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

Case Number: 2025-041558

In the matter between:

JUSTIN GEORGE PAULSEN	First Applicant
BELLACART MARKETING (PTY) LTD	Second Applicant
and	
KURT ANTON PAULSEN	First Respondent
TRADE 245 (PTY) LTD	Second Respondent
PRO FINTECH (PTY) LTD	Third Respondent

JUDGEMENT

Coram: Greig AJ

Heard: 24 November 2025

Delivered: 15 April 2026

INTRODUCTION

[1] These are contempt proceedings brought by the applicants in relation to an arbitration award handed down by the arbitrator, Mr Sholto-Douglas SC, on

8 December 2023 ('the award'). The award was made an order of court by the Honourable Ms Acting Justice Adams under case number 1247/2024 on 30 January 2025 ('the order').

[2] It is common cause that the award and the Court order are binding.[1] The Respondents contend, however, that they have complied with the order, or that, if they have breached it, they did do based on a genuinely mistaken interpretation.

BACKGROUND

[3] The First Applicant, Justin Paulsen, and the First Respondent, Kurt Paulsen, are brothers. For convenience, I will refer to the brothers by their first names.

[4] According to the arbitration award, Justin graduated from the University of Cape Town in 2009 with a degree in economics and finance. He worked in banking until around 2013 when he joined a foreign-exchange trading company. In late-2016 he set up a business known as 'JP Markets', a securities brokerage with a digital platform on which clients could trade in financial derivative instruments known as 'Contracts for Difference' or 'CFD's'.

[5] The JP Markets business grew substantially and in 2017 Kurt joined the company. His responsibility was for the IT functions of the business whilst Justin was the chief executive officer.

[6] On 19 June 2020, the Financial Sector Conduct Authority ('the FSCA') suspended the financial service provider licence of JP Markets. Pursuant to this the bank accounts of JP Markets were frozen, and the FSCA brought an application for the winding up of JP Markets, culminating in the final winding

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[1] I note that there is a paragraph numbering difference between the award and court order. Otherwise, there is no material distinction between them. I will, in referring to the obligations imposed, generally make reference to the paragraph numbering in the award and not in the order.

up of the company on 7 September 2020. However, the winding up order was set aside by the Supreme Court of Appeal on 20 October 2021.

[7] The winding up of JP Markets, and the suspension of its licence as a financial services provider, caused Justin 'to suffer negative media attention', notwithstanding the fact that the winding up order was overturned on appeal.

[8] At the time of its winding up JP Markets was a substantial concern, having approximately 300,000 clients and 70 permanent employees.

[9] Given the negative media attention to which Justin was subject because of the suspension of JP Markets' licence, in July 2020 Justin claims that the brothers had various discussions which led to the conclusion of an oral agreement to jointly re-establish an online CFD brokerage business. The terms of this agreement were that Kurt and Justin would pool their resources to jointly set up the business that would trade as 'Trade 245'. The Trade 245 business would be owned by a private company registered as Trade 245 (Pty) Ltd.[2]

[10] Justin says that, because Trade 245 (Pty) Ltd did not initially have a bank account, the brothers agreed to use a different company to act as a 'conduit' through which funds would flow to him from the Trade 245 business. This 'conduit' was the third respondent, Pro-Fintech (Pty) Ltd.

[11] In order to conduct the business of Trade 245, so says Justin, it was necessary to obtain the approval of the FSCA. If Trade 245 attempted to obtain such an authorisation in its own name, it would encounter 'a number of logistic [sic] difficulties, and it became necessary to utilise a third party who had already received the necessary FSCA authorisation, but who would be prepared to

[2] In what follows I will refer to the business and the company interchangeably as 'Trade 245' unless the context requires a specific indication as to whether it is the company or the business being referred to.

allow Trade 245 to utilise its FSCA licence...' The brothers 'succeeded in locating such an entity, Red Pine Capital (Pty) Ltd ('Red Pine').

[12] Pursuant to the above, Pro Fintech (acting through Kurt) concluded agreements with Red Pine (represented by one Nick Petousis) in terms of which Red Pine agreed to perform the above functions.

[13] For his part Kurt in the answering papers denies that there was any agreement to utilise Pro-Fintech as a 'conduit': he alleges that Trade 245 did have a bank account as of 17 July 2020, so it was not necessary to use any 'conduit'. Kurt's main complaint however appears to be that most allegations in the founding papers are irrelevant and go into details about the arbitration which are unnecessary for the resolution of this dispute (more about this below).

[14] Justin in the founding affidavit describes how he set up the Trade 245 business, through the second applicant, Bellacart Marketing (Pty) Ltd. Initially he was paid half of the profits generated by the Trade 245 business. However, at a family function in late December 2020 there was a 'confrontational encounter' which caused a breakdown in the brothers' relationship. Prior to this, Justin received amounts payable to Bellacart calculated at 50% of the cash payments received from and payable by Red Pine to Pro Fintech, less expenses. This profit share had initially been paid without demur but after the fallout in December 2020 Kurt began delaying payments. The deteriorating relationship culminated in Kurt refusing to make any further payments, after settling an invoice dated 30 June 2021. He simultaneously also excluded Justin 'from playing any role in the business of Trade 245.'

[15] This falling out led to an urgent application in the High Court and later to the arbitration before Mr Sholto-Douglas SC.

Arbitration before Sholto-Douglas SC

[16] I open this section by remarking that Kurt avers in these proceedings that everything that transpired at the arbitration, except the award which issued, is irrelevant to the decision whether the respondents are in contempt. The submission in paragraph 35 of the respondents' heads of argument is that the pleadings and evidence in the arbitration have all been 'superseded' by the award and the subsequent order, and that these allegations and details provided by Justin about the arbitration fall to be struck out.

[17] I disagree with the above. Given that the interpretation of the award is central to this case, this contention is anathema to the accepted modern canon of construction whereby interpretation is a 'unitary exercise' which must take place within the 'triad of text, context and purpose'.[3] I therefore propose to deal in some detail with the arbitration and the arbitrator's findings.

[18] In the arbitration Justin and Bellacart sought an award inter alia declaring that Justin was the owner of 50% of the issued shares in Trade 245, and directing Kurt, Trade 245 and Pro Fintech to provide an accounting to Justin and Bellacart pertaining to the conduct of the Trade 245 business from inception, the amounts paid and payable by Red Pine to Pro Fintech, the income and expenses of Pro Fintech, the whereabouts of profits and funds held by Pro Fintech, and the amounts payable to Bellacart.

