



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 16075/19

Before: The Hon. Ms Acting Justice Mangcu-Lockwood
Hearing: 11 December 2019, 21-23 January 2020
Judgment: 9 March 2020

In the matter between:

TECHNICAL SYSTEMS (PTY) LTD + 1 Other

Applicant(s)

and

RTS INDUSTRIES + 4 Others

Respondent(s)

JUDGMENT

MANGCU-LOCKWOOD AJ,

Introduction

1. The applicants seek a rule *nisi* interdicting and restraining the respondents from manufacturing, producing, marketing for sale and/or selling flat wire and auger, pending the completion of a process stipulated in a Court Order granted on 2

June 2015 ('the Court Order'). They also seek an interim interdict to this effect to operate pending the return day. In addition, the applicants seek an order declaring the respondents to be in contempt of the Court Order and their committal to prison, alternatively payment of a fine.

Summary of facts

2. The first applicant is a manufacturer and supplier of auger and flat wire for the production of auger in the agricultural industry. The second applicant is the majority shareholder of the first applicant. The third respondent is the owner of the first respondent, manager of the second respondent, and director of the fifth respondent. The fourth respondent is a director of the second respondent, and the partner of the third respondent.
3. It is common cause that in 2014 the applicants brought proceedings (under WCHC case number 17470/14) against the first to fourth respondents based on misappropriation of confidential information relating to the first applicant's auger manufacturing process and machinery, and the unlawful use of that information for the purpose of unlawfully competing with the first applicant. The notice of motion in that matter was later amended to include a prayer for relief based on copyright infringement of the first applicant's technical drawings relating to its auger machinery and equipment. On 2 June 2015 the parties settled the matter and agreed to the terms of the Court Order.
4. In terms of paragraph 4 of the Court Order, the respondents *'recognise that the First Applicant has a confidential production process for the production of*

augers'. In terms of paragraph 5, '[f]or so long as the applicants (sic) process remains confidential, the respondents are interdicted and restrained from employing any facet of the applicant's confidential process in the manufacture of flat wire or auger'.

5. In terms of paragraph 7, for a period of three years from the date of the granting of the Court Order, the respondents were interdicted and restrained from manufacturing and producing flat wire, or auger, or auger coiling machinery and/or parts or components thereof or any business doing same; and marketing and/or selling and/or soliciting of flat wire or auger or auger coiling machines and/or parts or components thereof.
6. Paragraph 9 provides: *'For so long as the applicant's process remains confidential, the respondents are interdicted and restrained from employing any facet of the applicant's confidential process in the manufacture of flat wire or auger. In the event of the Respondents after the three year period referred to above, deciding to manufacture flat wire for the use in auger, the Respondents will adapt/alter their production process so as to avoid using First Applicant's confidential information as aforesaid from the expiry of the said period as follows: 9.1 First Respondent will include in/add to First Respondent's production line a descaling process by means of reverse bending the wire through at least 90° degrees; and 9.2 First Respondent will include in/add to its production line a die through which the wire is drawn to reduce the diameter and to improve diameter tolerances'.*
7. In terms of paragraph 10 of the Court Order, the respondents were interdicted and restrained from infringing the first applicant's *'copyright in its artistic works'*

comprising of some identified technical drawings *‘by making any reproductions or adaptations of the copyrighted works, whether in two dimensional or three-dimensional form’*. In terms of paragraph 12, the respondents were further interdicted and restrained from utilising or directly or indirectly making use of the copyrighted works, or any copies, adaptations or reproductions thereof.

8. It is worth setting out paragraphs 23 and 24 in full. Paragraph 23 provides as follows: *‘Upon the expiry of the period referred to in paragraph 7 above and in the event that the Respondent or any of them, directly or indirectly, manufacture flat wire or auger or equipment for the manufacture of flat wire or auger, such manufacture shall not infringe on the confidential information or copyright of the applicants’*.

9. Paragraph 24 provides as follows:

‘The determination of the Respondents’ compliance with paragraph 23 shall be as follows:

- 24.1 *Suitably qualified experts, one appointed by the Applicants and one appointed by the Respondents, are to be granted access to the proposed production facility in order to inspect the proposed production facility and to compile a joint report in respect of the extent to which such production facility complies with paragraph 23 above;*
- 24.2 *The said experts are to state in the report the aspects on which they agree and the aspects on which they disagree;*
- 24.3 *The said report is to be handed to the Applicants and Respondents within 5 (five) court days of it being compiled and the Applicants and Respondents are to submit their written comments and/or disagreements on the said report within 5 (five) court days of so receiving the report, to such experts.*

24.4 *The said experts are to file a final report within 5 (five) court days of the expiration of the said 5(five) day period referred to in subparagraph 24.3 hereinabove;*

24.5 *In the event that the Applicants and/or the Respondents do not agree with the final report of the experts they shall be entitled to bring a motivated application to Court within 5 (five) court days to have the said final report varied and/or corrected. The Court so hearing the application will be entitled to determine what procedures are necessary to determine the application. In the event that such application is not launched within the 5 (five) court days referred to above, the report shall for all intents and purposes be regarded as final.'*

10. In terms of paragraph 25 of the Court Order, notwithstanding the three-year restraint in paragraph 7.3, *'the Respondents shall be entitled to construct an auger production facility, which is, as a whole or in any of its constituent parts, not be sold, leased or otherwise made available to any third party, solely for the purposes of commissioning same in terms of what follows below. The Respondents undertake not to commission the proposed auger production facility until such time as the Applicants and Respondents are in agreement as set out in sub paragraphs 24.1 - 24.4 above or a Court has made such determination in terms of subparagraph 24.5 above'.*

11. The three-year period referred to in paragraph 7 of the Court Order ended on 1 June 2018. It is common cause that, by that date, the respondents had indicated an intention to commence with the manufacture and production of flat wire and auger. Correspondence ensued between the parties from 15 May 2018 until these proceedings were launched, covering a range of issues, the relevant highlights of which are summarised in the paragraph below.

