereof.*”
- [29] The Applicants appear not to have taken issue with the content of the Report, but for whether or not the “*customer transaction report*” and the 21 June 2017 Minutes were attachments thereto.
- [30] On 8 September 2022, the Club’s current legal representatives wrote to the Applicant’s legal representative confirming that a compliance report had been prepared and submitted to the Members and the Applicants with all the documentation and requirements in terms thereof, and confirmed that the Club did not object to changes to the Transparency Manual. However, it objected to the proposed Constitution of the Transparency Committee which would be in direct conflict with the Constitution of the Club, proposing the calling of the meeting to deal with it.
- [31] The interim Committee was confirmed at the Annual General Meeting on 3 October 2022 as the Club’s Committee, also currently running the affairs of the Committee.

[32] The Club alleged that as of November 2022, a full report was provided and signed off by the Club and its attorney concerning the compliance issue, also alleging that any matters, if outstanding, were due to impossibility of performance, which allegation was denied by the Applicants.

[33] It is in the light of the facts mentioned above that the now First and Second Applicants only (Nkola Motata and Dusanj Mitrovic), in the absence of the initial Second Applicant, Noah Taruberrekera, launched this Contempt Application with reference to the non-compliance of the Settlement Order reflected in the non-compliance Settlement Order Provisions.

[34] The complaints regarding Settlement Order Provisions relevant hereto are the following:

1. *Annual financial statements*

1.1 *The Respondent shall make its annual financial statements for the years ended February 2017 to February 2019 available to the applicants;*

1.2 *Respondent records that to its knowledge the annual financial statements up to 31 July 2016 does not exist. The parties agree that the Respondent shall establish a finance sub-committee (finance sub-committee) and one of its finance sub-committee's first tasks shall be to investigate whether any financial documents prior to 31 July 2016 can be located and to report to all members at the 2020 annual general meeting of the outcome of the investigation.*

2 *List of outstanding members of fees*

2.1 *The Respondent undertakes that it shall:*

2.1.1 *finish the applicants with a written record confirming that all current Club Committee members are up to date vis a viz the payment of membership fees at time is that they were elected to serve on the current Club Committee; and*

3 *Transparency and Accountability policy*

- 3.1 *The Club Committee shall prepare a Transparency and Accountability Policy (the Policy), subject to what is agreed and paragraph 3.2 below.*
- 3.2 *The Respondent agrees to co-opt any person(s) with suitable and necessary skills to advise on the content of drafting of the Policy (transparency sub-committee).*
- 3.3 *One of the transparency sub-committee's first tasks shall be to investigate whether there is a statutory obligation on the Respondent to compile a PAJA annual ("the PAJA manual").*
- 3.4 *The Policy and PAJA manual (to the extent that the PAJA manual is applicable to the Respondent) shall set out the nature of documents that members may call for, and shall set out the manner that the request should be taken;*
- 3.5 *The Policy, and PAJA manual (to the extent that the PAJA manual is applicable to the Respondent), may be constituted to a single document;*
- 3.6 *The Respondent agrees to co-opt any of the first to third applicants in accordance with paragraph 3.2;*
- 3.7 *The parties agree that this agreement after it is made an Order of Court, shall be shared with the members, be it through email and placing it on the notice board of the Respondent at the Club.*
- 3.8 *The parties agree that the Policy and the PAJA manual (if the PAJA manual is applicable) shall be shared with members for comment before it is adopted by the Club Committee (on the recommendation of the transparency sub-committee). The parties agreed that the adopted Policy shall be presented by no later than the Respondent's next annual general meeting so that its terms can be made known to the members of the Respondent.*
- 3.9 *The Policy shall be established to separate the PAJA Manual even though these may ultimately be constituted under a single document. In other words, the fact that it may be that the PAJA manual is not applicable to the Respondent shall not affect the process of creating the Policy.)*

4 *Contracts between the Club and Milk Bar and/or the Once Active Gym and/or Discovery Soccer Club and/or New Shelf 83 (Pty) Ltd*