[19] Kurt opposed this relief alleging that, though he discussed with his brother various options to establish a new CFD online brokerage, which resulted in the incorporation of Trade 245 (Pty) Ltd on 9 July 2020, there were 'numerous insurmountable impediments' which led the brothers to realise that establishing a new CFD online brokerage together was not feasible, mainly

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[3] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at para 25.

because of the pariah status of Justin in the industry following the suspension of JP Markets' FSP licence. Trade 245 (Pty) Ltd was therefore incorporated with Kurt as the sole shareholder, and there was no question of Kurt holding 50% of the share capital on behalf of Justin as the latter's nominee.

[20] Kurt further pleaded that, as it was not possible for the brothers to jointly establish an online CFD brokerage as had been initially discussed, Kurt, with Red Pine, in August 2020 'resolved to no longer pursue establishing and operating an online CFD brokerage business but instead and through a new legal entity to be established by Kurt, to render services to Red Pine, the latter entity itself acting as an intermediary with an offshore CFD online brokerage.'

[21] Arising from this, Kurt and Red Pine entered into an agreement which entailed the use of Red Pine's FSP licence. The Trade 245 brand and online platform together with its infrastructure would, in terms of this agreement, be operated by Red Pine whilst Kurt, through an entity established by him, would be entitled to raise a 'volume fee' for generating business and providing marketing services to Red Pine.

[22] Kurt pleaded that he advised Justin of the above agreement and Justin accepted that he would 'in no way be associated with or directly involved in the Trade 245 business'. Kurt then 'attended, over the ensuing period, to setting up the Trade 245 business from the ground up to the exclusion of Justin.'

[23] As regards the allegation that an agreement was concluded in terms of which Justin's shares of the profits from Trade 245 would be claimed through Bellacart, Kurt also denied this, pleading instead that Justin 'approached Kurt and explained that he was down on his luck arising from the difficulties which he had been experiencing as a consequence of JP Markets…'. Thus, an agreement was concluded in terms of which Bellacart would exclusively refer

potential clients to Pro Fintech which would, through its relationship with Red Pine, grant access to the Trade 245 platform. Pro Fintech would compensate Bellacart for such referrals by paying 50% of the net profit from the associated revenue received from Red Pine.

[24] Kurt alleged that Bellacart repudiated this January 2021 agreement by directing independent brokers and clients away from the Trade 245 business to Justin's competing business ventures. As a result, Pro Fintech cancelled the agreement with Bellacart in around June 2021.

The arbitrator's findings

[25] The arbitrator held that it was established on the evidence that:

(a) Justin was, through Bellacart, initially paid half of the profits generated by Trade 245;

(b) After the falling out at the family function at the end of December 2020, the business relationship deteriorated, and the brothers were forced to communicate and conduct business through an attorney as a go-between.

(c) Despite this, matters still deteriorated, and though the initial invoices issued by Bellacart had been paid without demur, subsequent invoices were delayed and then not paid.

[26] Relevant to the present case is that the arbitrator remarked that

> 'it is not in issue that Trade 245[4] thereafter continued to trade and continued to make profits. *The allegation to the contrary made in the statement of defence was not established on the evidence.*' (My emphasis)

[4] As per the definitions in the arbitration award this is a reference to Trade 245 the company, not Trade 245 the business.

[27] The arbitrator further held that the evidence 'clearly established an agreement between Justin and Kurt in terms of which the business previously conducted by JP Markets would be housed in Trade 245 and that the shares in the company would be beneficially owned by Justin and Kurt in equal shares, despite the fact that they were nominally held by Kurt.'

[28] The arbitrator remarked in this regard that such an agreement was established not only by the uncontradicted evidence of Justin, but also 'by the wealth of documentary and corroborating evidence adduced by way of WhatsApp and Skype messages', and the evidence of other witnesses called during the arbitration. Moreover, the arbitrator held that, if further support was needed for this conclusion:

> 'the mere fact that Justin caused the assets, staff and client base of JP Markets to be transferred to Trade 245 is sufficient evidence of this. Despite the fact that when JP Markets was under a winding up order, Justin may not have had the legal right to accomplish this, he did accomplish it and effect was given to his intention to populate Trade 245 with the business of JP Markets.'

[29] Having found that the agreement as pleaded by Justin was established, the arbitrator proceeded to consider the various claims by Justin. Amongst them was relief in terms of section 163 of the Companies Act, 2008. The arbitrator found that the conduct of Kurt in keeping Justin from exercising his rights as a shareholder was unfair and oppressive within the meaning of section 163. The arbitrator thus concluded that he was at large to make an award as envisaged in section 163(2) directing Kurt to acquire Justin's shares in the company at a valuation to be determined by an independent auditor.

[30] However, the arbitrator remarked that it would be premature to value the business of Trade 245 until the valuation could be conducted on the basis of rights which Trade 245 might need to vindicate. The passage is important in interpreting the award which was made and I quote it in full below:

'if the defendants' assertion that Trade 245 is conducted not by Trade 245, but by Red Pine is correct, this may be as a result of a disposition of the assets of Trade 245 contrary to the provisions of section 112 of the Companies Act and is therefore liable to be set aside at the instance of Trade 245 or its shareholders by way of a derivative action. As a consequence, the claimant seeks an award directing that in the event that Red Pine or any other party disputes the fact that Trade 245 is the owner of various rights related to the Trade 245 business, the valuation by the independent auditor should be postponed until such time as Trade 245 has vindicated its rights in relation to such assets. I gather that by reference to the various rights listed by the claimants, what is intended as a reference to the goodwill of the Trade 245 business, and I intend to address it as such. With that modification, this strikes me as a sensible approach. Once Justin is placed in possession of the shares and is able to exercise his rights as a shareholder, he can take whatever steps he may be advised to take to ensure that Trade 245 is properly valued having regard to its to assets, liabilities, income and expenses. *It would be premature to value the business at this stage.* However, the business will have to be valued *in due course* for the purpose of determining the purchase price of Justin's shares and that it is appropriate that an award appointing a valuer be made at this stage. *Red Pine is not a party to this arbitration and any rights that it or any other party may assert must be asserted in another forum as I clearly lack the jurisdiction to determine this issue. That is another reason why it would be inappropriate for a valuer to immediately undertake a valuation.*' (The emphasis is my own).

[31] As to the claimed debatement of account, the arbitrator held that the agreement between the brothers gave rise to a duty on Kurt to account to Justin in relation to the business of Trade 245.