12. The respondents disputed the suitability of the expert appointed by the applicants, Mr Nicolaas Theodorus Broekhuizen ('Broekhuizen') on the basis that he designed the first applicant's initial production facility, of which 95% remains in use. Until December 2018, the parties were *ad idem* that the respondents could not commission their production facility until an inspection had been undertaken in terms of paragraph 24 of the Court Order, and were making arrangements for an inspection to be held. As from 13 December 2018, the respondents expressed a view, after taking advice from counsel, that the Court Order was incapable of implementation for a range of interpretative reasons, most of which are the basis for the respondents' opposition to applicants' application and of the respondents' counter-application. From 12 April 2019, the respondents stated that the concession made in the Court Order, that the applicants' process was confidential, was wrongly made. There were disagreements in the correspondence about the exact process to be followed in complying with paragraph 24 of the Court Order. On 11 June 2019, after the applicants had delayed in responding to the respondents' correspondence, the respondents gave notice that they intended commissioning their production line and to commence with production without further notice. On 30 July 2019 the respondents confirmed that they had commissioned their plant and were proceeding to manufacture their product for sale. In response to both the letters of 11 June 2019 and 30 July 2019, the applicants demanded an undertaking that the respondents would refrain from commissioning their production facility and manufacturing or selling flat wire or auger. No such undertaking was forthcoming until the launch of these proceedings.

13. Nevertheless, the parties agreed that an inspection as contemplated in paragraph 24 of the Court Order would commence on 20 August 2019, led by Broekhuizen and the respondents' appointed expert Mr Hellmut Bowles ('Bowles'). Inspections were indeed held on 20, 22, 23, and 29 August 2019. However, after Broekhuizen requested more drawings from the respondents, the latter saw this as a delaying tactic, refused to cooperate any further by granting any more access to Broekhuizen or supplying any further drawings, and insisted that rather a report should be furnished by Broekhuizen. According to the applicants and Broekhuizen, the drawings requested by Broekhuizen contained notes made at the inspections already held, could only be accessed at the respondents' premises, and were requested for purposes of enabling Broekhuizen to draft a preliminary report. At the time that these proceedings were launched, these drawings had not been furnished, but were, however furnished as an attachment to the respondents' answering affidavit.

The court proceedings

14. It came to the attention of the applicants that on 22 August 2019, the fifth respondent issued an invoice for, and subsequently sold auger to an Egyptian company called Techno Max, which is an existing client of the first applicant. The shipment was to depart on 30 September 2019. The copy of the invoice, which is attached as an annexure to the applicants' founding affidavit, bears the signature of the third respondent, and states that the auger was produced and manufactured in South Africa. On the basis of this information the applicants state that the inescapable conclusion is that the auger must have been

manufactured for sale by, or on behalf of the respondents. In addition to this, the applicants discovered that the respondents purchased substantial enough steel rod for the manufacturing of flat wire for the production of auger to fulfil the order contained in the Techno Max invoice. The respondents admit to issuing a quote to Techno Max, but deny issuing a stamped and countersigned invoice, or that a sale was made, and claim that the invoice attached to the applicants' founding affidavit is a *'fake generated solely for the purpose of this litigation'*. On the basis of the alleged Techno Max invoice and sale, the applicants launched these proceedings, claiming that the conduct of the respondents amounts to contempt of the 2015 Court Order in that the process in terms of paragraph 24 thereof has not been concluded. The notice of motion and founding affidavit were served upon the respondents' attorneys on 10 September 2019, and the respondents were informed therein that the matter was set down for 19 September 2019.

15. After launching the proceedings above, and before the hearing on 19 September 2019, the applicants delivered a supplementary affidavit dated 17 September 2019 setting out events which transpired on that day. In summary, the director of the first and second applicants and Broekhuizen attended at the premises of the respondents and, from across the premises they witnessed the respondents loading pallets of auger into a shipping container which was a truck. They followed the truck and stopped the driver who confirmed that he was transporting auger. He also showed them the shipping documents which revealed that the second respondent was the exporter of the shipment to Bangkok ('the Bangkok shipment'). As a result of this incident, the applicants sought an interim order interdicting and restraining the respondents from

delivering the container and/or its contents to the Cape Town Port or any other port in South Africa, or from removing the container and or its contents from South Africa ('the supplementary interdict application'). The respondents delivered an answering affidavit in response to the supplementary interdict application. It was admitted that there had been a contract of sale between the purchaser, who had prepaid the cargo, and the fifth respondent; that the goods had been delivered to the carrier; and that, at the time of deposing to the affidavit, the container containing the cargo was sitting in the loading stack and was due to be loaded onto a shipping vessel on the following day. The applicants delivered a replying affidavit attaching proof that the vessel onto which the container was to be loaded had not yet arrived in Cape Town, and therefore the container had not been loaded aboard it. Furthermore, the applicants discovered that the container was delivered to the stacking area by the respondents while the court proceedings were taking place on 17 September 2019, and not before, as suggested in the respondents' answering affidavit. The matter was heard on 17 and 18 September 2019, and on 18 September 2019, Myburgh AJ granted the supplementary interdict. The interim interdict was to operate pending the hearing of this matter. On 25 September 2019, Sievers AJ struck the matter from the roll for lack of urgency. By directive of the Judge President the matter was allocated a hearing date before me.