4.3 *The Respondent has agreed to make available for inspection in full, copies of the agreements identified in paragraphs 11.4, 11.5, 11.7 and 11.8 of the founding affidavit, to allow sight of the documents during a review meeting at which representatives(s) of the Respondent and representatives of the third-party managers will be present to answer any questions arising from the review of the agreements, subject to the applicants' signature of a non-disclosure agreement.*

5 *Employment contracts*

5.1 *The Respondent will provide documentation to the applicants to confirm that all its employees have been registered with the Unemployment Insurance Fund."*

[35] The current Applicants seek to hold the Club in Contempt of Court for failing to comply with the Settlement Order Provisions in circumstances where the Club alleged that it had complied with its obligations flowing from the Settlement Order and as reflected in the Report, it making available such information at Annual General Meetings as well as posting it to its members and affixing it to the general notice board in the form of Report, dealing with the issues that had taken place and the measures taken, to reflect it in context.

[36] The various complaints by the Applicants are referred to under the designated headings in the Founding Affidavit.

Non-compliance with paragraph 1.1 of the Settlement Order (The 2017 annual financial statements)

[37] The Applicants allege that the Club has failed to provide the annual financial statements for the year ending 2017 in circumstances where paragraph 1.1 required the Club to make it available.

[38] In response, the Club indicated that the statements requested were not provided, that it was never available and was not prepared, the Club not being in willful default nor *mala fide* in not providing it, it not being available. The Club further indicated that it was not reported on in the past due to members of the various previous committees not complying with the requirements in compiling it, acting in dereliction of their duties, there also being issues with finalising and preparing the 2017 Annual Financial Statements.

[39] The Club further alleged that formal financial statements for 2016 did not exist when the First Applicant was a Committee member of the Club and that the chairperson thereof shortly before 2017, one Mokati left "*the club in absolute disarray.*" The Applicants did not take issue with that.

[40] It is apparent from the Annual Financial Statements⁷ for the year ending 28 February 2018, that Independent Auditors compiled it, expressing an unqualified opinion on it in circumstances where it also reflected comparative financial information for the year 2017 with the Trial Balance Worksheet for the period ending 28 February 2018 including 2017 also made available.⁸ Working from that foundation, the formal Annual Financial Statements for the year ending February 2018, and going forward were compiled, it argued on behalf of the Club that the Club did what it could do in the circumstances, also considering the delay in the appointment of a finance sub-committee. It was one of the tasks of the finance sub-committee to be appointed to investigate if any financial documentation existed prior to July 2016 and, in all likelihood, to see to compliance with finance issues, including the creation of Annual Financial Statements.

[41] It is apparent that the Club inherited a precarious position from its committees before 2017, and attempts were made to regularise its finances and reporting obligations, which it did, notwithstanding difficulties in appointing a finance sub-committee, as appears from the unqualified Annual Financial Statement ending 28 February 2018, taking into consideration and reflecting the 2017 financial position.

⁷ answering affidavit annexure C3 caselines 019-79

⁸ answering affidavit annexure C5 caselines 019-114

[42] It is further apparent that during the turmoil of an apparent factional dispute within the Club, the Club was neither willful nor *mala fide* in its conduct, regularising its position and reporting obligations with full disclosure to its members, there being no deliberate disregard or disobedience of the Settlement Order.

Non-compliance with paragraph 1.2 of the Settlement Order

[43] The Applicants alleged that the Club failed to establish a finance sub-committee, which finance sub-committee did not investigate whether any financial documents could be located before 31 July 2016 and did not report on it to the 2020 Annual General Meeting, which was never convened.