[32] The arbitrator further held that Pro Fintech was, by agreement between Justin and Kurt, 'interposed as a conduit that served as an extension of Trade 245 in the sense that it only provided banking services to the latter'. Nonetheless, the arbitrator was not able to find that it was a term of any agreement that Pro Fintech owed a duty to account to Justin or Bellacart; and, though 'unquestionably such a relationship would have existed between Trade 245 and Pro Fintech', that was not a relationship upon which Justin and

Bellacart could rely on in the arbitration. The arbitrator thus excluded 'an accounting in respect of the amounts paid and payable by Red Pine to Pro Fintech, the income and expenses of Pro Fintech and the whereabouts of profits and/or funds held by or on behalf of Pro Fintech.'

[33] Based on the above findings the arbitrator made the following award:

(a) Justin was declared to be the owner of 50% of the issued shares in Trade 245.

(b) Kurt and/or Trade 245 were directed to deliver the share certificates in respect of Justin's 50% shareholding in Trade 245 to Justin.

(c) Kurt and/or Trade 245 were directed to take all such steps as may be necessary to rectify the share register of Trade 245 to reflect Justin's ownership of 50% of the issued shares in Trade 245.

(d) Kurt was directed to acquire Justin's shares in the company in terms of section 163(2)(e) of the Companies Act at a price to be determined by an independent auditor appointed by agreement between the parties and, failing agreement within 30 days after the date of the award, by the chair of the Independent Regulatory Board for Auditors ('IRBA').

(e) The costs of the independent auditor were to be borne by Justin and Kurt in equal shares.

(f) In the event that any third party asserted any right/s to any goodwill associated with the business conducted under the name Trade 245, the determination of the value of the shares in Trade 245 was to be postponed until Trade 245 had vindicated such right/s or until Justin determined that the valuation should be undertaken without such vindication having taken place, whichever was the earlier.

(g) Kurt was to pay Justin the value determined by the independent auditor for 50% of the shares in Trade 245 within 30 days of such determination and against transfer of Justin's shares to Kurt.

(h) Kurt and Trade 245 were to provide an accounting (fully vouched with all supporting documentation, including bank statements) to Justin and Bellacart pertaining to:

(i) the conduct of the Trade 245 business from inception; and

(ii) the amounts payable to Bellacart.

(i) Kurt and Trade 245 and Justin and Bellacart were to attend a debatement of the account.

(j) Bellacart was to raise invoices in respect of the amounts that were determined to be owing to it pursuant to the debatement.

(k) Trade 245 was to pay Bellacart the amounts reflected in the aforementioned invoices, together with interest thereon calculated at the rate prescribed in terms of the Prescribed Rate of Interest Act 7 of 1997.

(l) The awards pertaining to (h) to (k) above (the accounting, debatement and payment of invoices) were to fall away in the event that payment contemplated in the share acquisition paragraph was effected prior to the conclusion of the rendering and debatement of account.

(m) Kurt and Trade 245 were directed to pay Justin and Bellacart's costs of suit.

Order of court and review

[34] The respondents, dissatisfied with the arbitrator's award, launched an application seeking to review and set it aside in the Western Cape High Court in terms of section 33 (1) (b) of the Arbitration Act. The respondents asserted

that the arbitrator misconceived the issues to such an extent that jurisdiction to review the award was established. They contended that the arbitrator misconducted himself, committed a gross irregularity and/or exceeded his powers, particularly by taking into account allegations in the defendants' plea where no evidence had been presented on them by the defendants.

[35] The review application came before the Hon. Acting Justice Adams. In essence Adams AJ held[5] that, not only did the arbitrator not misconstrue the facts, but his findings 'seem eminently reasonable considering the submissions before him'. The Court further held that 'even if this was not the case, nothing points to the Arbitrator's conduct constituting misconduct or a gross irregularity, nor did he exceed his powers.'[6]

[36] As to the criticism that the arbitrator had taken account of the defendants' pleadings when they had elected to lead no evidence on these pleaded issues, the Court held that there was no suggestion that the arbitrator had referred to evidence never led, fabricated evidence, or misrepresented what was placed before him. The Court continued that in its view 'the award handed down was well-reasoned and … displays that the arbitrator considered the substantive defence and the extensive arguments presented.'[7]

[37] Arising from the above findings the review application was dismissed and the award was made an order of court.

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[5] The judgement is unreported and not reported on SAFLII. The judgement was handed down under case number 1247/2024 and is undated. The founding affidavit, which attaches the judgement as annexure "JP.1", also does not mention the date upon which the judgement was handed down.

[6] At para 71.

[7] At para 61.

Events following the Adams AJ judgement culminating in this application

[38] Following on the Adams AJ judgement, on 5 February 2025, Justin's attorney addressed a letter to Kurt's attorney suggesting that the parties should endeavour to agree on 'practical measures to ensure that an account is rendered and a debate thereof facilitated.' To this end, Kurt was requested to furnish daily reports, bank statements, monthly management accounts and the general ledger for the Trade 245 business, as well as the annual financial statements of Trade 245 (the company).

[39] On 20 February 2025 Kurt's attorney provided the assurance that 'Kurt and Trade 245 (Pty) Ltd were in the process of collecting and collating the documentation'. The letter continued:

> 'your clients have requested various documentation relating to Trade 245 from inception to date, including bank statements, monthly management accounts, financial statements and daily reports – which you will appreciate is a voluminous and time-consuming exercise'.

[40] A further letter on 28 February 2025 repeated that the documents were still in the process of being collated.

[41] On 5 March 2025, however, Kurt's attorneys changed tack, sending a letter enclosing an affidavit by Kurt in his capacity as a director of Trade 245 (Pty) Ltd stating that the company 'does not hold any active bank accounts', 'does not have any assets and/or liabilities', and 'has not traded in any form of business operation since its incorporation.' In terms of the production of documentation required by the order, the affidavit stated that Kurt was 'still awaiting receipt of bank statements from Standard Bank in respect of the account described in the affidavit'.

[42] On 18 March 2025 Justin's attorneys expressed perplexity as to the above response, referring to the fact that in the two prior letters Kurt's attorneys had stated that they were collating 'voluminous' documents in a 'time-consuming exercise' when, in the end, few documents were produced other than some bank statements and the affidavit from Kurt contending that Trade 245 had never traded or had any assets.

[43] Justin's attorneys continued:

> 'it is quite evident that Kurt is disingenuously trying to evade the clear terms of the Award, as confirmed by the Order, by furnishing an affidavit, the contents whereof are deliberately evasive and misleading. The inference is inescapable that, now that Kurt is beginning to fully appreciate that the rendering of the account and the debate thereof is going to demonstrate that Kurt and the companies controlled by him owe Justin a considerable amount of money, he is employing questionable tactics in an endeavour to avoid having to discharge the obligations flowing from the Award and the Order.'