16. In a further answering affidavit styled 'preliminary answering affidavit' and deposed on 19 September 2019, more detail was provided regarding the Bangkok shipment by the respondents. The fifth respondent pleaded that the respondents stood to suffer enormous commercial and financial harm if they were prevented from shipping the container. It was stated that the respondent

stood to suffer not only immediate financial loss because of its breach of contractual arrangements with its customer worth approximately R450,000.00, but also immeasurable loss in relation to business relationship with its customer in Thailand and potentially the entire Thai market. At the hearing of this matter in December 2019 I was informed from the bar by the respondents' counsel that the Bangkok shipment had left the Republic.

Interlocutory applications

The striking-out application

17. The respondents brought an application to strike out certain portions of the applicants' affidavit, some on the basis that they would prejudice the respondents if allowed, and others on the basis that they were scandalous, vexatious and irrelevant. The order made was that the Court would make an order at a later stage in light of all the evidence presented by the parties. The portions objected to relate to the background leading up to the agreement of the terms of the Court Order. According to the applicants, during the course of pre-trial preparation in case 17470/14, the respondents were caught red-handed in having misappropriated the first applicant's confidential information and technical drawings, and in the blatant infringement of the first respondent's copyright in its technical drawings. Documentation recovered from third parties under subpoenas *duces tecum* revealed that the respondents had concealed highly prejudicial evidence during the discovery process in the matter, and the third respondent had also perjured himself in what he stated in his discovery affidavit in relation thereto. This documentation also revealed the involvement of the fifth respondent in the respondents' unlawful activities. It was as a result of

these revelations that the parties agreed to the terms of the Court Order. In light of the approach I have taken in the matter, I do not consider the applicants' averments in this regard necessary or relevant to the case. The striking out application is accordingly granted, with no order as to costs.

Further affidavits

18. Two weeks before the hearing of this matter, the applicants delivered an application for leave to file a further affidavit for the purpose of placing correspondence exchanged between the parties for the period May 2018 to 16 September 2019. Two days before the hearing of the matter, the respondents delivered a practice note to the effect that if the further affidavit was to be received by the Court, they should be granted an opportunity to respond through the filing of a further affidavit or affidavits. For expediency's sake, I refused to allow the filing of the applicants' further affidavit.
19. At the continuation of the proceedings on 21 January 2020, the respondents applied for leave to file a further affidavit which attached the same correspondence that the applicants had sought to attach in their further affidavit, plus two additional letters. The respondents' affidavit also made certain allegations regarding the correspondence. The applicants opposed the admission of this further affidavit, alternatively requested an opportunity to respond thereto, and further alternatively suggested that only the correspondence be admitted without admitting the contents of affidavit. The application to admit the affidavit was dismissed. However, the correspondence was admitted.

The Competition Act challenge

20. Two weeks after the hearing of this matter, the respondents delivered a further note challenging the jurisdiction of this Court to grant the order sought by the applicants on the basis of the Competition Act 89 of 1998. It is contended that this Court has no jurisdiction to grant the order sought by the applicants, and that only the Competition Tribunal has such jurisdiction by virtue of the fact that one of the issues arising in this matter constitutes a prohibited act within the meaning of section 65(2) of the Competition Act. The respondents rely on a complaint that is currently pending before the Competition Tribunal to the effect that the parties' agreement underlying the Court Order is unlawful because it constitutes a prohibited act within the meaning of section 4(1)(b)(ii) of the Competition Act. Furthermore, the respondents rely on the decision of *Seagram Africa (Pty) Ltd v Stellenbosch Farmer's Winery Group Ltd and Others*¹ where the court held that ordinary civil courts do not have the power to grant interlocutory introductory relief in competition matters.
21. It is worth pointing out that this issue was not ventilated in Court or in the papers. And although the pleadings of the Competition Tribunal complaint are

¹ *Seagram Africa (Pty) Ltd v Stellenbosch Farmer's Winery Group Ltd and Others* 2001 (2) SA 1129 (C).

attached to the respondents' answering affidavit, they are not specifically dealt with in the answering affidavit. They are merely '*incorporated by reference*'. It is trite that this is impermissible.

22. In any event, the Competition Tribunal does not have the power or jurisdiction to enquire into the validity of the Court Order. In *Bezuidenhout v Patensie Sitrus Beherend Bpk*², Froneman J (as he then was) held that '*the Competition Tribunal does not have the competence under the Competition Act to issue orders in conflict with pre-existing orders of the High Court which have not been set aside, nor does the tribunal have the competence under the Act to set aside such orders*³. Dealing with similar arguments as those made by the respondents in this matter, the court emphasised that '*[a]n order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong*'.
23. Furthermore, in *Moraitis Investments (Pty) Ltd and others v Montic Dairy Pty Ltd*⁴, the Supreme Court of Appeal ('SCA') left no room for avoiding a court order by challenging the settlement agreement it embodies, and stated as follows: '*its defect lies in approaching the question from the direction of the agreement instead of from the direction of the judgment. The latter is the correct approach, because the judgment operates as res judicata and precludes a claim based on the agreement. Unless and until the judgement has been set aside, there can be no question of attacking the compromise agreement*'.