[44] The Club responded to these allegations by saying that it operates a sports club with a voluntary membership, with committee members being volunteers without compensation for services, it being a monumental task to get members to join committees in the climate of animosity and factionalism in that “*people simply do not wish to become involved in the club’s affairs and to have to negotiate the political minefield it had become through these various factions.*”. In addition, the Covid-19 pandemic rendered it impossible at the time “*to form a further committee as nobody wished to be involved, especially in light of the historical financial woes of the club as well as the fact that this further created a whole different set of obstacles.*”

[45] The Club further indicated that because of the Applicant’s obstructive behaviour in constantly blocking meetings,⁹ there had been no formal Annual General Meeting since Covid-19, resulting in the Club not being able to address issues regarding the Settlement Order in an open forum because meetings were not permitted to be called on being persistently blocked on the basis that the Settlement Order had not been complied with. The Applicants did not dispute these allegations.

⁹ as referred to in the Judgement

- [46] In these circumstances, the Club could not get volunteers or force members to become committee members to establish the finance sub-committee. A treasurer, accountant, and auditor were then appointed to ensure complete transparency and compliance with the Club's finance and financial reporting obligations.
- [47] The Club further bemoaned the fact that there were no financials prepared for 2016, which could not be provided as they never existed and that the First Applicant, notwithstanding his prior involvement in the Club and invitations to him to assist committees, elected instead to be oppositional in his stance and punish the current Committee for the ills of the past.
- [48] In order to rectify its position and not to be in willful disregard concerning the establishment of a finance sub-committee, the Club in its perception then created something better by appointing professional parties, a treasurer, accountant, and auditor, to administer the finances of the Club and to report to the treasurer who, in any event, would have been the observer over the finance sub-committee, as is apparent from the submitted Annual Financial Statements.
- [49] It is further apparent that in 2020, the Annual General Meeting at which these issues were to be reported did not take place, with no Annual General Meeting being held since the advent of Covid-19. Although a finance sub-committee was not created in a strict sense, the alternative aforementioned structure was designed and implemented in an environment where a finance sub-committee could not be constituted because of a lack of interest in the then prevailing and somewhat toxic environment of the Club.
- [50] In the absence of voluntary members being available to serve on a finance sub-committee, placing the Club in a precarious position, an alternative was devised in order to obtain financial compliance, and in the absence of the 2020 Annual General Meeting, the Court cannot find that the Club was either willful or *mala fide* in its conduct, it then regularising its position and reporting obligations, there also being subsequent full disclosure to its members with reference to the Settlement Order and its consequent obligations, also in the most unfortunate environment of apparent factionalism and opposition in the Club.

Non-compliance with paragraph 2.1.1 of the Settlement Order

- [51] The Applicants complained that there was no strict compliance by the Club to furnish to the Applicants also fully paid up members in good standing, with a written record confirming that all current Club Committee members were up-to-date in the payment of the membership fees at the time that they were elected to serve on the then current Club Committee.
- [52] The Applicants then criticised the process adopted by the Club in sending an invitation "*To all members*" which invitation stated "*From all records available to the committee, or committee members are paid up and we have documentary proof if anyone would like to see it*" which was issued by Kate Fouche – Administration, that notice and invitation being self-destroying to the allegations by the Applicants as fully paid up members in good standing entitled to receive it.
- [53] The Club also stated that at the time of the Settlement Order, the records of the Club were in an appalling state, which appears to have been rectified by the Committee going forward. The Club elected to follow the aforementioned notice and invitation procedure to not compromise or embarrass members not in good standing, alleging that it complied with the Settlement Order Provisions through its conduct.
- [54] During the argument, the Court's attention was also drawn to Annexure C5, reflecting various paid memberships of apparent committee members from 2018, and the Club further claimed compliance with the provisions of paragraphs 2.1.1 and 2.1.2 of the Settlement Order.
- [55] The Court cannot find that the Club was either willful or *mala fide* in its conduct of the process and procedure adopted; it also regularised its position regarding membership and committee membership obligations with full disclosure and transparency with reference to the payment of membership fees and committee membership fee obligations.

