IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 125850/2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: NO

....

DATE SIGNATURE

In the matter between:

NATIVE CHILD AFRICA (PTY) LTD **APPLICANT**

and

MARY OLUWATOBILOBA AKINWALE **FIRST RESPONDENT**

LUTENDO SIPHUMA **SECOND RESPONDENT**

JUDGMENT

K STRYDOM AJ

INTRODUCTION

1. The applicant, a South African hair product company, on an urgent basis, applies for a declaration that the First Respondent, a so-called 'influencer' and the Second Respondent, her attorney, are in contempt of Court.

2. The applicant had previously employed the first respondent to market its products on various social platforms. A dispute arose regarding payment and the first respondent turned to the social media platforms to vent her opinions regarding the applicant. In doing so, however, *"…instead of promoting the brand — she started trashing the applicant's reputation and goodwill*."[1]

3. This necessitated the applicant to approach the Court on urgent basis to obtain interdictory relief against the first respondent.

4. The Court was in agreement with the contentions of the applicant and, on the 11th of December 2023, Khwinana AJ made the following order ("the Khwinana order"):

"**1.** That the respondent is interdicted and restrained from publishing any **defamatory** statements, posts, memes, comments, video clips or sound clips to or on any platform (including TikTok, Instagram, Facebook, X (formerly known as Twitter) and WhatsApp) referring to the Applicant or encouraging her social media followers to do so;

2. That the respondent is interdicted and restrained from publishing, any statements, posts, memes, comments, video clips or sound clips (including Tik Tok, Instagram, Facebook, X (formerly known as twitter) and WhatsApp) on any platform which,

[1] *Native Child Africa (Pty) Ltd v Akinwale* (2023-125850) [2023] ZAGPPHC 2007 (11 December 2023) para 24

directly or indirectly, invites, entices or calls on the public to **boycott** the applicant's business or products;

3. That the respondent is ordered to **remove** all defamatory statements, posts, memes, comments, video clips or sound clips, on any platform (including Tik Tok, Instagram, Facebook, X(formerly known as Twitter) and Whatsapp) made by the respondent against the Applicant commencing on or before 17 November 2023;

4. That the respondent is ordered to post a video and written **retracting and/or apology** of and/or for any defamatory statements, posts, memes comments, video clips, or sound clips that the respondent made against the applicant on any platform (including Tik Tok, Instagram, Facebook, X (formerly known as Twitter) and WhatsApp), which retraction and/or apology posts should remain published for a period of not less than 60 (sixty) calendar days;

5. That the orders in paragraph 2 above shall operate as an interim interdict pending the institution of action proceedings by the applicant against the respondent within 60 (sixty) calendar days from the date of the order;

6. That the respondent is to pay the costs of this application, on a scale between attorney and client." **[Emphasis my own]**

5. The Khinwana order therefore provided for four different sets of relief, which, for ease of reference, I will refer to as (1) "the defamation interdict", (2) "the interim boycott interdict", (3) "the removal order", and (4) "the retraction/apology order".

6. Eight days later, on the 19th of December 2023, the Applicant was back in the urgent court alleging that the first and second respondents were in contempt of the Khinwana order.

7. If the Respondents are found to be in contempt, the applicant seeks a rule *nisi* calling upon the respondents to show cause, on the 30 January 2024 at 10h00 as to why a final order for the committal of the first respondent to 30 days in prison and a recordal of criminal guilt against the second respondent, should not be made.[2]

URGENCY

8. It is trite that application for declaration of contempt of Court and not urgent *per se*. Despite being generally regarded as urgent, due to the need to vindicate the authority of the Court itself, each case must be assessed on its own merits.

9. As a general proposition, however, contempt proceedings would be regarded as urgent if the contempt is of an ongoing nature.

10. In *Victoria Park Ratepayers' Association v Greyvenouw ("Victoria Park")* it was held that "*it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow."*[3]

[2] The effect and/or desirability of "divorcing" of a finding of contempt from the sanction pursuant thereto, will be dealt with in the judgment below.
[3] *Victoria Park Ratepayers' Association v Greyvenouw* CC 2004 JDR 0498 (SE) ("Victoria Park") at para 27

11. Similarly, in *Protea Holdings Limited v Wriwt*, the Court said that "*if there was no continuing contempt of court . . . then the hearing of this application as a matter of urgency in the Court vacation would not be justified*"[4] It further held that:

"the element of urgency would be satisfied if in fact it was shown that [the] respondents were continuing to disregard the order . . . . If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed."[5]

12. Having already found that the matter, insofar as the first respondent is concerned, is urgent, I do not intend to belabour this judgment with comprehensive reasoning for my decision. The crisp point is this: in *casu,* the first respondent was ordered to desist from actions infringing on the reputation and good-will of the applicant. The first respondent (according to the applicant) has continued to act contrary to the order and as such her contempt is continuous. Furthermore, should this contempt of court application not be heard on an urgent basis, the entire purpose (to avoid further reputational harm) of the Khinwana order would be defeated. The launching of the contempt application itself also serves to deter the first respondent from continuing her disregard of the Khinwana order.

13. With regards to the second Respondent, the applicant sought a declaration *"…that Mr Lutendo Siphuma is guilty of the crime of contempt of court for stating that Ms Mary Oluwatobiloba Akinwale need not comply with the order made by this Court…"*

[4] Protea Holdings Limited v Wriwt 1978 (3) SA 865 (W) (Protea Holdings) at 867G.
[5] Protea Holdings Limited v Wriwt 1978 (3) SA 865 (W) (Protea Holdings) at 868H.