² *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E).

³ At 231. See also at 229J-230B.

⁴ *Moraitis Investments (Pty) Ltd and others v Montic Dairy Pty Ltd* 2017 (5) SA 508 (SCA) at [16].

24. The fact is that there is an existing order granted by this Court, and this Court retains the right to control its processes and especially to have oversight regarding compliance with its orders.
25. Furthermore, upon a consideration of section 65(2)(b) of the Competition Act, I am not satisfied that its requirements are met. Section 65(2)(b) provides as follows:

'If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and –

...

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that –

- (i) the issue has not been raised in a frivolous or vexatious manner; and*
- (ii) the resolution of that issue is required to determine the final outcome of the action.'*

26. I am not satisfied that a finding by the Competition Tribunal is required in order to determine the final outcome of this matter. As stated in *Bezuidenhout*, the Competition Tribunal does not have the competence to set aside the terms of the Court Order. I also point out that the late stage and manner in which the respondents have raised this issue, which should properly have been raised as a point *in limine*, illustrates the frivolous nature of application.,
27. Lastly the case of *Seagram Africa (Pty) Ltd v Stellenbosch Farmer's Winery Group Ltd and Others*, on which the respondents rely, is distinguishable from the facts of this case. Firstly, that case concerned an interdict pending a

decision in terms of the Competition Act, whereas this case concerns and interdict pending the completion of a process ordered by this Court. Secondly, the *ratio* in *Seagram Africa* concerned section 65 (3) Competition Act, which has since been repealed.

28. For all the above reasons, the respondents' challenge based on the Competition Act is dismissed with costs.

The Interim interdict

29. The test for the grant of an interim interdict is trite. The applicant must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other available remedy. If a clear right is established, there is no need to establish element of the apprehension of irreparable harm.⁵
30. The first question is whether the applicants have established a *prima facie* right although open to some doubt. In this regard, reference must be made to the Court Order, and specifically paragraphs 4, 7, 23, 24 and 25 thereof. The Court Order was taken by agreement between the parties. It expressly interdicts and restrains the respondents from commencing with manufacturing, producing, marketing for sale and/or selling flat wire and auger, until such time as there has been compliance with the procedure set out in paragraph 24. It is common

⁵ Erasmus, *Superior Court Practice* at D6-20.

cause that the process in terms of paragraph 24 of the Court Order has not been concluded. It is also common cause that the respondents concluded the sale resulting in the Bangkok shipment, and according to the respondents the contract price was worth approximately R450 000,00. Although the initial set of heads of argument on behalf of the respondents state that the respondents were seeking to set aside the order of Myburgh AJ, I was informed from the bar that this is no longer the case.

31. As regards the Techno Max invoice, the respondents deny issuing it, stating that they only issued a quote which was not accepted by the customer. The first problem with this version is that the issuing of a quote was itself a breach of the Court Order since, in terms thereof, the respondents are interdicted from marketing, selling, soliciting or being involved in any of those activities in any capacity. In my view, issuing a quote falls within this list of prohibited activities, and amounts to making an offer to sell. The additional problem is that the respondents did not provide any evidence to support their denial of the evidence set forth by the applicants, which includes, not only a copy of the invoice but also proof that the respondents had purchased substantial enough steel rod for the manufacturing of flat wire for the production of auger to fulfil the order contained in the invoice. The applicable test in this regard is that which is set out in *Webster v Mitchell*⁶, as qualified by *Gool v Minister of Justice and Another*⁷, in terms of which the applicants must show that on their version, together with the allegations of the respondents that they cannot dispute, they should obtain relief at the trial. If, having regard to the respondents' contrary

⁶ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 11189.

⁷ *Gool v Minister of Justice and Another*, 1955 (2) SA 682 (C) at 688E.

version and the inherent probabilities serious doubt is then cast on the applicants' case, the applicants cannot succeed. On application of this test, the respondents' denial is unsatisfactory and amounts to a bare denial which is rejected.

32. I have already referred to the correspondence in which the respondents notified the applicants that they were commissioning their production line, commencing with production, and manufacturing product for sale. I was informed from the bar that the respondents did manufacture at some point, but that this is no longer the case. This version is contrary to the attitude taken in the respondents' answering affidavit which is expressed as follows: *'If an interdict is granted in the terms sought the respondents will suffer serious financial harm running to tens of millions of rand as a result of lost sales opportunities. The respondents employ approximately 12 people in their manufacturing facility. If the facility is not permitted to operate or if the respondents are forced to suspend their trading activities all of these people stand to lose their jobs-with obvious dire consequences for them and their families. The sales of product by the respondents also generate foreign revenue given that all of the products are exported. The shutting down of the respondents' operations would accordingly be injurious to the economy of the Republic'*. There are also complaints in the answering affidavit that, if the order is granted, its effect will be to stifle competition. Even further, the respondents complain in the papers that there is no concurrent tender by the applicants for damages if the order of restraint were to be granted. This attitude continued in the heads of argument. I am therefore persuaded that the respondents have not only breached the terms of the Court

Order, but continue to do so, and in fact harbour an intention to continue to do so.

33. The respondents justify their attitude towards the Court Order on many grounds, which are dealt with below under the following headings: (a) meaning of the Court Order as regards confidentiality and copyright; (b) status of the Order; and (c) equity considerations.