[44] The letter concluded by expressing the view

> 'that the duty to account is also in relation to the Trade 245 business. It is not limited to the trading activities of the Company, as seems to be implicitly suggested in your correspondence. Kurt cannot honestly claim that he does not have knowledge and control of the documentation pertaining to the aforesaid business, or that he is unable to gain access to whatever documentation is required in order to prepare an account. Not a single reason has hitherto been advanced as to why Pro Fintech cannot furnish statements pertaining to the account operated by it; why Red Pine cannot supply whatever information is required and is in its possession; why such records…as exist or existed regarding the business which Kurt has confirmed under oath is operated by Trade 245, cannot be obtained and made available.'

[45] The letter concluded by stating that, unless a proper accounting was provided within 5 days, Justin would approach the courts for urgent relief including relief holding the respondents in contempt.

[46] Kurt's attorneys dismissed these complaints on 25 March 2025, maintaining that Kurt and Trade 245 'have already discharged their obligations in terms of the Order', and would not 'entertain a fishing expedition whereby Justin and Bellacart sought to gain access to information or documentation proprietary to a third party which was not the subject of any order'.

[47] The above exchange of correspondence culminated in the present application which was launched on 27 March 2025.

PART A, URGENCY AND COSTS

[48] Part A of the notice of motion was set down on 13 May 2025 and sought relief in terms of which this application could be enrolled on the semi-urgent roll. The respondents contended in argument that the applicants should not have brought the matter on an urgent basis on 13 May 2025, and that the applicants should pay the costs of this appearance.

[49] It is significant to note that no substantive relief was sought against the respondents on 13 May 2025. Instead, the application was set down for the limited purpose of agreeing or imposing a timetable for the further conduct of the matter based on a semi-urgent hearing. The applicants thus contend that, observing the prescripts in *Gallagher v Norman's Transport Lines (Pty) Ltd,*[8] they structured a timetable for the hearing of Part B that struck a balance between hearing the matter on an expedited basis and providing the respondents with sufficient time to respond. They further submit that ongoing contempt of the court order, by its very nature, is urgent, relying on *Victoria Park Ratepayers' Association v Grewenouw CC and others*[9] and *Secretary,*

[8] 1992 (3) SA 500 (W)

[9] *Victoria Park Ratepayers' Association v Grewenouw CC and others* [2004] 3 All SA 623 (SE) at para [26]

Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others.[10]

[50] The respondents, for their part, referred to certain cases which they say indicate that the approach adopted by the applicants deserves censure, including *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas T kolose Trading* CC[11] and *Manamela v Maite*.[12]

[51] In *Volvo Financial Services Southern Africa (Pty) Ltd*, the Court was concerned with the question whether an application based on the *rei vindicatio* is inherently urgent. The court's observations in relation to contempt proceedings were accordingly *obiter*.

[52] There may be some force in the *obiter* observations in *Volvo Financial Services* that contempt proceedings may entail (as indeed is here the case to some extent) 'the exercise of powers which often demand the kind of careful and lengthy consideration which is generally incompatible with urgent proceedings'.

[53] However, the applicants on 13 May 2025 sought only a semi-urgent hearing and further conduct order, justification for which I think is a hurdle easily vaulted given the nature of contempt proceedings generally, and (specifically) the impact of the respondents' ongoing breach of the order in unduly retarding the valuation process envisaged in the award.

[54] It is further evident that the respondents do not substantiate that they were prejudiced as a result of the approach adopted by the applicants. Had they at

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[10] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) at paras [31]- [33].

[11] *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* 2023 JDR 2806 (GJ)

[12] *Manamela v Maite* 2023 JDR 3419 (GJ)

an early stage agreed to a semi-urgent hearing, the costs of the hearing on 13 May 2025 would have been largely or completely avoided.

[55] I therefore find no merit in the respondents' objections in relation to urgency.

STRIKING OUT APPLICATION

[56] On 23 October 2025 the respondents launched an application seeking to strike out various paragraphs of the replying affidavit on the basis that they constituted new matter which ought properly to have been raised in the founding affidavit, including:

(a) Paragraph 15, together with annexures 'RA 2' and RA 3',

(b) Paragraphs 16, 17, 18 and 19, together with annexure 'RA 4',

(c) Paragraphs 20, 21, 22 and 23, on the grounds that they are irrelevant as well as on the grounds that they constitute new matter, together with annexures 'RA 5', 'RA 6' and 'RA 7'; and

(d) Paragraph 25, on the grounds that the matter referred to therein is frivolous, vexatious and irrelevant and constitutes new matter, together with annexure 'RA 8'.

[57] During the hearing I enquired of counsel for the respondents whether, since the respondents had replied to these allegations, it would not be more practical and expedient to deal with the matter on that basis, instead of striking the material. The response was 'technically we do persist with the application'.

[58] I am of the view that it is unduly technical to strike these allegations from the record at this stage.

[59] In any event, I am not persuaded that there is any substantial prejudice given that the respondents have had ample opportunity to respond, and have in fact responded, to these allegations.

[60] As will be noted from the analysis which follows, my conclusions have further been reached largely without reference to the material sought to be struck out, and accordingly the application is in any event something of a brutum fulmen.

LEGAL POSITION – REQUIREMENTS FOR CONTEMPT

[61] The requirements for committal for contempt are well known. The applicant must establish beyond reasonable doubt:

(a) the order;

(b) service or notice of the order;

(c) non-compliance with the terms of the order;

(d) wilful and mala fide disobedience or breach of the order.[13]

[62] Once the first three requisites are proved, unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt are established.

[63] A deliberate disregard of the order is not sufficient: the respondent may generally, albeit mistakenly, have believed themselves to be entitled to act in the way they did.[14]

[64] The respondent in such proceedings is not an accused person, but 'is entitled to analogous protections as are appropriate to motion proceedings'.[15]

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[13] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

[14] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 9.

[15] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 25.

[65] A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.[16] Thus, where a court finds a recalcitrant litigant to be wilful or mala fide on a balance of probabilities, civil contempt remedies (other than committal) may still ensue. These include less drastic remedies which would ensure compliance, such as declaratory relief, or a mandamus.[17]

RESPONDENT'S CONTENTIONS IN RELATION TO THE CASE OF CONTEMPT

[66] In opposing the application, Kurt and Trade 245 (i) deny disobeying the order; and (ii), to the extent that this court concludes that there has been disobedience of the order, they contend that they have demonstrated that they did not wilfully nor in bad faith disobey the order.