14. The applicant alleges that soon after the Khinwana order was granted, the second respondent made certain utterances to the applicant's attorney to the effect that, in his view, as the first respondent had deleted the impugned messages and had uploaded a retraction to the relevant social media platform, the first respondent did not need to comply with the whole order. The applicant alleges that he "*ostensibly conveyed his contemptuous attitude to the Order to the Second Respondent.*"

15. Firstly, there is no Court order directed at the second respondent for him to be in contempt of. Secondly, there were no allegations that his conduct was continuing and would result in imminent harm to the applicant. Should the applicant have a claim against him, there is no reason to believe that it would not obtain substantial redress in the ordinary course.

16. As such, on the day of the hearing, I ordered that, insofar as the second respondent is concerned, the matter was struck from the roll due to lack of urgency, with costs to be reserved.

17. As the second respondent is not involved in any further findings in terms of this judgment, any further references to 'respondent ", should be understood to refer to the first respondent only.

RESPONDENT'S POINTS *IN LIMINE*

18. The respondent raised two additional preliminary points *in limine*; namely non-joinder and incompetence of relief sought.

19. In the first place, she indicates that the Station Commander and/or the SAPS, as well as the "Minister of Correctional services"[6] have direct and substantial interests in the outcome of the matter and should therefore have been joined.

20. In terms of the notice of motion, pursuant to a declaration of contempt and upon the return date of the rule *nisi,* the Station Commander and/or the SAPS are (in terms of the rule nisi portion) may be ordered to record the finding of guilt of contempt on her criminal record and to deliver her to a correctional center to serve her period of imprisonment. She further argues that the Minister has interest by virtue of the fact that the sanction sought is imprisonment.

21. In *The Judicial Service Commission v The Cape Bar Council (Centre for Constitutional Rights as amicus curiae)*, the test for non-joinder was described as follows:

> *"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."* [In-line references omitted]

22. I fail to see how the rights of either the Station Commander, the SAPS or the Minister could be prejudiced by a court making an order to the effect that they the nominal capacities perform the functions necessary flow from such an order. The respondent has

[6] Presumably a reference to the Minister of Justice and Correctional Services

also failed to make any averments indicating the prejudicial effect of the order save for a bold averment of interest and prejudice.

23. The point *in limine* regarding non-joinder was therefore dismissed.

24. She secondly alleges that, as the applicant seeks her committal to a prison, it was incompetent to bring the application in civil court. She alleges that criminal proceedings should have been instituted and that the relief sought is therefore incompetent.

25. The majority of the Constitutional Court, in the Zuma contempt case[7], at length explained why an order for direct imprisonment can be competently granted in civil contempt proceedings.

26. I am aware that the minority vociferously argued that given the criminal nature of the sanction, the matter should be referred to the National Prosecuting Authority for prosecution in accordance with criminal procedures and the relevant criminal safeguards afforded to accused persons in terms of Section 35(3) of the Constitution. However, the finding of the majority is binding.

27. The point *in limine*, regarding the incompetence of the relief sought, is therefore also dismissed.

CONTEMPT OF COURT

[7] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021) ("the Zuma contempt case")

General principles

28. *In Snowy Owl Properties 284 (Pty) Ltd v Celliers and Another*[8] the Supreme Court of Appeal ("SCA") restated the trite principle that an applicant alleging contempt of court must establish that:

"(a) an order was granted against the alleged contemnor;

(b) the alleged contemnor was served with the order or had knowledge of it; and

(c) the alleged contemnor failed to comply with the order.

Once these elements are established, willfulness and mala fides are presumed and the respondent bears an evidentiary burden……. Should the respondent fail to discharge this burden, contempt will have been established."[9]

29. Both the applicant and the respondent in contempt applications therefore have a burden of proof. In *casu*, it is not in dispute that the applicant has proven, beyond reasonable doubt, that the order was served and had come to the attention of the respondent. The applicant must therefore prove each alleged instance of non-compliance with the Khinwana order. For each instance of non-compliance so proven, the respondent must then establish that the non-compliance was not willful and mala fide.

30. The aforementioned requirements are relatively straightforward, however, the determination of the standard of the burden of proof, it is not.

The standard of the burden of proof

31. In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[10] the Constitutional Court determined the standard of proof with reference to the committal and coercive remedies of contempt orders:

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[8] *Snowy Owl Properties 284 (Pty) Ltd v Celliers and Another* (1295/2021) [2023] ZASCA 37 (31 March 2023) (Snowy Owl")

[9] Snowy Owl at para 22

[10] *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC). ("Matjhabeng")

"[67] '. . . [O]n 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.'

32. It is therefore clear that, depending on the sanction, the standard of proof could be either on a balance of probabilities or beyond a reasonable doubt.

33. The first question for determination of therefore whether the applicant has proven that the respondent has failed to comply with the order. As to this requirement the onus is on the applicant to prove such non-compliance for each of the alleged instances of non-compliance. It should be borne in mind that the Khinwana order in fact contains four different orders that the respondent had to comply with. Any determination then for purposes of contempt requires an evaluation of contempt vis-à-vis each of the four orders individually.

34. This is not to say that, just because the four orders are contained in a single judgement, that contempt of all of them collectively needs to be established to succeed with this

application. It is entirely feasible that the respondent may have been guilty of non-compliance with only certain of the orders.

35. For purposes of this first enquiry regard must be had to the burden of proof resting on the applicant in establishing non-compliance. Generally, as per *Matjhabeng*, the burden of proof is gleaned from the nature of the sanction sought. In other words, if the sanction relates to civil remedies, such as for instance a structured interdict, the burden of proof would be on a balance of probabilities. However, where the sanction is a criminal one the burden of proof would be beyond a reasonable doubt.