Non-compliance with paragraph 4.3 of the Settlement Order: Contracts between the Club and Milk Bar and/or the Once Active Gym and/or Discovery Soccer Club and/or New Shelf 83 (Pty) Ltd

[56] The Applicants complained that various agreements identified in the first application between the Club and third parties were not made available to them, despite non-disclosure undertakings being provided on or about 30 November 2019 in terms of which they agreed to keep confidential all documents and records to be disclosed in terms of the Settlement Order.

[57] By way of paragraph 4.3 the Club *“agreed to make available for inspection in full, copies of the agreements identified”* and *“to allow sight of the documents during a review meeting at which representative(s) of the respondents and representatives of the third-party managers will be present to answer any questions arising from the review of the agreements, ..”*.

[58] The Club alleged that in compliance with the Settlement Order, the Applicants were provided with an opportunity, and were able to inspect the copies of the agreements pertaining to the Milk Bar, the Discovery Soccer Park and the Gym in circumstances where the Applicants had personally met with the representatives of these different service providers with copies of the agreements being provided to them. The Applicants denied these allegations, stating that the Deponent to the answering affidavit was not present at those meetings, consequently admitting that such meetings took place.

[59] The Applicants further did not deny that they had personally met with the representatives of the different service providers and procured copies of the various agreements, which were also recorded in paragraph 4 of the aforementioned Report under the heading *“Service Providers”*.

[60] In paragraph 4.2 of the Report, it was recorded that correspondence was received from the service providers that there were *“certain contract reviews*

and interaction between the service providers and the Applicants” and in paragraph 4.3 it was also recorded that *“The Applicants also had sight and inspected the contracts and to the belief of the committee, these are provided directly to them by such service providers.”*¹⁰ The Applicants did not take issue with these allegations and the Reports content, except for stating that the Club failed to state when and how the service providers allegedly furnished the documents.

[61] The Applicants further complained that on 24 February 2020, during a review meeting between them, their attorneys, representatives of the Club and the Milk Bar it became apparent that certain annexures were not attached to the management agreements, their attorney then called for it by way of email dated 4 March 2020, confirming that the parties shared copies of the management agreements but that some annexures were not appended to the agreements, the annexures having reference to plans and specifications as well as a Letter of Support from the Sandhurst Community Club for the establishment of the soccer club and the erection of the soccer grounds by New Shelf known as *“the Beautiful Game”*, referred to as the New Shelf agreement.

[62] The Milk Bar could not hand it over for some time because of Covid 19, with the Applicants being informed on 4 September 2020 that one Andrew Harris would meet their attorney at the Milk Bar to show the annexures, which did not occur, with no explanation given by the Applicants for being remiss in viewing it, when offered.

[63] On 28 February 2022 the Club’s current attorney wrote that the Applicants required access to various records maintained by the Club and be provided an opportunity to consider the contents fully, further stating that *“Our client has no objection thereto and is more than willing to comply with the order and in fact asserts that your clients have had access and in fact were given copies.”* In the same correspondence¹¹ it was expressed that the Club was more than happy to furnish further copies of any confidential information and to avail members of the financial information without naming and shaming any party indebted to the

¹⁰ caselines annexure C page 019-35

¹¹ annexure FA 15 dated 28 February 2020 caselines page 010-57

Club, it wanting to adopt a pragmatic approach, wishing to work together the benefit of the Club so as to ensure that there are no longer separate factions.

[64] Notwithstanding the Applicant's direct access to the service providers, they did not obtain the relevant annexures, the Court was informed during argument that the Club had to provide it in circumstances where it was not to be provided by others.

[65] Because of the parties' conduct, the various agreements being made available to the Applicants and the Applicants having unfettered access to the service providers, the Court cannot find any conduct attributable to the Club that would render it liable for Contempt of Court.

Non-compliance with paragraphs 3.1 to 3.9 of the Settlement order (*inter alia*, the Transparency and Accountability policy and Committee)

[66] The Applicant's complaint is that the Club has failed to compile the Transparency Policy and PAIA manual, despite numerous reminders and that it failed to adopt a Transparency Policy, which it was ordered to do and to present by no later than the next Annual General Meeting after the Settlement Order. The same criticism was levelled at the Club concerning the PAIA manual.