Meaning of the Court Order

34. The respondents' counsel argued firstly, that the Court Order does not identify the information which is confidential, and is therefore void. To this argument the applicants have correctly pointed out that there is no requirement that the Court Order should do so. In any event, the evidence is that, the Court Order was agreed by the parties at an advanced stage of proceedings, after exchange of pleadings by the parties. It is common cause that the application in case number 17470/14 was based on the misappropriation of the applicants' confidential information by the respondents. Thereafter, the parties agreed to the terms of the Court Order in which the respondents 'recognised' that the first applicant had a confidential production process. It is highly unlikely that the respondents were not aware of what the confidential information that they were found to have misappropriated, and which they recognised in the Court Order, entailed. In any event, if there was any doubt as to the meaning of the Court Order, the respondents should have approached the Court for interpretation, and should not have taken the law into their own hands. The same

considerations as those discussed in this paragraph apply to the complaint that the applicants have failed to place evidence before the Court regarding what information is confidential. Notably, there is no application to amend, set aside or be excused from the application of paragraph 4 of the Court Order in which the respondents acknowledged the applicants' confidential production process.

35. The respondents also contend that paragraphs 23 and 24 of the Order must be read in light of paragraphs 5 and 9. The latter paragraphs interdicted the respondents from employing any facet of the applicants' confidential process in their manufacture of flat wire or auger '*for so long as the applicants' process remains confidential*'. If the applicants' process is no longer confidential, so the argument goes, paragraphs 23 and 24 do not find application. In this regard, the respondents rely, firstly, on an expert report by Professor R.J Mostert ('Mostert') dated 30 June 2015, who, after watching a video depicting the applicants' manufacturing process, opined that the information pertaining to that process is public knowledge and property, and cannot be regarded as confidential. The respondents' counsel could not give an exact date regarding when the respondents considered the information to no longer be confidential. However, it is contended that by 30 June 2015, the date on which the expert wrote his opinion, the information was no longer confidential. This was within less than a month after the Court Order was agreed. Mostert's opinion also does not state when he saw the video on which his opinion is based – whether this was before or after the Court Order was agreed by the parties. Given these views, it is strange that, at least from 30 June 2015 onwards, the respondents did not attempt to amend the Court Order if they were of the view that it was defective

as they now contend. It is also relevant in this regard that the respondents' answering affidavit avers that the acknowledgement of confidentiality regarding the first applicant's process in paragraph 4 was a concession wrongly made. During the Court proceedings the respondents' counsel disavowed any reliance on this averment. Nevertheless, the swift answer to these averments is that, upon realising these alleged defects, the respondents should have approached this Court for an amendment of the Court Order, and specifically paragraph 4 thereof, before commencing with their operations, thereby transgressing the terms of the Court Order.

36. It is also contended by the respondents that, in any event, their production process did not offend the confidentiality requirements of the Court Order because they employed the two production processes mentioned in paragraphs 9.1 and 9.2 namely a descaling process by means of reverse bending the wire through at least 90° degrees, and a die through which the wire is drawn to reduce the diameter and to improve diameter tolerances (*'the two production processes'*). The argument is that, if the respondents' process incorporates the two production processes, the process no longer contains confidential information, and the purpose of the inspection contemplated in paragraph 24 was to confirm whether or not the two production processes have been complied with. The purpose of the process in terms of paragraph 24 is expressly stated as *'the determination of the respondents' compliance with paragraph 23'*, which includes a determination of whether or not the respondents' processes infringe the applicants' confidential information. Neither paragraph 23 nor 24 limits the determination of an infringement of confidentiality by reference to the instances described in paragraph 9.1 and 9.2. In any event, paragraph 9 itself is

drafted in wide terms. According to that paragraph, the respondents are interdicted and restrained from ‘employing any facet of the applicant’s confidential process’; and they are to adapt/alter their production process ‘so as to avoid using the First Applicant’s confidential process’. This language is echoed in paragraph 5 of the Court Order. The two production processes listed in paragraph 9.1 and 9.2 are, in my view, the minimum that the respondents are required to do in order to avoid infringing the applicants’ confidentiality. If the intention was that the process in paragraph 24 should only confirm compliance with paragraphs 9.1 and 9.2, this would have surely been stated in paragraph 23 and or 24. It would be anomalous for the process contemplated in paragraph 24 to permit the respondents to breach the applicants’ confidentiality in other ways but which are not identified in paragraphs 9.1 and 9.2. In any event, it is common cause that the process set out in paragraph 24 has not been concluded. Even if the respondents held the views espoused in this paragraph, that did not entitle them to transgress the terms of the Court Order by resuming manufacture, production, marketing and selling before the conclusion of the process set out in paragraph 24.

