



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

**CASE NO: 2024 - 027703**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO

SIGNATURE      DATE

In the application by

**TUHF LTD**

Applicant

**And**

**FARBER, MARK MORRIS**

First Respondent

**28 ESSELEN STREET HILLBROW CC**

Second Respondent

**HILLBROW CONSOLIDATED INVESTMENTS CC**

Third Respondent

**HCI INNER CITY PROPERTIES (PTY) LTD**

Fourth Respondent

**10 FIFE AVENUE BEREA (PTY) LTD**

Fifth Respondent

**68 WOLMERANS STREET JOHANNESBURG (PTY) LTD**

Sixth Respondent

**THE SHERIFF OF THE HIGH COURT, JOHANNESBURG  
CENTRAL**

Seventh Respondent

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**JUDGMENT**

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**MOORCROFT AJ:**

Summary

*Order of court – can not be ignored because party believes the order is wrong and should be rescinded because of a finding envisaged in a related case – order even if indeed wrong is valid until set aside*

*Contempt of court – wilful refusal to obey existing order on ground that Supreme Court of Appeal might reach a different conclusion in a related matter – amounts to contempt*

Order

[1] In this matter I made the following order on Thursday, 28 March 2024:

***Contempt of Court: The first, second and third respondents***

1. *Mark Morris Farber (“the first respondent”), 28 Esselen Street Hillbrow CC (“the second respondent”) and Hillbrow Consolidated Investments CC (“the third respondent”), are declared to be in contempt of the court order handed down by the above court under case number 44393/2020 (“the 44393 Court Order”) on 12 August 2022 in –*
  - 1.1. *interfering with TUHF’s rights to collect rentals from the Waldorf Heights Tenants;*
  - 1.2. *refusing to provide TUHF with the names and contact information of the Waldorf Heights tenants, together with copies of written lease agreements concluded with the Waldorf Height tenants and particularity in respect of the terms of any implied and/or oral terms of any lease agreement; and*
  - 1.3. *failing to sign all documents necessary to facilitate the cession;*
2. *The first, second and third respondents are declared to be in breach of the 44393 Court Order.*
3. *The applicant is granted leave to approach the Court on amplified papers for an order for the committal to prison of the first respondent and of identified*

*representatives of the second and third respondents in the event of the first, second and third respondents failing to comply with the 44393 order*

*3.1. by 1 April 2024 in respect of paragraph 1.1 above;*

*3.2. by 5 April 2024 in respect of paragraphs 1.2 and 1.3 above.*

***Interim Interdict: The first to sixth respondents***

*4. Pending the sale in execution of the second respondent's immovable property situated at Erf 3209 Johannesburg Township, Registration Division I.R., Province of Gauteng, with street address 28 Esselen Street, Hillbrow, Johannesburg, comprising 12 storeys, 44 bachelor units, 1 penthouse unit and 3 retail ground floor units ("Waldorf Heights"), alternatively the finalisation of the respondents' application in terms of uniform rule 45A, under case number 2024-021574 ("the rule 45A Application") –*

*4.1. the first to fourth respondents, and any of their employees, agents or representatives, are forthwith interdicted and restrained from –*

*4.1.1. collecting rental from the Waldorf Heights tenants;*

*4.1.2. attending at and accessing Waldorf Heights for purposes of interfering with the tenants or the collection of rental;*

*4.1.3. interfering with TUHF, its employees, agents or representatives in respect of the collection of rentals at Waldorf Heights;*

*4.1.4. preventing TUHF, its employees, agents or representatives from gaining access to Waldorf Heights or the tenants of Waldorf Heights;*

*4.1.5. contacting tenants of Waldorf Heights without the written consent of TUHF and ordering the respondents to advise TUHF in writing forthwith if any tenants contact them;*

*4.1.6. soliciting payment of any amounts of money, including rentals, from tenants at Waldorf Heights; and*

*4.1.7. interfering with TUHF's rights to collect rentals from the tenants of Waldorf Heights in any manner whatsoever.*

5. *The Sheriff of the Court (“the seventh respondent”), or his lawfully appointed Deputy, are authorised and directed –*

*5.1. to notify the Waldorf Heights tenants of this Order; and*

*5.2. to notify the Waldorf Heights tenants that as from 1 April 2024 their rent must be paid into a bank account that the applicant will provide to the Sheriff.*

*5.3. the applicant, and its duly appointed agents, are authorised unfettered access to Waldorf Heights for purposes of –*

*5.3.1. giving effect to this Order; and*

*5.3.2. collecting rental from the Waldorf Heights tenants.*

6. *The first to sixth respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on an attorney and client scale, including the costs of two counsel, one of whom is senior counsel, on scale C.*

[2] The reasons for the order follow below.