[67] In this regard the respondents advance seven grounds which they contend render the application 'fatally flawed':

(a) The applicants wrongly contend that the accounting required by paragraph (h) of the Award (paragraph (p) of the Order) extends to an obligation on the respondents to provide information in respect of Red Pine and Pro Fintech, issues expressly excluded by the Award.

(b) In characterising the respondents' conduct as merely 'a misinterpretation of the Order' the applicants have conceded that the respondents cannot be in wilful default of the order.

(c) The applicants have failed to set out any evidence supporting a conclusion that:

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[16] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 42.

[17] *Pheko and Others v Ekurhuleni City 2015 (5) SA 600 (CC)* at paras 34 and 35; *Matjhabeng Local Municipality v Eskom Holdings Ltd & Others* 2018 (1) SA 1 (CC) at para [65].

(i) They (the applicants) intend to attend a debatement of account;

(ii) Bellacart has rendered any invoices; and

(iii) Any amounts due to Bellacart have been invoiced and are due to be paid with interest.

(d) In motion proceedings the application falls to be determined effectively on the respondents' version, and the applicants were aware, prior to launching the application, that there would be 'irresoluble disputes of fact'.

(e) The application was launched prematurely.

(f) The applicants are themselves in contempt, and until that contempt is purged, they are disqualified from pursuing the relief sought.

(g) The applicants have adopted an 'overzealous' approach, making 'wild and speculative allegations' without any foundation.

[68] Many of the grounds in paragraph [67] above overlap or are facets of each other. The discussion in the respondents' heads of argument, whilst setting out these seven grounds at the outset, does not proceed to consider these grounds individually or discretely, and I likewise do not intend to do so.

[69] Proceeding to a discussion of the opposition raised, it is as well to point out that the first two requisites for contempt of court are not in dispute, namely the order and service thereof. It is only the last two requirements, (1) breach, and (2) wilfulness and mala fides, which are.

PROPER INTERPRETATION OF AWARD

[70] The first issue is the proper interpretation of the award (I deliberately consider this issue before turning to whether there are material disputes of fact, as the proper interpretation of the award limits the relevance of some of

these disputes to a material extent). There are two disputed issues of interpretation:

(a) The scope of the award and whether it extends to an obligation to provide information or an accounting in respect of transactions involving Red Pine and Pro Fintech; and

(b) Whether the award contemplates first appointing an auditor to value Justin's shares in Trade 245, or first conducting a debatement and (if necessary) vindication of Trade 245's rights (this also relates to the prematurity argument in para [67](e) above).

Does the award extend to an obligation on the respondents to provide an accounting in respect of transactions involving Red Pine and Pro Fintech?

[71] This has been correctly identified by both parties as the hinge of the dispute. The respondents contend that the award expressly excludes an accounting of these aspects. The applicants' attorneys' letter, they say, went too far in demanding an accounting requiring 'Pro Fintech …. to furnish statements pertaining to the account operated by it [and that] Red Pine … supply whatever information is required and is in its possession.'

[72] They point to the express statement in the Arbitrator's award which excluded 'an accounting in respect of the amounts paid and payable by Red Pine to Pro Fintech, the income and expenses of Pro Fintech and the whereabouts of profits and special funds held by or on behalf of Pro Fintech'.

[73] I have set out the arbitrator's reasoning in this regard in paragraphs [30] to [32] above. The limitation which the arbitrator imposed stemmed in my view (1) from his acceptance that he did not have jurisdiction in relation to Red Pine and (2) in a similar vein, from the fact that he was not able to find on the evidence that Pro Fintech owed a duty to account to Justin or Bellacart; and,

though he did find that 'unquestionably such a relationship would have existed between Trade 245 and Pro Fintech', that was not a relationship upon which the applicants could rely in the arbitration.

[74] However, whilst the applicants' attorneys may have gone too far in formulating their demand for an accounting, by the same token, the respondents' construction of the award is too narrow. They focus on the arbitrator's limitation, magnifying its scope, whilst also forgetting important express statements and directives in the award which indicate, in my view, that the proper interpretation is in fact a via media.

[75] The scope of the arbitrator's exclusion focuses on information *within the purview of Pro Fintech*, or the relationship between *Red Pine and Pro Fintech*, viz.:

(a) Amounts paid and payable between Red Pine and Pro Fintech;

(b) Income and expenditure of Pro Fintech; and

(c) The whereabouts of any profits and special funds held by or on behalf of Pro Fintech.

[76] But this is not to say that the required accounting cannot encompass information as to transactions involving Pro Fintech and Red Pine, to the extent that such transactions must necessarily be accounted for in the Trade 245 business. Firstly, given the role the arbitrator found was played by Pro Fintech as a 'conduit' or 'extension', it *must* encompass this information. Secondly, even if (for example) payments to Pro Fintech destined for Bellacart were made directly by Red Pine, if such payments were made pursuant to the Trade 245 business, they *would* entail an accounting

obligation; the arbitrator did not accept that the Trade 245 business was owned by Red Pine, as the respondents allege, and nor can this court.[18]

[77] Furthermore, it is not only Trade 245 (the company) but also Kurt, who must provide the accounting.[19] It is common cause that Kurt was intimately involved in the Trade 245 business and there are thus no proper grounds on these papers to conclude that the respondents are blind to such transactions, or that they are 'third party' transactions. Indeed, it would be an unbusinesslike and odd interpretation of the award to believe that the accounting it requires would exclude these transactions central to the Trade 245 business.

[78] I should hasten to point out that the above is not a gloss upon the arbitrator's award.[20] It is simply in my view the correct interpretation of the scope of the award which the respondents seek to interpret narrowly and selectively instead of purposively.

[79] The respondents further argue that the invoices from Bellacart to Pro Fintech on the record do not on their face bear out Justin's version in the founding affidavit that these invoices were for half the profits generated by Trade 245.

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[18] If the Trade 245 business was conducted by Red Pine this may have entailed a disposition of Trade 245's assets requiring vindication – see for example paragraph 106 of the arbitrator's award. But the award is clear in finding that the Trade 245 business was not owned by Red Pine.

[19] As already set out, the relevant provision requires 'Kurt and Trade 245 [the company] to provide an accounting …to Justin and Bellacart pertaining to ….the conduct of the Trade 245 business from inception…'.

[20] The respondents suggested in supplementary heads of argument that the draft order proposed by the applicants is formulated 'in a fashion purposed at amending the learned Arbitrator's award' which seeks to 'secure an accounting not only beyond the scope of the award but in fact expressly prohibited by the award.' I shall deal with this below.

[80] It is true that these invoices are raised under a generic rubric, 'marketing and consulting fee', and make no mention of a share of the profits in Trade 245, nor do they reflect how they are calculated relative to any such profits.