36. However, given the nature of contempt proceedings, a strict reference to the sanction, as framed by the applicant, does not assist the court. In view of the fact that contempt is not just directed at the party applying for such an order but also at vindicating the authority of the Court, a Court has a wide discretion.

37. In *Pheko v Ekurhuleni City*[11] the Constitutional Court, in 2015, held that:

[37] However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief, a mandamus demanding the contemnor to behave in a particular manner, a fine, and any further order that would have the effect of coercing compliance."

38. The majority in Zuma described the extent of this discretion as follows:

"[*86] …..However, it is trite that this Court enjoys wide discretionary powers, and that we are enjoined by the Constitution to grant appropriate remedies that are just and equitable….*

[110] In any event, whether or not a litigant is entitled to approach a court seeking punitive relief has absolutely nothing to do with a court's competence to grant it. Indeed, Pheko II unequivocally held that a court can raise contempt mero motu (of its own

[11] *Pheko v Ekurhuleni City 2015* (5) SA 600 (CC) ("Pheko II")

accord). In this context then, the process followed by the applicant says nothing about this Court's competence to make a purely punitive order of committal. In other words, nothing, including the process instituted by the applicant, could prevent this Court from determining the matter by exercising our right to raise the proceedings of our own volition.

[111] It is further trite that courts must make orders that are just and equitable in the circumstances. This means that even if it is not appropriate for an applicant to seek certain relief, this Court cannot be bound by what is sought by the applicant if granting an order beyond those limitations is what justice demands." [Underlining my own]

39. In view of this wide discretion and inherent duty of the court to ensure that the demands of justice are met, the mere fact that an applicant seeks a criminal sanction does not prohibit a court from imposing a civil sanction. Concomitantly, where contempt has not been proven beyond reasonable doubt, a civil sanction can still be imposed if it was proven on a balance of probabilities.

40. The burden of proof, therefore, should be determined in view of the sanction the court imposes, not the sanction the applicant seeks.

41. The effect of this wide discretion, in the present matter, on a practical level, is that for each of the instances of non-compliance, assessments must be done on whether the applicant has discharged its onus beyond reasonable doubt, as well as whether, in the alternative, the onus was discharged on a balance of probabilities. Once so proven, the burden falls to the respondent to either create reasonable doubt or rebut on a balance of probability the presumption of her wilfulness and *mala fides* of each of these instances of non-compliance.

The inextricable nature of contempt and sanction

42. In the present instance applicant has “separated” the contempt declaration and the question of sanction, as one would separate conviction and sentencing in a criminal trial. During the hearing, after being queried on the nature of proceedings on the return date, counsel for the applicant, for instance, argued that the respondent would then be able to make submissions in “mitigation” of the criminal sanctions imposed as per the rule nisi.

43. While it can be appreciated that the present application was structured so as such to afford the respondent rights akin to those afforded to accused in criminal trials, it misconstrues the nature and effect of a rule *nisi* and the that of contempt proceedings.

44. In *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport*[12] Corbet JA stated:

“…..*The procedure of a rule nisi is usually restored to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons….. In fact, the rule nisi procedure does……., in a proper case, permit of the granting of interim relief*.” [Underlining my own]

45. In *Member of the Executive Council for the Department of Health, Eastern Cape v BM*,[13] the Supreme Court of Appeal (“the SCA”) explained the rationale for using the rule *nisi* procedure in urgent applications:

“[12]….Its use and development is underpinned by the principle that a court will not grant relief which impacts or constrains the rights and interests of a party without affording that party an opportunity to be heard (audi alteram partem). It is also premised

[12] *Safcor Freight (Pty) Limited t/a Safcor Panalpina v South African Freight and Dock Workers Union* 2004 (3) ALL SA 623 (SE)paragraph 5

[13] *Member of the Executive Council for the Department of Health, Eastern Cape v BM* (213/2021) [2022] ZASCA 140 (24 October 2022) para 12

on the acceptance that the interests of justice require the balancing of rights and interests to ensure that what is worthy of immediate protection is not prejudiced by the time it takes to hear all interested parties."

46. In *Victoria Park*, the Court further held that:

[7] There is authority for the proposition that, in contempt of court cases, the party alleged to be in contempt because he or she has failed or refused to obey an order is not automatically entitled to be heard while he or she remains in default. While courts will obviously be loath to refuse to hear a party's defence, and it will only be in the most exceptional of cases that a party may be barred in this way from defending himself or herself, the rule nisi procedure allows the court to regulate the respondent's access to court, set the bounds of the dispute in the rule so that the respondent is in no doubt as to the case he or she must meet, and set the procedural rules for the further conduct of the matter.

47. I would note a further reason for deeming the use of the rule nisi procedure sensible in urgent applications. An applicant, having to act urgently with limited timeframes, does not have the luxury of properly formulating, substantiating or drafting its application as it would have had in the normal course. There is simply no time and the applicant must approach the court with the best case it can present before the harm it foresees occurs. When using the rule nisi procedure, a Court evaluating the applicant's case, only needs to find that the applicant has a prima facie case. The granting of the rule nisi affords the applicant the breathing space to present its case for final relief on the return date.

48. The present application, however, seeks a final finding on the contempt of the Respondent, but a prima facie finding on the sanction.

49. However, in contempt proceedings the burden of proof in declaring a person in contempt and the sanction to be imposed are inextricably intertwined.