37. Elementary as it may sound, it is worth summarising the legal position applicable to the attitude adopted by the respondents in this matter, and which is the answer to most of their interpretative arguments. A court order is binding, irrespective of whether or not it is valid, until set aside.⁸ A party is not entitled to ignore a court order enforcing a contract that is subsequently found to be

⁸ *Department of Transport & Others v Tasima (Pty) Ltd* 2017 (2) SA 622 at paras [177] and [180].

unlawful.⁹ A court order must be obeyed even if it is wrong. Parties are not allowed to take the law into their own hands.¹⁰

38. Regarding copyright, the respondents' counsel referred to paragraph 10 of the Court Order, which states as follows: *'The Respondents are interdicted and restrained from infringing the First Applicant's copyright in its artistic works comprising of its technical drawings as described [in] the definition of the Works in annexure "SA15" to Applicants' Founding Affidavit in the Application for Amendment and as discovered under the heading Part 1 B: Confidential Discovery Document Items 1 to 1179 ("the copyrighted works") by making any reproductions or adaptations of the copyrighted works, whether in two dimensional or three dimensional form.'* (own emphasis) The main argument in Court relied on section 15(3A) of the Copyright Act 98 of 1978 which provides as follows: *'[t]he copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as authorised reproductions), shall not be infringed if any person without the consent of the owner makes or makes available to the public three-dimensional reproductions or adaptations of the authorised reproductions, provided the authorised reproductions primarily have a utilitarian purpose and are made by an industrial process'*. This provision, according to the respondents means copyright of designs cannot be infringed by making machine parts, as they have done. The law of copyright accordingly finds no application to the facts of this

⁹ *Department of Transport & Others v Tasima op cit* at para [177].

¹⁰ *Clipsal Australia (Pty) Ltd and others v Gap Distributor and Others* 2010 (2) SA 289 (SCA) para [21].

case. As a result, paragraph 24 of the Court Order is defective because it contemplates conduct which is not unlawful. The respondents rely on the case of *Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd and Another*¹¹ for this argument.

39. Firstly, it must be pointed out that the respondents' reliance on section 15A of the Copyright Act is not foreshadowed in the papers. Secondly, as appears from its wording, in order for section 15(3A) to apply, three-dimensional reproductions of the artistic work must have been made available to the public. There is no evidence that the machinery in this matter was made available to the public. Thirdly, the Copyright Act was subsequently amended for the specific purpose of rectifying the interpretation given in *Bress Designs*. This was confirmed in the later decision of *Dexion Europe Ltd v Universal Storage Systems (Pty) Ltd*¹². In *Dexion*, the Supreme Court of Appeal stated as follows: *'The effect of this, in general terms, is that copyright in a technical drawing is not infringed by a three-dimensional version of the drawing, which has no causal connection with the drawing. It is also not infringed if the version is reproduced from an authorised reproduction (reverse engineering). Even if the owner of the copyright made three-dimensional 6 versions (as defined in the proviso) available to the public, third parties are not entitled to make three-dimensional copies by reference to the drawings. In other words, the drawings may not be used, directly or indirectly, to produce copyright-free three-dimensional 'reproductions'. An example of such indirect copying would be the instance*

¹¹ *Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd and Another* 1991 (2) SA 455 (W).

¹² *Dexion Europe Ltd. v Universal Storage Systems (Pty) Ltd* 2003 (1) SA 31 (SCA) at para 5.

where the third party uses tools that were made from the drawings to make its version. The same would apply if the third party were to produce its own set of tools by copying tools produced from the copyright owner's drawings. In this event the tools can be likened to negatives of photographs: making a photo from a negative infringes the copyright in the photo'. (own emphasis). Thus, the general proposition that making a machine based on the drawing is not a breach of copyright in South African law is not correct, according to *Dexion*.

40. Another argument from the respondents regarding copyright is that, in order to determine whether there has been copyright infringement, one needs to conduct a forensic enquiry by comparing different drawings. The process provided for in paragraph 24 of the Court Order is not the appropriate way to make this determination as it does not provide for the comparison of drawings. And the experts are, in any event, not qualified to make a determination regarding copyright. In this regard, it is argued that paragraph 24 is therefore defective. The obvious answer to this argument is that the respondents should have approached the Court to amend or set aside paragraph 24 before transgressing the terms of the Order, and they did not do so.

Status and enforceability of the Order

41. Because the Court Order was taken by agreement between the parties, the respondents contend that it does not have the force of a judicial outcome, but is contractual in nature. In this regard the main complaint is that the applicants have themselves failed to perform in terms of the Court Order by, amongst other

things, producing a report from their independent expert. In those circumstances, it was argued that it would be grossly inequitable to grant an interdict because there is no incentive for the applicants to produce the report.

42. The argument that a settlement agreement does not have the force or status or enforceability or appealability of a judgment is contrary to the Constitutional Court decision in *Eke v Parsons*¹³, where it was held that *'the original underlying dispute is settled and becomes res judicata. Second, what litigation that may be after the settlement order will relate to non-compliance of this order, and not the original underlying dispute'*. In *Moraitis Investments (Pty) Ltd and others v Montic Dairy Pty Ltd*¹⁴, the Supreme Court of Appeal held that such an order has exactly the same standing and qualities as any other court order.
43. Regarding the demand for the applicants' expert to produce a report, there is no such requirement in the Court Order. What is required in terms of paragraph 24 is that the experts should produce a joint report, and state the extent to which they agree or disagree.

Equity considerations

44. It was argued that the Court should exercise its discretion and refuse to enforce the Court Order on the basis that the applicants are perpetuating fraud or abusing the court process. Regarding fraud, the respondents rely on the Techno Max invoice, which they aver is *'a fake document generated for the purpose of initiating these proceedings'*. I have already dealt with the unsatisfactory manner

¹³ *Eke v Parsons* 2016 (3) SA 37 (CC) at [29] and [36].