### Introduction

[3] This is a judgement in the urgent court. The application is opposed by the first to sixth respondents and unless otherwise indicated by the context they are referred to in this judgement as “the respondents”. The application is not opposed by the seventh respondent, the Sheriff.

[4] The applicant and the second respondent, represented by the first respondent entered into a written loan agreement in terms of which the applicant lent and advanced money to the second respondent. The first respondent and three companies, namely the third and fifth respondents together with 266 Bree Street Johannesburg (Pty) Ltd [in liquidation] provided suretyships and the second respondent furnished the applicant with a mortgage bond over its building known as Waldorf Heights which included a cession of rentals. The loan amount of R9,980,700.00 was advanced during April to August 2017 to the principal debtor, the second respondent.

The first respondent is the sole shareholder of the 2<sup>nd</sup> to 6<sup>th</sup> respondents.

[5] The applicant initially launched an application under case number case number 2020/7843 in March 2020 against the respondents and this application was dismissed by Senyatsi J for reasons that are not now material. The applicant was successful in an appeal and the respondents applied for special leave to appeal to the Supreme Court of Appeal. The application for special leave was referred to oral argument on 5 April 2023.<sup>1</sup>

[6] In this first application the respondents contended that the suretyships referred to above are void due to non-compliance with section 45 of the Companies Act 71 of 2008. The section deals with the validity of loans or other forms of financial assistance to directors of companies.

[7] The applicant brought a second application and on 12 August 2022 Senyatsi J sitting in the Gauteng Division in Johannesburg granted an order under case number 2020/44393 (the “44393 application” and “44393 order”). The applicant adopted the attitude that the respondents’ allegation in the earlier application under case number 2020/7843 that the suretyships were void amounted to a repudiation and was an event of default in terms of the loan agreement. In terms of the order the second respondent and the sureties were ordered jointly and severally to pay the amount of R9,198,953.702 to the applicant together with interest calculated from 1 November 2022 to date of payment, together with legal costs on the attorney and client scale. The applicant was also authorised with immediate effect to take cession of any rental amounts payable to the second respondent or to any of the sureties or their agents by every tenant occupying the building known as Waldorf Heights.

[8] It is not clear from the papers whether reliance on voidness by the third and fifth respondents would be construed as an event of default in terms of the loan agreement between the second respondent and the applicant even if the second and fifth respondents were correct in the view they now adopted that the suretyships were indeed void.

[9] The second respondent and alternatively the sureties were ordered to sign all documents necessary to facilitate the cession, failing which the Sheriff was authorised to sign these documents. The applicant was authorised also to take the necessary steps for purposes of collecting rental from the tenants of the building and the second respondent, and alternatively the sureties, were ordered to furnish the applicant with the

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<sup>1</sup> See sections 16 (1) (b) and 17 (2) (d) of the Superior Courts Act 10 of 2013.

names and contact information of every tenant occupying the building together with copies of lease agreements, particularity in respect of oral terms of such agreement, and copies of existing property management agreements in respect of the building.

[10] An application for leave to appeal the judgment in the 443993 application by the second respondent and the sureties was refused. An application for leave to appeal made to the Supreme Court of Appeal was also refused, as was an application to the Supreme Court of Appeal for reconsideration. An application for leave to appeal was made to the Constitutional Court under case number CCT 211/23. This application was refused on 12 February 2024.

[11] The applicant's attorneys wrote to the respondents on 15 February 2024 informing them of the order by the Constitutional Court and of the applicant's rights to collect rental for March 2024. The applicant also demanded compliance with the 44393 order. No response was received. On 19 February 2024 a notice of cession was delivered to every room in the building. The rent was due by 1 March 2024 and by 4 March 2024 it was clear that no rent was being received despite the cession notice. The applicant then learned that the respondents had informed the tenants in writing and on a letterhead reflecting the details of the third respondent (but with the name of a related company) that:

*"we are aware of the letter sent to you ...on behalf of ... Tuhf.*

*Our lawyers are dealing with this matter.*

*In terms of your lease agreement please continue to pay your rent as per your statement."*

[12] The applicant submits that the inference to be drawn from this letter is that the first and third respondents distributed the notice to tenants of the building and in doing so interfered with the applicant's rights to collect rentals. The right to collect rental arise from the 44393 court order. They also failed to comply with the 44393 court order by refusing to provide the applicant's with the details and documentation required and by refusing to sign the documents necessary to effect the cession.

[13] The attorneys acting for the respondents confirmed to on 6 March 2024 that the respondents refused to provide the undertakings sought and made a with prejudice offer to pay the gross rental receipts less the monthly disbursements of the building into the respondents attorneys trust account. The applicant rejected this offer.