50. In the *Zuma contempt case*, for instance, the Constitutional Court, in an urgent application, the Constitutional Court, appreciated that, for a Court to make a final finding on contempt it would have had to consider the possible sanction the finding should attract. Having determined that the finding of contempt in that case would necessitate a sanction of direct imprisonment, it nevertheless did not find that Mr Zuma was in contempt before affording him an opportunity to address the Court in mitigation of such a sanction.

"[63] Since all of this led this Court in the direction of an unsuspended order of committal, this Court was alive to the need to consider, and indeed safeguard, Mr Zuma's constitutional right to freedom. Accordingly, we issued directions on 9 April 2021, in which we invited Mr Zuma to file an affidavit on an appropriate sanction and sentence in the event that he is found to be in contempt of this Court's order." [Underlining my own]

51. These directions, contained in the footnotes to this paragraph, where:

"The first respondent is directed to file an affidavit of no longer than 15 pages on or before Wednesday, 14 April 2021 on the following issues:

a) In the event that the first respondent is found to be guilty of the alleged contempt of court, what constitutes the appropriate sanction; and

b) In the event that this Court deems committal to be appropriate, the nature and magnitude of sentence that should be imposed, supported by reasons."

52. For present purposes it is important to note that the constitutional court did not first find Mr. Zuma in contempt and then considered the sanction, it considered both simultaneously. An example, loosely based on the facts in the *Zuma contempt case,* is illustrative of the profound effect the sanction has on the declaration of contempt itself:

52.1. Mr Z refuses to appear before a board of inquiry as a witness, despite being ordered to do so by Court.

52.2. In the subsequent contempt proceedings, the Court could impose either a civil sanction (such as mandamus) or a criminal sanction (such as a fine or imprisonment).

52.3. If a criminal sanction is to be imposed, the court must, in evaluating the acts of non-compliance, determine whether such non-compliance was willful and mala fide, beyond a reasonable doubt.

52.4. However, if a civil sanction is to be opposed, court in its evaluation only needs to determine whether the noncompliance was willful and mala fide, on a balance of probabilities.

52.5. The sanction is therefore determinative of the standard of proof the court will apply in the evaluation of the contempt itself.

53. The aforementioned should not be interpreted to mean that as Court having found contempt beyond reasonable doubt must impose a criminal sanction. The Court has a wide discretion in determining the sanction. Invariably however the sanction should be imposed "…. *in order to vindicate the Court's honour consequent upon the disregard of its order . . . and to compel the performance thereof*".[14]

54. Sanctions are therefore not primarily aimed at punishing the contemnor. As stated by the SCA in Meadow Glen: *"…[a]lthough some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court orders It is indeed the accepted practice in contempt matters to seek compliance, using punishment as a means of coercing same*.[15]

[14] Victoria Park para 19;
[15] Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality [2014] ZASCA 209; 2015 (2) SA 413 (SCA) (Meadow Glen) at para 16

55. A court should be aware of the exact impact the order it makes would have on a party. This is an obvious proposition for all cases a Court is called to decide upon. However, given the inextricable nature as described above and the possible dire consequences unique to contempt proceedings, this awareness should be at the forefront of the Court's mind at every step of the decision making process.

***Zuma* strikes again**

56. Whilst the (initial) judgment in this matter was largely finalised, the declaration by the IEC, on the 17th of January 2024, that Mr Zuma cannot become president after this year's general election, necessitated a reconsideration of the findings in the initial judgment as. Mr. Zuma cannot become president because he has a criminal record. He has a criminal record by virtue of the order made in the *Zuma contempt case*:

"3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma [2021] ZACC 2.

4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment."

57. The wording of the order used by the Constitutional Court leaves no doubt that the Constitutional Court sentenced Mr. Zuma as a criminal and therefore implicitly appreciated that the result of the finding would be inter alia that he would have a criminal record.

58. However, as conceded by the majority, the *Zuma contempt case* was exceptional. The High Courts (or at least the two Gauteng divisions) grant contempt applications on an almost daily basis. Those orders rarely specifically address the criminality of contempt

and usually worded along the lines of: *"Mr X is guilty of contempt of court*" or "*Mr X is declared to be in contempt of Court.*"

59. The sanctions in those orders also vary between civil and criminal sanctions. Where criminal sanctions are imposed, those sanctions have always been suspended, conditional on the contemnor complying with the Court order.[16] In some instances, a declaration that the contemnor is in contempt is made without a sanction being imposed at all.

60. The disconcerting question that arose in my mind was whether all persons found to be in contempt of court, regardless of sanction, are guilty of a criminal offence and therefore have a criminal record. An evaluation of the common law and caselaw, consistently confirmed that, at common law, contempt of court is defined as a criminal offence. In terms of the present matter, the effect hereof is that, for instance, even if I only find that the Respondent is in contempt of court on a balance of probabilities, she would still be "guilty" of a criminal offence. I discuss the exact legal position and contentions that form the basis for the possible development of the common law in the "*Problem statement and Directions*" at the end of this judgment.

61. Given that, as already indicated supra, in determining the Respondent's, I would have to have regard to the sanction and effect of such an order, it is obvious that the question regarding criminality would have to be determined before such an order can be made.

62. I accordingly convened a meeting with the legal representatives for both parties to indicate that I foresee a possible need development of the common law definition of contempt of court and indicated that I intend to provide a problem statement and directions in this regard.