¹⁴ *Moraitis Investments (Pty) Ltd and others v Montic Dairy Pty Ltd* 2017 (5) SA 508 (SCA) at [10] and [16].

in which the allegation of a fake document is dealt with by the respondents. A party wishing to rely on fraud must not only plead it, but must also prove it clearly and distinctly. The onus is the ordinary civil onus, bearing in mind that fraud is not easily inferred. The essential elements for a claim or defence based on fraud are the following: (a) there must be a representation by the other party or by that party's agent. (b) It must be alleged that fraud or misrepresentation was false and or intentional or negligent.¹⁵ (c) It must be alleged and proved that the representation induced the representative or innocent party to act.¹⁶ In this matter, the respondents, not only failed to properly plead fraud, but also failed to prove it clearly and distinctly.

45. The respondents claim that the applicants are frustrating the finalisation of the inspection process. In support of this argument, the respondents rely on the correspondence summarised earlier, and the fact that Broekhuizen has not delivered a report which is an indication of the applicants' delaying tactics. I have already dealt with the demand for Broekhuizen to issue a report. The argument lacks merit, as there is no such requirement in the Court Order. What is more is that Broekhuizen deposed to an affidavit setting out the reasons for requesting the technical drawings. Those reasons are not challenged. In fact, the respondents appear to agree that the drawings were required, and attached them to their answering papers. The respondents persist with their complaint regarding the suitability of Broekhuizen as an expert, because of his previous involvement with the applicants' business, and lately, because of an averment in his affidavit that he is in the *'process of setting up the correct templates and*

¹⁵ *Rato Flour Mills (Pty) Ltd v Moriates* 1957 (3) ALL SA 28 (T).

¹⁶ *Bill Harvey's Investment Trust (Pty) Ltd v Oranjezicht Citrus Estate (Pty) Ltd* (A) 1958 (1) SA 479 (A).

designing the report in consultation with the applicants' attorney'. It was argued that the experts contemplated in paragraph 24 have the status of an adjudicative authority. This argument is not supported by the terms of the Court Order. The experts are appointed to conduct an inspection and compile a report, whereafter the applicants and respondents are to agree, disagree or refer the experts' final report court for variation or correction. Regarding the chronology of events, I am not persuaded that the correspondence shows an abuse of process by the applicants. Rather, what is clear from the correspondence is that the parties were initially *ad idem* regarding compliance with the Court Order, and specifically that, before the respondents could resume operations, paragraph 24 had to be complied with. It was from 13 December 2018 that the respondents expressed the view that the Court Order was incapable of implementation. Thereafter, the parties continued to disagree. In my view, the respondents should not have resumed operations without first resolving the interpretive issues, including by approaching this Court. The fact that they resumed operations, apparently out of exasperation by the applicants' alleged frustration of the process, is an indication that they took the law into their own hands.

46. It was also argued on behalf of the respondents that the circumstances of this case are such that competition should not be punished and a restraint of trade should, in any event, apply. The argument is based on the fact that the main respondent left the employment of the main applicant some 10 years ago, and should not be punished from being a competitor in the market. The answer to this argument is that the Court Order stands until set aside. The respondents in

those circumstances should have approached the court for an amendment before breaching the terms of the Court Order.

47. In my view, the applicants have established a *prima facie* right, if not a clear right, emanating from the terms of the Court Order, the existence of which is not in dispute. In light of the fact that the applicants have established a clear right, there is no need to establish element of the apprehension of irreparable harm.¹⁷ In any event, the transgression of the applicants' rights afforded by the Court Order constitutes irreparable harm. Regarding the balance of convenience, the respondents state that if the interim relief is granted, they will suffer clear, identifiable and measurable losses. It is also argued that the applicants should have tendered damages as indemnity for the respondents' losses. In addition, it is averred that the respondents employ approximately 12 people in their manufacturing facility. If the facility is not permitted to operate or if the respondents are forced to suspend their trading activities all of these people stand to lose their jobs with obvious dire consequences. Furthermore, the respondents argue that granting the order would entrench the first applicants' monopoly in the market. In my view, these arguments illustrate the problem. The respondents' attitude is that they are entitled to continue manufacturing and operating without regard to the terms of the Court Order. The prejudice to the applicants, if the interim interdict is refused now but they succeed in due course, outweighs any prejudice to the respondents if an interim interdict is granted but the application ultimately fails. The balance of convenience clearly favours the granting of the interim interdict since the alternative is continued unlawful

¹⁷ Erasmus, *Superior Court Practice* at D6-20.

activity by the respondents. There is no other legal remedy available to the applicants to prevent the respondents' illegal conduct and to protect their rights in terms of the Court Order.

Respondents' counter-application

48. The respondents have brought a counter-application which is conditional upon the Court entertaining the applicants' application. The counter-application relies on the answering papers already filed in the matter, and seeks the setting aside of paragraphs 24 and 25 of the Court Order. The issues discussed above apply with regards to the counter-application, the main one of which is that a party in default of a court order must first purge the default before bringing proceedings in court.¹⁸ There is otherwise no case made out in the papers for the counter-application. Another consideration regarding the counter-application is its timing. Some of arguments raised by the respondents should, on their version, have been raised, either at the time of agreeing to the Court Order, or very soon thereafter. In this regard, the challenges relating to confidentiality are relevant. There is no explanation for why the application was not brought at that time. Then, the challenges relating to copyright were raised in correspondence from December 2018. If the respondents genuinely believed in this argument it is strange that they waited until the applicants approached this Court on an urgent basis before the counter-application was brought. It is not only strange, but is unfair and prejudicial towards the applicants, and evinces a lack of *bona fides* on the part of the respondents.