[67] The Club, however, engaged with them on these issues to be inclusive in its approach and in circumstances where the Applicants required it and in circumstances where paragraph 3 created an inclusive process and procedure requiring eventual consultation with the membership prior to adoption by the Club Committee.

[68] The Club, through its previous legal representative, Norton Rose Fulbright, addressed correspondence to the Applicants, attached to the answering affidavit as annexures D and E,¹² it not being disputed, confirming a threat by the Applicants to launch interdict proceedings, to either interdict a proposed

¹² Annexure D Norton Rose Fulbright correspondence caselines pages 019-128 and further dated 22 February 2021, annexure A draft PAIA document

Special General Meeting or to subsequently apply to the Court to have the resolutions taken, set aside.

[69] In the same correspondence, it was noted that *“11. Our client is prepared to once again postponed the meeting, while it invites your clients’ comment on the draft manual, and to engage in the outstanding items in the court order that your clients alleges have not been complied with, so that the process of complying with the court order can be completed by no later than Tuesday, 16 March, that is on condition that: 11.1 your clients agree that the meeting to amend the Constitution can proceed on further notice to members thereafter; and 11.2 the Club can, in the interim, temporarily co-up committee members for the reasons dealt with in this letter. Since co-opting members by the Committee is provided for in clause 8.2.11 of the Constitution, in addition to clause 7.13, we can see no reason for your clients to resist this.”*

[70] Attached was a draft PAIA Manual (annexure E) to which the Applicants responded with several changes to the draft documents and also submitted a transparency sub-committee Constitution, those attached to the answering affidavit as annexures F¹³ and G,¹⁴ which is not disputed.

[71] The primary disagreement between the parties was about the Constitution of the transparency sub-committee, the transparency sub-committee eventually constituted. The dispute concerning the Constitution of the transparency sub-committee and the creation of a parallel governing structure was referred to hereinbefore.

[72] During June 2022 the respective legal representatives of the parties were engaging each other regarding the amendments to the Constitution; the Club required feedback before the proposed AGM in order for members to understand the debate and also expressed the view that simply raising objections would hardly be transparent in that they needed to take opinion, or at least be in a position to answer, and not be put on the spot.

¹³ caselines pages 019-137 and further, PAIA Manual

¹⁴ caselines pages 019-142 and further, transparency sub-committee Terms of Reference

[73] The Applicants did not share this view. They wanted to discuss it in an open forum and did not want a situation where proposed amendments were discussed privately by the Club and a select group of members; they apparently required complete transparency. This dispute regarding the Constitution of the transparency subcommittee appears to have continued for some time.

[74] In the absence of a transparency sub-committee, effect could not be given to the required investigation into the Policy and Manual, the creation thereof and the calling of comments by members before its adoption by the Club Committee,¹⁵ that process consequently being ongoing until the receipt of members comments.

[75] During the argument on behalf of the Club, the Court was further informed that at the time of the 2022 Special General Meeting, post Covid 19, the documents had not yet been finalised between the parties *inter se*, that doing away with the allegation by the Applicant that all the Club was to do was to adopt the Policy and Manual, in circumstances where that process seemed to have been undermined, the Applicants also informing the Court during argument that its complaint centred around the Transparency Policy, and not the PAIA Manual.

76. The process of compliance with the Settlement Order and Settlement Order Provisions appears to have been continuously undermined in circumstances where these documents could not be presented to the members for comment, prior to its adoption by the Club Committee, that process being ongoing until the finalisation of members comments, it detracting from any either willful or *mala fide* conduct in the process and procedure adopted by the Club, and the input required by the Applicants, the Court then not being able to find any conduct attributable to the Club that would render it liable for Contempt of Court.