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[16] The direct committal of Mr Zuma in the *Zuma contempt case* was unprecedented. As stated by the majority at para 57: "*I acknowledge that the decision at which I arrive, namely an order of direct committal, may constitute an unprecedented step forward on the trajectory of contempt litigation, in fact, the first time such an order had been made.*"

63. However, I am mindful of the fact that, at its heart, the purpose application and that which served before Khinwana J, was to protect the rights of the Applicant and to avoid the imminent (and now ongoing) harm suffered by it due to the actions of the Respondent. As such, even though no final determination will be made regarding the contempt of the Respondent, her acts of non-compliance will be assessed to determine whether such non-compliance was willful and mala fide beyond a reasonable doubt, alternatively on a balance of probabilities. In doing so, I intend to following the approach taken by the Constitutional Court in the *Zuma contempt* case by issuing further directions to the Respondent to address the question of sanction.) The relief granted will also be formulated to protect the Applicant's rights as far as possible.

EVALUATION OF THE FACTS

Chronology of events after the Khinwala order was made

64. On the 11th of December 2023 the Respondent made the following sequence of posts to her handle "@planettobi" on Instagram:

    64.1. A post quoting concerned questions from her followers asking why she had not posted in a while.

    64.2. A picture of herself apologising to her followers for not posting because she was "*fighting for her life*" and trying her best to be strong so that she does not "kill herself due to depression" "*all because [she] was trying to make something of herself and put food on the table*"

    64.3. A picture of the Court room where the Urgent Application was heard and stating that she had been in Court "*fighting for her life so that she does not end up in jail for standing up for herself*",

    64.4. A video retracting her defamatory statements against the Applicant.

64.5. A written retraction in an Instagram story

65. On the 12th of December 2023, the Applicant posted a media statement to its Instagram account noting that they were successful in their application before Khinwana AJ and reiterating the terms of the order granted.

66. The following morning, the 13th of December 2023, the applicant became aware of the following Instagram posts made by the Respondent to her handle “@planettobi” :

66.1. Over a screenshot of the Applicant’s media statement, which clearly shows the Applicant’s brand name and logo, she stated as follows:

"this hurts because they only won because I WAS ALONE AND HAD NO LAWYER TO DEFEND ME. They lied about me in court and I couldn't do ANYTHING TO DEFEND MYSELF! This breaks my heart so bad." (“the first post”)

66.2. A few minutes later, on the same thread as above, she commented further:

“it really hurts you guys. I’m not wrong I promise. Do you guys know that even in court, their lawyer told me I could leave because out case wouldn’t be heard that day? That was a lie! Our case was heard and they just didn’t want me to be there so they could tell the judge that i refused to attend.

They lied about me in court and it hurts so so much. I’ve been in tears for so long because I couldn’t defend myself. I broke down in court and started crying because of everything they kept saying about me.

i'll never forgive them! FUCK THEM AND THEIR BRAND! i hope everyone dies! And fuck everyone else that supports them!” (“The second post”)

67. On or about the 14th of December 2023, the Respondent changed her profile name from “@planettobi” to “@temisplanet”. The profile “@temisplanet” was initially private but, following legal advice, the

Respondent on the 15th of December 2023 changed it to enable public viewing.

Contempt of the defamation interdict

Legal principles applicable

68. In *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others*[17] the constitutional Court found that a juristic entity has an enforceable common law right to its good name and reputation, which extends beyond mere goodwill.

69. In *Khumalo v Holomisa*[18] it was held that:

"*At common law, the elements of the delict of defamation are:*

(a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff.

It is not an element of the delict in common law that the statement be false. Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public benefit; that the publication constituted fair comment and that the publication was made on a privileged occasion. Most recently, a fourth defence rebutting unlawfulness was adopted by the Supreme Court of Appeal in National Media Ltd and Others v Bogoshi"

70. A statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published.[19]

Application of defamation principles to Instagram posts of 13 December 2023

[17] *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* (CCT 67/21) [2022] ZACC 38; 2023 (2) SA 404 (CC); 2023 (7) BCLR 830 (CC) (14 November 2022)
[18] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC). para 18
[19] *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) PARA 91

71. With regards to the first post, the Respondent alleges that the content thereof is true; she was unrepresented the first day and on the second day her lawyer was unable to adequately represent her as he had insufficient time to prepare. (Khinwana AJ had refused a postponement in this regard.)

72. She admits that the comments in the second post "are unsavoury", but denies that they are defamatory, arguing that whilst they constitute emotive expression, they fall outside the definition of defamation.

73. I had afforded the legal representatives for both parties an opportunity to file further written submissions with regards to these comments specifically.

74. For the respondent it was, firstly, submitted that the content of the posts were not defamatory as they do *"…not have the effect of reducing the Applicant's status in the community, at worse, it presents them as having acted mala fide, no more, no less*."

75. Secondly, the Respondent raised truth and public interest as a defence, stating that: "*The publication was the First Respondent's truth on what transpired in Court and given that the Applicant had published its own version of what transpired in Court, the First Respondent found it in the public interest to respond thereto. Furthermore, it is submitted with respect, the Court was not scandalized by these remarks as they make no reference to it but the Applicant."*

76. Khinwana AJ's judgment clearly demonstrates the Respondent's modus operandi: she obstinately refuses to accept that she could possibly be in the wrong, portrays herself to the public as a victim and, even in the face of legal action, uses her influence to lash out and injure the reputation of the Applicant, asserting that her defamatory statements are the truth. I refer to some of the findings in that judgments in illustration:

    76.1. *"[29.6] If this was not sufficient reason to pause, she could have taken the second media statement issued on 20 November 2023 more seriously as it set out all of*

the facts and threatened urgent legal action, she doubled down on her resolve, even accusing the applicant of being the party that was lying"[20]

76.2. *"[36] Upon the launching of this application, which was physically served on her on 29 November 2023, the respondent could have reconsidered the requests of the applicant but she failed to. The respondent displayed an obstinate disregard for the consequences of her actions."*