[14] The respondents based their refusal to comply with the court order on the pending rule 45A application dealt with below.

[15] The parties were involved in other litigation before the Supreme Court of Appeal in Bloemfontein and the applicant only responded on 12 March 2024. He reject the offer made. The offer was rejected for a number of reasons primarily because it contradicted the express terms of the 44393 order as the applicant is entitled to the payment of all the rentals and not the rentals subject to deductions at the discretion of the first respondent.

[16] The applicant argues that the application is urgent *inter alia* because rental is payable by tenants on 1 April 2024 and unless an order was granted before the end of March 2024 the respondents would continue their practice of collecting the rental in wilful disregard of the 44393 order.

[17] The applicant then brought an urgent application seeking to hold the first, second and third respondents and alternatively also the fourth respondent in contempt of the 44393 order, alternatively that they are in breach of the 44393 order, interdicting the respondents and any of their employees, agents or representatives from collecting rental from the tenants, attending at the building for the purpose of interfering with the tenants or the collection of rental, contacting the tenants, soliciting payment of any amounts from tenants, interfering with the applicant's rights to collect rental, and related relief.

[18] An unsigned copy of the application was served and the respondents on 12 March 2024 and a signed copy was served the next day. The respondents were required to file the notice of opposition on or before 14 March 2024 and to file answering affidavits by 19 March 2024. A notice to oppose was filed on 20 March 2024 and an answering affidavit and the day of the hearing, 27 March 2024. The applicant adopted the view that no defences were raised and elected not to file a replying affidavit.

[19] An urgent application must be brought as soon as possible and an applicant is expected to provide cogent reasons for any delay.<sup>2</sup> An applicant should not be penalised for making attempts to resolve the dispute before launching the application.<sup>3</sup>

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<sup>2</sup> *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) 94C–D; *Stock v Minister of Housing* 2007 (2) SA 9 (C) 12I–13A; *Kumah v Minister of Home Affairs* 2018 (2) SA 510 (GJ) 511D–E.

<sup>3</sup> *Transnet Ltd v Rubinstein* 2006 (1) SA 591 (SCA) paragraphs 21 to 33.

[20] The applicant wasted no time in approaching the court and the only reason why the answering affidavit was only filed on the day prior to the hearing (and one day after the set down date) was because the respondents took the time between 13 March and 27 March 2024 to do so. The respondents had sufficient time, namely 14 calendar days to comply with the time periods imposed by the applicant.

[21] I do not intend to traverse the wealth of learning reflected by the case law and academic writings on the subject of the correct approach to urgent applications.<sup>4</sup> I determine the matter of urgency on the applicant's papers and on the allegations made it is apparent that the respondents do not intend to comply with the 44393 order but do intend to continue to collect rentals. A proper case has been made out for the invocation of rule 6 (12).

[22] The applicant fears that if the respondents continue to collect rental and even if rental were paid over to the applicant after the deduction of amounts believed to be due to the respondents as a management fee and disbursements, it will still be out of pocket as a similar problem was experienced in the past when excessive maintenance fees and disbursements were deducted. It is also a cause for concern for the first applicant that the first respondent had formed a new entity, HCI Co, in response to judgements that were taken against the third respondent – a company with a similar name.

[23] A party is in contempt of court when it wilfully and in bad faith disobeyed an order of court that had been brought to its notice.<sup>5</sup> The applicant bears the onus to prove the facts to substantiate these requirements and once it has done so an evidentiary onus (an onus of rebuttal or 'weerleggingslas') is cast on the respondent. A declarator and other civil remedies are available on proof on a balance of probabilities<sup>6</sup> but the criminal standard of proof applies in respect of a finding of contempt. The case for contempt against the respondent must be proved beyond reasonable doubt. In the *Fakie* case, Cameron JA remarked:

*"[6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute*

<sup>4</sup> *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A), *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another t/a Makin's Furniture Manufacturers* 1977 (4) SA 135 (W) *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* 2011 JDR 1832 (GSJ), *Siyakhula Sonke Empowerment Corporation (Pty) Ltd v Redpath Mining (South Africa) (Pty) Ltd and Others* 2022 JDR 1148 (GJ) paras 7 and 8, *Allmed Healthcare Professionals (Pty) Ltd v Gauteng Department of Health* 2023 JDR 3410 (GJ), Van Loggerenberg Erasmus: *Superior Court Practice* 2023 vol 2 D1 Rule 6-1.

<sup>5</sup> *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 6 to 42.

<sup>6</sup> Para 42.