¹⁸ *Readam v BSB International* 2017 (5) SA 183.

Contempt of the Court Order

49. The legal consequence that flows from non-compliance with a court order is contempt.¹⁹ The requirements for contempt of a court order are that there must be an existing order; of which the offending party has knowledge; there must be non-compliance with the order; and wilfulness or *mala fides*. Once the first three of these elements are established beyond a reasonable doubt, the evidential onus shifts to the respondent to show that the non-compliance was not wilful or *mala fide*.²⁰
50. It is trite that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution.²¹ In *Fakie NO v CCII Systems*²² the Supreme Court of Appeal describes the application for committal for contempt by a private party as a '*peculiar amalgam*' because '*it is a civil proceeding that invokes a criminal sanction or its threat*.'²³ The SCA continued²⁴ that Court stated in paragraph '*this 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..., unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide the*

¹⁹ *Department of Transport & Others v Tasima* para [186].

²⁰ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42.

²¹ *JSO v HWO (24384/2009)* (2014) ZAGPPHC 133 (19 February 2014).

²² (Pty) Ltd 2006 (4) SA 326 (SCA). See also *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10

²³ At para [8].

²⁴ At para [41].

requisites of contempt would have been established The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt.' Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt. A deliberate (wilful) disregard is not enough, '*since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in a way claimed to constitute contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*'²⁵

51. 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.²⁶ Importantly, the case law is clear that *contempt of court is not an issue inter parties; it is an issue between the court and the party who has not complied with a mandatory order of court.*²⁷

²⁵ *Supra* at paragraph [9].

²⁶ At paragraph [37].

²⁷ *Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) at 6730-E.

52. There is no doubt that the first three elements are met in this case. It is common cause that the Court Order continues to exist; that the respondents were at all times aware of it; and that its terms have been breached on more than one occasion, as discussed above. This means the evidentiary burden shifts to the respondents to create reasonable doubt as to the existence of wilfulness and *mala fides*. In my view, the respondents have failed to discharge the evidentiary burden. To the contrary, the facts surrounding the Bangkok shipment show, not only wilfulness to breach the Court Order, but also *mala fides* on the part of the respondents. The evidence shows that the respondents sought to mislead the court by concealing the factual circumstances surrounding the transporting and loading of the shipment. The respondents were found to have been acting unlawfully with full knowledge of, and while the court proceedings were taking place on 17 September 2019. Likewise, the issuing of the Techno Max invoice has the same effect. I have already rejected the respondents' version that they merely issued a quote. However, even this version shows *mala fides* on their part.
53. There is at least a *prima facie* case for contempt in the form of wrongful interference with the applicants' rights in terms of the Court Order. In considering the alternative means through which the Court can ensure compliance with the Court Order, I have reached the view that, in addition to an interdict, a fine would have the desired result to coerce the respondents to comply. The sum of R450 000, being the amount which the respondents aver was the contractual price in relation to the Bangkok shipment, is the minimum amount I consider appropriate in this regard. I am satisfied that the balance of convenience favours the applicants and that a failure to grant the interdict would

result in irreparable harm being done to the applicants to which there is no alternate remedy.

54. The applicants have made out a case for an interim interdict pending the completion of the process envisaged by paragraphs 23 to 25 of the 2015 Court Order. The respondents have delivered answering papers. I was informed from the bar by the respondents' counsel that, even though the respondents' last answering affidavit is entitled 'preliminary affidavit', they have no desire to deliver further answering papers, and that the issues have been adequately ventilated in the existing papers before the court. It is therefore not necessary to issue a *rule nisi* in the circumstances of this case.

55. I see no reason why the costs should not follow the result. The respondents have brazenly acted against the terms of the Court Order and taken the law into their own hands.

Order

56. In the result, the following order is made:

1) An interim interdict is granted in the following:

1.1 Pending the finalisation of the process provided for in paragraphs 23 to 25 of the order granted by this Court under case number 17470/14 on 2 June 2015 (the Court Order), the respondents are interdicted and restrained from-

1.1.1 manufacturing and/or producing flat wire for purposes of manufacturing auger;

1.1.2 manufacturing and/or producing auger;

1.1.3 marketing for sale and/or selling any flat wire and/or auger produced by any of the respondents;

1.2 The respondents are restrained and interdicted from removing, causing or permitting the removal of any of the unlawfully produced products from the premises situated at 6 Distillery Way, BAT Building, Paarl, Western Cape, or from any other premises where same may be located.

1.3 Within 5 court days of the issue of this Order, the respondents are directed to furnish the applicants with the addresses of all premises where the respondents are storing the unlawfully produced products;

- 2) It is declared that the respondents are in contempt of the Court Order of 2 June 2015;
- 3) The respondents are directed to pay to the applicants a fine of R450 000.00, jointly and severally, the one paying the other to be absolved, by no later than 30 April 2020;
- 4) The respondents are to pay the costs of all the proceedings to date, including costs of two counsel, save for costs related to the respondents' application to strike out portions of the applicants' founding affidavit.

N. MANGCU-LOCKWOOD

Acting Judge of the High Court

Legal representatives:

Applicants' Counsel: W. Duminy SC, B Vaughan.

Instructed by: Riaan Nabal of Nabal Attorneys.

Respondents' counsel: G. Myburgh SC, R. Gordon.

Instructed by: Conrad Coetzee of Faure & Faure