76.3. *"[38] The respondent's primary defence is based on the assertion that her statements were true, particularly regarding the issue of non-payment."*

76.4. *"[45] During the proceedings, the respondent was allowed to present oral submissions to the court. Throughout this process, she exhibited a lack of remorse for the harm her actions may have caused the applicant. Her focus appeared to be primarily on her interests, aiming to avoid personal repercussions rather than meaningfully addressing the issues raised in the case. This approach indicated a self-centered perspective, with little consideration for the broader implications of her actions."*

77. In the present matter the respondent has simply elevated her disdain for the applicant by asserting that they lied under oath. Khinwana AJ had already found that Applicant did not lie in court and that it was the Respondent who was prone to embellishment. Having already been ordered by the court to remove posts containing such statements, amongst others, the respondents continued assertion that referring to the applicant as "liars" is not defamatory, is unfathomable. Within the context of the Khinwana judgment, it is evident that references to the applicant as "lying", form part of the relief granted against the applicant.

[20] Para 29.6

78. Furthermore, by stating "*I am not wrong*" and that "*they lied*" she conveys to the public that her previous averments regarding the applicant remain true and, in so doing, continues with the defamation she was ordered to cease.

79. True to form, the respondent raises the defence of truthfulness and public interest to excuse her defamatory statements. This defence is as contrived as it is devoid of merit

    79.1. In the first instance, the concept of "own truth" might find favour on a road to self-exploration and personal enrichment, but it is decidedly inappropriate in legal proceedings. Where a court has written a well-reasoned judgement and made an order pursuant thereto, as Khinwana AJ did in casu, the only truth is that which is declared by the court. The applicant's media statement conveyed the findings of court and reiterated the order. By publishing this media statement the applicant did not present its "own version" worthy of retaliation from the respondent; it noted the findings of the court.

    79.2. Secondly, contrary to her "own truth" as alleged in her answering affidavit and in the further written submissions, she did not state that she was unrepresented the first day and had (unprepared) representation the second day. She stated that she did not have a lawyer and could not defend herself against the applicant's "lies". The first post is therefore blatantly untrue.

80. Thirdly, the allegation that Khinwana AJ ruled in favour of the applicant based on "lies" and that the Respondent could not rebut those lies as she was unrepresented, costs and aspersion on the dignity of the court. The respondent, as is evident from her answering affidavit, was afforded the chance to obtain legal representation. The matter, which is on the urgent role, was even allowed to stand over to the next day to afford her the opportunity to obtain same. From a plain reading of the first post, it falsely conveys to the general public that she was unrepresented the whole time and that Khinwana AJ had not

given her chance to defend herself. The post was intended to cast aspersions on the manner in which the proceedings were conducted and resultantly on the judge in allowing the proceedings to be so conducted. This attack on the integrity of the Court cannot stand.

81. The comment as per the second post are similarly defamatory insofar as they repeat the first post's contentions regarding the court procedure and the truthfulness of the applicant. However the second post, given the unsavoury tone and vulgar assertions, goes even further in its injurious nature.

82. Having already found that the respondent's non-compliance, in posting both the first and second posts, was wilful and mala fide beyond a reasonable doubt, it is unnecessary to describe how the unsavoury portions of the second post constitute defamation. I have little doubt that any lay person who read these posts would consider them as injurious to the Applicants' good name and reputation.

Contempt of the interim boycott interdict?

Direct enticement to boycott

83. Khinwala AJ's reasoning shows a clear understanding of the extent of influence, statements on social media by influencers such as the respondent can have on a business' "bottom line". It is within this context that it was ordered that the respondent refrain from using such influence, directly or indirectly, to, by way of invitation enticement or calls on the public, effect a boycott of the applicant's business and products.

84. One would be hard pressed to find a better example of a direct contravention of this interdict than a social media influencer stating to her followers on social media: *FUCK THEM AND THEIR BRAND! i hope everyone dies! And fuck everyone else that supports them!"*

85. The respondent justifies this statement as an emotive comment made following the applicant's media statement referred to supra. The implication being that she was

defending herself against an unwarranted campaign launched against her by the applicant pursuant to the Khinwala order.[21] I have already dealt with the nature of the media statement, the perception of a campaign against her is another example of the "victimhood complex" and blatant refusal to own up to her errors, that the respondent suffers from

86. In any event, the respondent has failed to cast a reasonable doubt as to her mala fides and wilfulness in making this statement.

Indirect enticement to boycott

87. I hasten to point out at this juncture that insofar as the wilfulness and mala fides of the respondent are concerned, her counsel during argument sought clemency in view of her youthfulness and inexperience. However, specifically in relation to social media posts, she is by virtue of her self-proclaimed status as a social media influencer, in fact an expert in determining the effect of comments made on social media. By virtue of her job description she is capable of using social media as a weapon against her detractors. Where a social media influencer posts comments, such as referred to supra, it would be exceptionally difficult to persuade a Court that she did not appreciate the nature and effect of such comments at the time of posting such comments.

88. It is within the context of this expertise of the respondent that the applicant's further complaint of non-compliance with the interim boycott order should be understood.

89. Essentially the applicant alleges that by virtue of the entire chronological of posts (set out supra) by the respondent, she indirectly enticed the public to boycott the applicant. When viewed individually none of the posts are a blatantly contemptuous. However when viewed holistically and interpreted in light of the image of the conduct of the applicant and the court proceedings that it would conjure up in the mind of the public, it is clear that the respondent manipulated social media to injure the Applicant's reputation.

[21] See for instance para 150 of the answering affidavit.