*or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.*" [footnotes omitted]

[24] Only a natural person may be committed to prison. A company can not be imprisoned and an order for committal must be brought against a named individual.

[25] *Dolus eventualis* is sufficient and *dolus directus* or *indirectus* need not be proved.<sup>7</sup> in evaluating the conduct and the subjective insight of a respondent in a contempt of court application it is in my view important to determine whether or not the respondent had access to legal advice.

[26] No party is expected to know all of the law but any party venturing into a specific field of law is required to familiarise itself with the legal principles applicable to the field. This applies also to attorneys.

[27] Court orders must be complied with even when they are wrong or believed to be wrong. A party cannot unilaterally decide that it disagrees with a court judgement and then ignore it. A party can be in contempt of an order that is wrong<sup>8</sup> or that is subjectively believes to be wrong.

[28] The respondents are in effect saying that they are entitled to ignore the 44393 order because they believe the order is wrong and because they believe they will be able to obtain special leave to appeal to the Supreme Court of Appeal in the matter under case number 2020/7843, and will then be able to obtain a judgement to the effect that suretyships are void. There will then be, so the argument goes and as in the thought experiment involving Schrödinger's cat, two judgements – one in the Supreme Court of Appeal in terms of which the suretyships will be void and one by the Full Bench in the 44393 application terms of which the suretyships are valid.

[29] The respondents submit that they will then be able to obtain a rescission of the 44393 order or alternative relief with the same effect. In support of these submissions the respondents rely on you *CTP LTD and Others v Argus Holdings Ltd and Another*

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<sup>7</sup> *HEG Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others* 2000 (1) SA 507 (C) 518H.

<sup>8</sup> See *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) paras 178 to 182 and 198.

and *CTP Ltd and Others v Independent Newspapers Holdings Ltd*.<sup>9</sup>

[30] It is doubtful whether the two cases are authority for the argument that the 44393 judgement should be rescinded on the basis of a subsequent finding in the Supreme Court of Appeal in a different matter between the same parties. These judgements involved restraint of trade agreements. The Appellate Division as it then was stated in the *Argus* case that a court can include in its order a provision that the defendant be granted leave to approach the court for an order amending or rescinding the interdict on good cause being shown that circumstances have materially changed. In the *Independent Newspapers* case it was held that a defendant or respondent can in proceedings to enforce an interdict again rely on facts and circumstances raised by him in the proceedings which culminated in the interdict being granted if such facts and circumstances were relevant or of significance because of other facts and circumstances which arose after the interdict was given.<sup>10</sup> In short, when a court grants an interdict on the basis of certain facts and the facts had changed by the time the interdict is enforced then the defendant or respondent will be entitled to place these new facts before the court.

[31] On 27 February 2024 the respondents issued an application to stay the execution of the 44394 order in terms of rule 45A<sup>11</sup> under case number 2024/021574. The rule provides that:

*“The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.”*

[32] The rule 454A application was brought in the ordinary course. The applicant served a notice of intention to oppose on 12 March 2024 and the answering affidavit will be due on 5 April 2024.

[33] The respondents also point out that any relief granted pending an envisaged liquidation application would imply that the applicant was preferring itself above other creditors and would amount to a voidable disposition or undue preference.

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<sup>9</sup> *CTP LTD and Others v Argus Holdings Ltd and Another* 1995 (4) SA 774 (A) and *CTP Ltd and Others v Independent Newspapers Holdings Ltd* 1999 (1) SA 452 (W)

<sup>10</sup> 465F-G.

<sup>11</sup> See *MEC, Department of Public Works and Others v Ikamva Architects and Others* 2022 (6) SA 275 (ECB).

[34] The possibility (if it existed at all) that the 44393 order will be rescinded at some future point in time in terms of the common law or rule 42 does not mean that the respondents are at liberty to wilfully ignore the order at present. Their intentional and unilateral disregard of the order is not supported by any authority. The applicant is therefore entitled to the relief sought. I am also of the view that the respondent's conduct by ignoring correspondence in March and then refusing to be bound by the court order merited a punitive cost order. The applicant was represented by two counsel, including a senior counsel, and the respondent by a senior junior. The cost of senior counsel is therefore justified.

Conclusion

[35] For the reasons as set out above I make the order in paragraph 1.

[36] The order was furnished to the parties on a court day and this being an urgent application the judgement will be emailed and published on Easter Friday but on the basis that the deemed date of publication will be 2 April 2024.

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**MOORCROFT AJ**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

***Electronically submitted***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **2 APRIL 2024**

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GREENBERG INC

DATE OF ARGUMENT:

27 MARCH 2024

DATE OF JUDGMENT:

29 MARCH 2024