Non-compliance with paragraph 5.1 of the Settlement Order (employment contracts)

¹⁵ Settlement Order paragraphs 3.1, 3.3, 3.7, 3.8

- [77] The complaint of the Applicants is that the Club was required to “*provide documentation to the applicants to confirm that all its employees have been registered with the Unemployment Insurance Fund*” (UIF) in circumstances where, on 30 April 2019 the Club furnished UIF declarations for two employees, ST Boshomane and I Sibanda.
- [78] However, the Applicants took issue with that and merely alleged that during 2019, the Club apparently had five employees, which included Portia (unknown surname), Niel (unknown surname), Julia Mabena, ST Boshomane and I Sibanda.
- [79] It was further also alleged that when the Milk Bar commenced with its activities on the premises in 2017, Neil, Julia and Portia became employed with the Milk Bar, in circumstances where their transfer from the Club to the Milk was not known to the Applicants, that apparently being the reason for then requiring the UIF documentation, to ensure transparency.
- [80] The Club confirmed that when the Milk Bar commenced trading activities in 2017, it took over the Club’s employees, with the Club remaining with two employees only, and all services were outsourced to different individuals in different companies. In compliance with its Settlement Order Provisions, the Club provided the UIF payment schedule reflected in Annexure J from July 2019 to November 2019, predating the Settlement Order.¹⁶
- [81] These issues were further dealt with in the Report in paragraph 5 under the heading “*Employees*” the Club confirmed that during 2019, it only had two employees, both registered for UIF and proof thereof being provided.
- [82] During reply Counsel on behalf of the Applicants requested the Court to find the Club guilty of Contempt, and required the Court to interpret the Settlement Order dating back to the commencement of the Club’s activities and requiring the Club to produce the UIF compliances regarding all five of the employees from date of their employment, which it did not do. The Settlement Order of Keightley J cannot be interpreted in any way to provide for that.

¹⁶ caselines 019-157

[83] As a consequence of the presented facts and speculation, the Court cannot find any conduct attributable to the Club that would render it liable for Contempt of Court.

In General

[84] The relevance, requirements and associated *onus* for Contempt of Court were confirmed and set out in the matter of *Fakie NO v CCII Systems (Pty) Ltd*,¹⁷ to vindicate judicial authority by way of Contempt proceedings Kirk-Cohen J put it thus on behalf of the full Court, “*Contempt of court is not an issue inter partes; it is an issue between the court and the party who has not complied with a mandatory order of court*”.¹⁸ Plasket J further pointed out in the *Victoria Park Ratepayers* case that Contempt of Court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government: there is thus a public interest element in every contempt committal,¹⁹ when viewed in the constitutional context –

“it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. ... That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest”.

[85] The punitive and public dimensions of contempt are inextricable: coherence requires that the criminal standard of proof should apply in all applications for contempt committal. In addition to criminal contempt, declaratory and other

¹⁷ 2006 (4) SA 326 (SCA) at [38]-[42]

¹⁸ *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) 673D-E (Southwood & Basson JJ concurring).

¹⁹ *Victoria Park Ratepayers* (above) para 5.

appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.²⁰

[86] The development of the common law does not require the Applicant to lead evidence as to the Respondent's state of mind or motive, once the Applicant proves the three requisites (order, service and non-compliance) unless the Respondent provides evidence raising reasonable doubt as to whether non-compliance was wilful and mala fide, in criminal contempt, the requisites of contempt will have been established, as opposed to civil contempt with the burden of proof on a balance of probabilities.

[87] To sum up, as in *Fakie NO v CCII Systems (Pty) Ltd*:²¹

- (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; non-compliance; 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 wilfulness and mala fides: should the Respondent fail to advance evidence that establishes a reasonable doubt as to whether*

²⁰ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC) at “[67] Summing up, on a reading of *Fakie*, *Pheko II*, and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies – for example, declaratory relief, *mandamus*, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is *Burchell*. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.”