90. In *Le Roux and Others v Dey* the Constitutional Court held that:

"In determining its meaning the court must take account not only of what the publication expressly conveys, but also of what it implies, ie what a reasonable person may infer from it. The implied meaning is not the same as innuendo, which relates to a secondary or unusual defamatory meaning that flows from knowledge of special circumstances. Meaning is usually conveyed by words, but a picture may also convey a message, sometimes even stronger than words."

91. In *Isparta v Richter and Another*[22] Hiemstra AJ also followed this contextual approach in determining whether a post on Facebook defamed the plaintiff, despite not mentioning her by name. He held that, in light of the string of previous postings (referencing the Plaintiff) made by the first defendant within a short period of time, the defamatory post would be understood as referring to the Plaintiff. He further held that one cannot look at the posting in isolation and must consider it as forming part of an "exchange of messages".

92. For the sake of brevity, I do not intend to provide an exposition of how each of the sequential posts slot together to form non-compliance with the boycott interdict. The following facts are in my view especially pertinent:

92.1. On 11 December 2023, after having received Khinwala AJ's judgement, the respondent persisted in holding herself out as a victim. She plays to the sympathy of her followers and seemingly still refuses to acknowledge any fault on her part. In this regard her statement that she was fighting for her life or because she was attempting to keep make something of herself and keep food on the table, is telling.

[22] *Isparta v Richter and Another* (22452/12) [2013] ZAGPPHC 243; 2013 (6) SA 529 (GNP) (4 September 2013)

92.2. Thereafter she posts a picture taken inside court over which she asserts that she stood the risk of going to jail for merely standing up for herself again this statement is devoid of any acknowledgement of fault. The reference to jail is blatantly incorrect. The respondent in her answering affidavit states that she believed at that stage that the intention of the applicant was for her to wind up in jail. Presumably, this once again refers to this concept of own truth. The real truth for purposes of legal determination is that at the time of this post she was in receipt of not only a notice of motion, but also a comprehensive judgement, neither of which even mention the possibility of committal. In her answering affidavit she states that the present contempt of court application vindicates her own truth. This is disingenuous: The only reasonable explanation why she would have, on 11 December 2023, thought that committal is possible outcome, would be if she at that date new she would be in contempt of the order granted that very day.

92.3. At the time of the application before Khinwala AJ, the respondent had created a narrative through the negative comments of the applicant being a corporate bully, casting herself as an innocent victim. In light here of the aforementioned posts, in the face of the order , contextually amount to incitement of the public to continue boycotting the applicant products. The fact that the respondent superimposes this false narrative over a picture of court makes it even more egregious.

92.4. Shortly after these posts (intimating that she is a victim and has in fact done nothing wrong), she publishes the retraction of her negative comments regarding the applicant is ordered indicating that she wishes *"…the best for the brand and would like to refrain from making any comments about it*". (As is evident from the posts of 13 December 2023, she prevailed with this intent for less than two days.)

The mere proximity in time to the aforementioned posts, creates the impression that the retraction itself is false.

93. Resultantly, it is found that the chronology of these posts constitutes non-compliance with the boycott interdict on a balance of probabilities. Similarly, the Respondent has not, on a balance of probabilities convinced this Court that the non-compliance was not wilful and *mala fide*.

Is the Respondent in contempt of the apology/retraction order?

94. In the first place, the applicant alleges that the Respondent only made a retraction and did not issue and apology. The order itself stated that the Respondent must "*post a video and written retracting and/or apology***".**

95. As *'…[a]n order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole'* and to*'…have regard to the context and surrounding circumstances'*[23] the Applicant however, correctly, asserts that when interpreted within the context of the reasoning contained in Khinwala AJ's judgment, the order envisioned an apology and a retraction. I am in agreement in this regard. However, in making this determination a party would have to have legal knowledge of the principles governing the interpretation of court orders.

96. Even if it were to be found that the Respondent failed to comply in this regard, wilfulness and mala fides cannot be impugned to her conduct (on either standards of proof).

97. Secondly, the applicant states that by changing her profile name, the respondent sidesteps the spirit of the order. By ordering that the retraction the published on the respondent's social media accounts and remain visible for 60 days, the intent was that those members of the public that are aware of the respondent's negative commentary on the applicant, would be able to see that the respondent has retracted those

[23] *Ian Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* [2018] SCA 165; 2019 (3) SA 441 (SCA) at para 16

statements. The applicant draws an analogy in this regard to the effect that if news station A is ordered to issue an apology for defamation of a company. If, before issuing same, however, A changes its name to B, the public would not be able to link the apology now being made by B as relating to defamatory statements made by A. That is not the case here. The negative comments were made under the profile of @planettobi. The retraction was published under the same profile name.

98. A more apt analogy would be: Defamors Pty Ltd trading as Influencerpro is ordered to publish a retraction for defamatory statements made against Hairco on its facebook account. At the time when it publishes the retraction, its Facebook profile is “Influencerpro”. After publishing the retraction, however, it starts trading as “Influencersupreme” and created a profile with the same name. Whilst not deleting the old profile, it no longer keeps the old profile active. Unless the public is aware that “Influencerpro” and “Influencersupreme” are the same company, the fact that Defamors Pty Ltd has retracted the statements becomes obscured.

99. I agree that the intention of the Court in making the order was that the followers of the Respondent and all members of the public who had knowledge of her defamatory statement, should be informed that she has retracted those statements and has apologised. When she created a “new” profile, her followers (who again repost and influence non-followers) also migrated to this new profile. Therefore, despite the retraction being visible on the “old” profile, it would not attract the same number of views as the original defamatory posts had. The order was aimed at the Respondent, and not “the Respondent known as @planettobi”. Therefore any action which has the result that the public cannot readily ascertain that it was the Respondent retracting or apologising, negates the object of the order.