[81] However, the applicants offer the only plausible explanation on the papers for the existence and payment of these invoices. The respondents' explanation in paragraph 16 of the answering affidavit, by contrast, is laconic to say the least: 'the invoices do not reflect payments but rather reflect that Bellacart invoiced Pro Fintech for 'marketing and consulting' fees… Trade 245 (Pty) Ltd, as repeatedly stated … has no assets and never traded.'

[82] Notably, the respondents provide no explanation as to why such significant sums totalling some R 37 million would have been invoiced by Bellacart to Pro Fintech for 'marketing and consulting fees'. The explanation by the applicants, that Pro Fintech was a 'conduit' in relation to the 50% share of the profits of Trade 245 fits the context and history of the matter, and is in any event the explanation accepted by the arbitrator after hearing evidence in the arbitration. I see no reason to disturb this finding based on the respondents' cryptic explanation in the answering affidavit. To the extent that this is a claim for final relief and to be decided on the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[21] in my view the respondents' bald contrary assertions can be rejected merely on the papers on the same legal principles as set out in the section on 'Resolution of disputes of fact' below.

[83] I should add that I am mindful of the fact that the respondents suggest in the answering affidavit that it was not necessary for Pro Fintech to operate as an 'extension' of Trade 245 because in fact Trade 245 did open a bank account with Standard Bank on 17 July 2020. This issue was, however, dealt with by the arbitrator and his finding was that Pro Fintech did indeed operate as an

[21] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E-F

'extension'. It is not this Court's place in contempt of court proceedings to overturn findings of the arbitrator which form the basis of the award and the later order. They must, for the purposes of this judgement, be accepted as correct, particularly where the arbitrator's award was reviewed in terms of the Arbitration Act, and was not set aside but rather affirmed.

[84] Even if I were at liberty to do so I would in any event be hesitant to reconsider these findings by the arbitrator based on the '*Plascon-Evans* test'. Whilst the assertion that Trade 245 did indeed have a bank account appears unchallenged on these papers, it does not necessarily follow from this that Pro Fintech could not have been – or remained - the 'conduit' for monies destined for Bellacart, and ultimately for Justin.

[85] Lastly, I should add that the respondents' interpretation of the award cannot hold water on accepted canons of construction such as the principle ut res magis valeat quam pereat: paragraph (h) of the award expressly requires the respondents to give an accounting of the conduct of the Trade 245 *business* and the amounts payable to Bellacart. On the interpretation proffered by the respondents, however, these directives are effectively nullified by the exclusion the award mentions.[22]

Does the award require appointing an auditor prior to debatement and (if necessary) vindication of Trade 245's rights?

[86] This interpretation issue is one facet of the respondents' prematurity argument. The respondents submitted in response to questions from the court that the parties were obliged to identify the auditor to perform the valuation,

[22] Of 'an accounting in respect of the amounts paid and payable by Red Pine to Pro Fintech, the income and expenses of Pro Fintech and the whereabouts of profits and/or funds held by or on behalf of Pro Fintech.'

even if the valuation takes place at a later stage. They point to the fact that the award states that the appointment must take place within 30 days.

[87] Based on this submission they further contend that the applicants' demand that the IRBA refrain from appointing a valuer is itself contemptuous, thus precluding the applicants from approaching this Court when they themselves are in contempt. For this 'clean hands' argument they rely on *Di Bona v Di Bona and another*[23] which is to the effect that a party may be prevented from seeking an order for contempt until it has purged its own contempt.

[88] In assessing these submissions, the terms of the award should be considered. In relevant part and in sequence they contemplate:

(a) Appointment of an independent auditor within 30 days after the award by the IRBA.

(b) If any third party asserted a right to any goodwill in the Trade 245 business, the valuation was to be postponed until Trade 245 (the company) had vindicated such rights or until Justin determined that the valuation should be undertaken without such vindication.

(c) Kurt was to pay Justin the value determined by the auditor for 50% of the shares in the company within 30 days against transfer of the shares to him.

(d) Kurt and Trade 245 were to provide an accounting to Justin and Bellacart pertaining to:

(i) the conduct of the Trade 245 business from inception; and

(ii) the amounts payable to Bellacart.

(e) Kurt, Trade 245. Justin and Bellacart were to debate the account.

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[23] *Di Bona v Di Bona and another* 1993 (2) SA 682 (C) at 688F – G. The applicants correctly point out that the case explicitly makes the rule subject to a court's discretion – see *Di Bona* at 689B.

[89] In broad brush strokes, the above sequence thus contemplates the appointment of an auditor to value the business first, and then various possible decisions and vindication proceedings, whereafter the parties were to produce and debate an account.

[90] However, on a businesslike interpretation, I do not believe that the accounting and debatement was necessarily to follow the appointment of an auditor and (if applicable) the vindication. The accounting obligation in (h)–(k) and the valuation process in (d)–(g) are imposed as independent obligations with no express sequencing between them. Furthermore, a debatement and accounting in most cases will precede the involvement of an auditor to conduct a valuation. The respondent's converse interpretation of the award based on nothing more than the sequence of its paragraphs is not a compelling reason to believe that such rigidity was intended or constitutes a businesslike interpretation.

[91] Whilst, failing agreement between the parties, an auditor was required to be appointed within 30 days after the date of the award by the IRBA, clearly the award envisaged that the auditor's tasks could thereafter be held in abeyance pending vindication proceedings. Likewise, the context indicates that the accounting and debatement is probably to take place between the parties themselves, prior to any intervention by the auditor. This too is the usual and businesslike procedure: the debatement generally precedes the involvement of a court or referee, allowing the parties to narrow the issues before such involvement. As Holmes JA observed in *Doyle and Another v Fleet Motors P.E. (Pty.) Ltd*,[24] ordinarily the parties should first debate the account between themselves, and only if they are unable to agree should they formulate a list of disputed items and issues for determination by the court; the court should

[24] *Doyle and Another v Fleet Motors P.E. (Pty.) Ltd.* 1971 (3) SA 760 (A) at 762–763.

moreover not be bound to any rigid procedure, but should enjoy such measure of flexibility as practical justice may require. In this case the same considerations apply to the auditor and (overall) to the process, in my view.

[92] Seen in this light the opposition by the applicants to the immediate appointment of an auditor is not significant and indeed understandable. Certainly, I do not see in the applicants' interpreting the award this way, which accords with the law and common sense, any wilful and mala fide contempt such as to debar them relief in these proceedings.