²¹ 2006 (4) SA 326 (SCA) at [42]

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

- (e) *A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.*

[88] In *Fakie NO v CCII Systems (Pty) Ltd* the test²² for when disobedience of a civil order constitutes contempt was stated “*as whether the breach was committed “deliberately and mala fide”.*²³ *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.*²⁴ *Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*”²⁵

[89] Consequently, 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 was found to accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. 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.²⁶ The honest belief that non-compliance is justified or proper is incompatible with that intent.

²² 2006 (4) SA 326 (SCA) at [9]-[10]

²³ *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) 367H-I; *Jaiyiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602 (SCA) paras 18 and 19.

²⁴ *Consolidated Fish (Pty) Ltd v Zive* 1968 (2) SA 517 (C) 524D, applied in *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 691C.

²⁵ *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 692E-G per Botha J, rejecting the contrary view on this point expressed *Consolidated Fish v Zive* (above). This court referred to Botha J’s approach with seeming approval in *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) 368C-D.

²⁶ See the formulation in *S v Beyers* 1968 (3) SA 70 (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 (‘Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it’) and CR Snyman *Strafreg* (4ed, 1999) page 329 (‘Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van ‘n regterlike amptenaar in sy regterlike hoedanigheid, of van ‘n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande ‘n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding’).

[90]]On a careful consideration of the facts and the version placed before the Court by the parties, there does not appear to be a real, genuine and bona fide dispute of fact between the parties²⁷ in relation to compliance, or not with the Settlement Order. With the application of the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,²⁸ this Court is inclined to hear the matter in circumstances where the Club did not sit idly but rather engaged on the historical inherited issues and regularised the affairs of the Club in somewhat trying circumstances prior to, during and after Covid-19 and a toxic environment characterised by obstruction and factionalism, the Club asserting good faith, although open for criticism, in its efforts, over time to comply with the Settlement Order.

[91] In August 2022 the Club provided a Report to all the members of the Club in which it attempted to reflect on compliance with the Settlement Order and the various issues now before the Court in this matter, expressing the view that all issues were dealt with and addressed by the Club as appears from the Report under the various headings, also alleging that any matters, if outstanding, were due to impossibility of performance.

[92] The Club specifically alleged in the Report “*that all clauses have been complied with in terms of the order*” and that “Any outstanding issues are as a result of the disputes arising and not due to willful default or disregard of the order”, further stating that “*Such dispute centered around the transparency policy and manual and the nature of these disputes were not envisaged At the time of the order.*”

[93] The Club appears to have or attempted to comply with the provisions of the Settlement Order to the extent that it was possible and where it was not possible, such non-compliance is neither willful nor *mala fide*, there is no deliberate attempt nor deliberate attempt shown to circumvent the Settlement Order circumstances where, overtime and notwithstanding Covid 19 and

²⁷ *Wightman t/a JW Construction v Headford and another* [2008] (3) SA 371 at [13]

²⁸ 1984 (3) SA 623 (A) at 634-635, per Corbett JA.

various optical there appears to have been every bona fide intent comply with the Settlement Order.²⁹

Conclusion

[94] In the circumstances, the Applicants call upon the Court in this matter, acting as guardian of the public interest, to find the Club in contempt in circumstances where the Applicants appear to be both successful and frustrated litigants, and frustrating litigants in the same process. The Court, for the aforementioned reasons, cannot do so.

[95] As to costs, the general rule is that the costs follow the event. The discretion to award costs must be exercised judicially pertinently to achieve fairness and justice for all parties. In this matter, I cannot find any reason to deviate from the principle

ORDER

[96] In the result, the following Order is made:

1. The application is dismissed with costs.

H. LOUW

Acting Judge of the High Court
Gauteng Division, Johannesburg

²⁹ Free State Agriculture v President of the Republic of South Africa and others (A 96/2016) [2017] ZAFSHC 158 (40 September 2017) at [9]

Heard: 28 February 2024
Judgment: 10 June 2024

Appearances

For Applicant: Adv NS Nxumalo
Instructed by: Tshabalala Attorneys

For Respondent: Attorney Ian Theo Allis