100. In this regard I will, once again, give the benefit of the doubt to the Respondent and assume that she misunderstood the Khinwala J order contextually.

101. In view of the circumstances regarding the inability to presently provide final relief to the applicant in any of the aspects raised, it would be an injustice of this court to not apply to mind to the powers granted to it by virtue of Rule 42(1)(b).

102. Rule 42(1)(b), contextually, exists to assist Judges in doing justice between the parties. It allows a Judge to, of her own accord or on application, amend an order to reflect the true intention of the pronounced judgment, provided that the tenor of the judgment is preserved.[24] If an order does not reflect the true or real intention of the court, it is indicative of a patent error, which falls to be corrected.[25]There is, in principle, no reason why another Court cannot interpret the order to determine what the true intention was[26] and vary another Court's order to properly reflect such true intention. My order will therefore contain a variation of this portion of the Khinwala order. As there was a timeframe coupled with this portion of the order, which has already started running, I will also give effect to the intention of Khinwala J in this regard by providing a new timeframe.

FINDINGS ON ACTS OF NON COMPLIANCE

103. After having evaluated the acts of non-compliance as alleged by the applicant I have determined that the applicant has proven that the respondent has not complied with the following orders made by Khinwala AJ:

103.1. "1. That the respondent is interdicted and restrained from publishing any defamatory statements, posts, memes, comments, video clips or sound clips to or on any platform (including TikTok, Instagram, Facebook, X(formerly known as Twitter) and WhatsApp) referring to the Applicant or encouraging her social media followers to do so;"

[24] *S v Wells* 1990 (1) SA 816 (A) at 820C-F
[25] *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 532 (C) at 541C
[26] See for instance: *Ian Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* [2018] SCA 165; 2019 (3) SA 441 (SCA) at para 17

103.2. 2. That the respondent is interdicted and restrained from publishing, any statements, posts, memes, comments, video clips or sound clips (including Tik Tok, Instagram, Facebook, X(formerly known as twitter) and WhatsApp) on any platform which, directly or indirectly, invites, entices or calls on the public to boycott the applicant's business or products;

104. The respondent's noncompliance in relation to the first order was found to be willful and mala fide beyond a reasonable doubt.

105. In relation to the second order was found that, where she directly invited, enticed or called on the public to boycott the applicant's business or products, her non-compliance was willful and mala fide beyond a reasonable doubt. Where she did so indirectly, however, it was found that the non-compliance was willful and mala fide on a balance of probabilities.

106. I also find that the applicant has proven that the Respondent has not complied with the fourth order as per Khinwala AJ's judgment, which provided:

"4. That the respondent is ordered to post a video and written retracting and/or apology of and/or for any defamatory statements, posts, memes comments, video clips, or sound clips that the respondent made against the applicant on any platform (including Tik Tok, Instagram, Facebook, X (formerly known as Twitter) and WhatsApp), which retraction and/or apology posts should remain published for a period of not less than 60 (sixty) calendar days."

107. However, in this regard the Respondent's non-compliance was not wilful or mala fide, but rather was rather the result of her not being able to glean the Court's true intention from the wording of the order. I have already indicated that I will vary this portion to ensure it reflects such intention.

ORDER

108. I accordingly order as follows:

1. It is declared that:

    a. The first Respondent has not complied with order 1,2 and 4 of the order made by Khwinana AJ on the 11th of December 2023.

    b. The first Respondent's non-compliance in relation to orders 1 and 2 was willful and mala fide beyond a reasonable doubt.

    c. The first Respondent's non-compliance in relation to order 4 was partially willful and mala fide beyond a reasonable doubt and partially willful and mala fide on a balance of probabilities.

2. Paragraph 3 of the order made by Khwinana AJ which reads as follows

    "*That the respondent is ordered to post a video and written retracting and/or apology of and/or for any defamatory statements, posts, memes comments, video clips, or sound clips that the respondent made against the applicant on any platform (including Tik Tok, Instagram, Facebook, X (formerly known as Twitter) and WhatsApp), which retraction and/or apology posts should remain published for a period of not less than 60 (sixty) calendar days*"

    Is hereby varied and to read as follows

    "*That the respondent is ordered to post to any and all her profiles or handles, a video and a written retraction and apology for any defamatory statements, posts, memes comments, video clips, or sound clips that the respondent made against the applicant on any platform (including Tik Tok, Instagram, Facebook, X (formerly known as Twitter) and WhatsApp), which retraction and/or apology*

posts should remain published for a period of not less than 60 (sixty) calendar days"

3. Judgment on the determination of whether the first Respondent is in contempt of court by virtue of the declarations contained in paragraph 1 above is reserved pending the determination of the issues raised in the "*Problem statement and directions*" annexed to this judgment as "A"

4. Judgment on the determination of the sanction to be imposed (if any) is reserved pending the determinations as per paragraph 3 above.

5. The first Respondent is ordered to, simultaneously with her submissions as per the directives contained in the "Problem statement and directives", file an affidavit and, if she deems it necessary, written submissions on the following issues:

   a) In the event that the first respondent is found to be guilty of the alleged contempt of court, what constitutes the appropriate sanction; and

   b) In the event that this Court deems committal to be appropriate, the nature and magnitude of sentence that should be imposed, supported by reasons

6. The applicant may, within 3 days of receipt of the affidavit referred to in paragraph 5 above, file an answering affidavit thereto, whereafter the first Respondent shall within 3 days file her replying affidavit.

7. Costs of the application are reserved.

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K. STRYDOM

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing:

Date of judgement:

APPEARANCES:

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