[93] A further facet to the respondents' prematurity argument is that, after this application was launched, bank statements were in fact produced. The respondents say that the applicants were aware that bank statements were being requested from Standard Bank but nonetheless proceeded with this application anyway. They also mention difficulties they experienced obtaining the bank statements, an issue which eventually had to be referred to the relevant industry ombud.

[94] I do not believe that this belated production of bank statements makes any substantial difference. It would be one thing if the bank statements could be said to be a full accounting, in which case the matter might boil down to a debate on costs, but for the reasons set out above, these statements give insufficient information or insight relative to the Trade 245 business. They thus cannot constitute proper or full compliance with the order.

RESOLUTION OF DISPUTES OF FACT, BREACH OF THE ORDER AND SCOPE OF ITS OBLIGATIONS

[95] The respondents submit that:

'the applicants, no doubt aware of the factual disputes, in advancing the Contempt Application in the Motion Court rely on conjecture and speculation in an effort to have the above Honourable Court reject the respondents' clear demonstration of compliance with the Order.'

[96] Referencing *Plascon Evans*[25] without nuance they say that the relevant test to be applied is that the application 'stands to be determined effectively in the version of the respondents.'

[97] The first point to raise in this regard is, as I have mentioned, the version presented by the respondents appears to be based on an incorrect interpretation of the order. The interpretation ignores the fact that the award expressly stated that Pro Fintech was a 'conduit' for profits from Trade 245 (the business or the company) to be paid to Bellacart, and it was effectively an 'extension' of the Trade 245 business. However, the respondents, relying on their narrow interpretation, seek to focus only on transactions of Trade 245 (the company), and to exclude from this transactions pertaining to Trade 245 (the business) as well as its 'extension', Pro Fintech.

[98] There is therefore little that I can see in the way of a material dispute of fact as to the breach of the order by the respondents. They have breached the order by not providing a full accounting on the above basis. The dispute of fact, it seems to me, relates to whether the approach adopted by the respondents is wilful and mala fide, or only arises from a 'genuine albeit mistaken interpretation of the order'.[26]

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[25] *Supra.*

[26] See *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 9.

Is the respondents' misinterpretation of the order 'genuine albeit mistaken'?

[99] As held in *Pheko and Others v Ekurhuleni City,*[27] 'when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence'.[28]

[100] The applicants suggest, relying on *Institute of Market Agents of South Africa v City of Tshwane Metropolitan Municipality and Others*[29] and *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another*,[30] that it is not appropriate for a party asserting compliance with an order to wait until the applicant comes to court complaining of non-compliance: unless an approach has first been made to a court on the issue, a defence based on the interpretation of the order cannot stand.

[101] I do not agree that, where there is a debate on the interpretation of an order, a party who asserts compliance must, as a necessary precondition for raising its interpretation as a defence, first approach a court for guidance (if that is what the submission amounts to). Nor in my view do the cited authorities establish such a proposition. They establish merely that parties must make serious good faith endeavours to comply with an order and this may

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[27] *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at para 34.

[28] At para 36.

[29] *Institute of Market Agents of South Africa v City of Tshwane Metropolitan Municipality and Others* 2025 JDR 3797 (GP)

[30] *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA).

comprehend returning to court seeking relaxation of the order's terms.[31] Naturally, the failure to approach a court may in certain circumstances be relevant in ascertaining whether the breach of the court order is based on a genuinely mistaken interpretation and therefore not wilful and mala fide. However, of course, courts are not advice bureaux,[32] and it would be inappropriate for such an approach to be a prerequisite for the defence in all instances. Nor do I think that the failure by the respondents to approach a court for clarification or relaxation of the order in this instance points to wilfulness and mala fides on their part.

[102] However, the matter certainly does not end there. The applicants rightly point to other events which preceded this application as indicative of the respondents' mala fides and wilful disobedience. Firstly, in the urgent proceedings which preceded the arbitration, Kurt confirmed that he was responsible for running the Trade 245 business; he did not rely on the fact that Trade 245 had never traded and was not possessed of any assets. Indeed, the applicants point out that in those proceedings Kurt stated that it was 'true that the Trade 245 business was met with success'.

[103] Kurt's response in his answering affidavit is that the 'Trade 245 business' to which he made reference was that conducted by Red Pine, not by Trade 245 (the company). Red Pine, says Kurt, was the owner of the Trade 245 business. But this was not accepted by the arbitrator; quite the contrary.

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[31] See *Institute of Market Agents of South Africa v City of Tshwane Metropolitan Municipality and Others* 2025 JDR 3797 (GP) paras 123 and 124.

[32] 'Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important' - *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441.

[104] The answering affidavit further suggests that 'the award, properly interpreted, furthermore, fails to distinguish between the 'Trade 245 business' and Trade 245 (Pty) Ltd.'

[105] It is in the first instance difficult to conceive how the award can be 'properly interpreted' to result in such a failure. But it is in any event plain that this suggestion is not correct: the arbitrator was alive to this distinction, and in fact at pains to carefully draw it. In paragraph 16.1 of his award, he defines 'the Trade 245 business' as one pursuant to the agreement between Justin and Kurt to set up a CFD brokerage business, which would include the trademark 'Trade 245', as well as the Trade 245 trading platform, an 'essential part of the business'. Later, he states that the parties had agreed that the Trade 245 business would be owned by the Trade 245 company, which he defines in paragraph 16.8 simply as 'Trade 245'.

[106] The arbitrator's finding that 'Justin caused the assets, staff and client base of JP Markets to be transferred to Trade 245'[33] is also relevant in this context, and cannot be ignored when assessing whether there is compliance with the order.

[107] Of further prime significance in assessing whether the breach of the order was wilful or mala fide is the initial correspondence exchanged between the parties which culminated in this application.

[108] Against the background of the arbitrator's findings and the ensuing order, this correspondence is striking. On 5 February 2025, Justin's attorneys requested Kurt's attorneys to furnish bank statements, monthly management accounts, the general ledger and daily reports in respect of the Trade 245 business from inception, together with the annual financial statements of

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[33] IN the context of the award this is a reference to the company.

Trade 245. On 20 February 2025 Kurt's attorneys acknowledged that request, stating:

'Your clients have requested various documentation relating to Trade 245 from inception to date, including bank statements, monthly management accounts, financial statements and daily reports — which you will appreciate is a voluminous and time-consuming exercise. Kurt and Trade 245 (Pty) Ltd are collecting and collating this documentation.'

[109] A further letter dated 28 February 2025 repeated that the documentation was still in the process of being collated, with Kurt's attorneys indicating that they expected to be in a position to revert 'early next week.'

[110] Kurt's correspondence thus on the face of it acknowledged that voluminous documentation pertaining to Trade 245 was in existence and was in the process of being collected and collated.

[111] What followed was a remarkable volte-face. On 5 March 2025, a matter of days after Kurt's attorneys had undertaken to produce the documentation 'early next week', a letter was sent enclosing an affidavit by Kurt in his capacity as a director of Trade 245, asserting that the company held no active bank accounts, had no assets, and had not traded since incorporation. This position was later repeated in paragraph 43.3 of the answering affidavit, in which Kurt stated that 'Trade 245 (Pty) Ltd never traded and never generated any revenue.'

[112] The contradiction between these two positions is stark and irreconcilable. In the event only seven Standard Bank statements were produced pertaining to an account of the company that had been closed.

[113] Kurt's explanation for the characterisation of the documentation as 'voluminous' (or lack thereof) is to be found in paragraph 44 of his answering affidavit. Kurt admits the exchange of correspondence and its content, but implies that what he had in mind when his attorneys described a 'voluminous

and time-consuming' exercise of collection and collation was nothing more than the anticipated difficulty of obtaining bank statements from Standard Bank.

[114] He avers that at the time of receiving the request on 5 February 2025 he knew 'that it would be necessary to engage with Standard Bank to secure bank statements in respect of the Trade 245 (Pty) Ltd bank account', and that he 'anticipated, at that stage, that Standard Bank would take some time to ready whatever documents were necessary.' He adds that he 'was uncertain as to the structure and format that would be used by Standard Bank for this purpose,' and that he anticipated that bank statements for the last five years would be forthcoming (though the account reflects it was closed on 19 January 2021). He further avers that by 28 February 2025 he 'had collated whatever documentation [he] had in [his] and Trade 245 (Pty) Ltd's possession but could not do so in regard to bank statements.' He concludes by rejecting 'the innuendo that there was any untruthfulness in what was communicated to the applicants concerning the provision of accounting requested.'

[115] This explanation is, as I have said, difficult to reconcile with the language used in the prior correspondence. If the documentation had been confined to the awaited bank statements, the letters of 20 and 28 February 2025 would surely not have described a process of collection and collation so substantial that it was still incomplete more than a week after it had begun. Those letters would instead have recorded that there was little documentation to speak of, save for certain bank statements which had been requested.

[116] An issue which demonstrates this starkly revolves around the so-called 'daily reports'. It must again be recalled that, in Kurt's letter of 20 February 2025, he explained his delay by saying that he was involved in the 'time-consuming' exercise of collating the requested documents relating to Trade 245 from inception, including, amongst other things, 'daily reports'.

[117] It is not disputed that daily reports are generated to record trades placed by Trade 245 customers on a given day on its platform. The applicants attach one such daily report in their possession relating to trading activity on 30 August 2021. (The logo at the top identifies it as a 'Trade 245' daily report; the name Red Pine appears nowhere on it).

[118] The existence of this document demonstrates, absent any proper explanation, that daily reports of this nature exist and were generated in the ordinary course of the Trade 245 business. The suggestion by Kurt that the exclusion in the award exonerates him from providing an accounting because these reports were generated by Trade 245 (the business) rather than Trade 245 (the company) is to my mind misconceived, and probably deliberately so. Likewise, the insinuation that he (Kurt) need not account for the Trade 245 business because it is the property of Red Pine is not sufficiently explained either in terms of his access to this information or his relationship with Red Pine; nor is it borne out by the findings and ruling in the arbitration.

[119] I should also in this context mention that a 'Domain Licence Agreement' concluded between 'Red Pine Capital (Pty) Ltd and Trade 245 (Pty) Ltd'[34] records Trade 245 (the company) as the legal owner of the domain on which the trading activities of the Trade 245 business were conducted, and contemplates a monthly licence fee of R20 000 payable to Trade 245. The response to this issue in the respondents' responding affidavit to the applicant's supplementary replying affidavit is that the licence agreement was never implemented and Trade 245 (the company) never invoiced Red Pine in terms thereof. But the agreement created obligations and one would expect some account to be given thereof, even if no invoices were ever rendered. A

[34] This came to light during a due diligence investigation and which was attached by the applicants in a further replying affidavit.

proper accounting of this issue would at least have produced this agreement even under an explanation that it was never implemented.

[120] The contention that Trade 245 (the company) never traded and has no assets is, in any event, opportunistic and largely at odds with Kurt's previous stance in the review and arbitration in which he strenuously opposed any order declaring that Justin was the owner of 50% of the issued shares in Trade 245 (the company). That belated emphasis made its first appearance only in March 2025, in circumstances where it had manifestly become convenient.

[121] The dictum of Heher JA in Wightman with reference to the *Plascon-Evans test*, with good reason now well-worn, bears full repetition in relation to the above:

A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'[35]

[122] In my view the respondents in the answering affidavit did not deal squarely with the issue their attorney's volte face. They did not properly explain why the 'voluminous' documentation turned out not to be so. This was information, to borrow from *Wightman*, 'that they must necessarily possess knowledge of'. Yet the explanation, such as it is, by no means 'seriously and unambiguously' deals with this issue.

[123] In addition to their failure to explain the voluminous documentation which never eventually made its appearance, the respondents further did not adequately and unambiguously explain why, having reluctantly accepted the terms of the award and order as binding, they suddenly relied on the fact that Trade 245 (the company) had never traded and possessed no assets, when:

(a) As mentioned, they opposed any declaration that Justin was the beneficial holder of 50% of the shares in the company;

(b) They pleaded in the arbitration that '*in Trade 245 (Pty) Limited*, Kurt was to oversee all aspects of the business operations of the Trade 245 business owned and held by Red Pine…';[36] and

(c) The arbitrator found that Trade 245 (the company), after the brothers' falling out, continued to trade and to make profits.[37]

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[35] *Wightman t/a JW Construction v Headfour (Pty)Ltd and Another* 2008 (3) SA 371 (SCA) at para 13.

[36] The emphasis is mine. I should mention in this regard that I agree with the sentiments of Adams AJ in the judgement in the respondents' review application to the effect that the respondents cannot without explanation disavow their own pleadings when they have become inconvenient or disconsonant with their new approach; this is especially so after evidence was led (or not led) on the relevant issues at the arbitration.

[37] Para 67 of the award states 'it is not in issue that Trade 245 thereafter continued to trade and continue to make profits. The allegation to the contrary made in the statement of defence was not established on the evidence'. The award defines 'Trade 245' as the company, not the business.

[124] In *H.A.E v H.S.E*,[38] for instance, the respondent was held in contempt where information pertaining to transactions recorded in financial statements lay within his knowledge but he failed to take the court into his confidence to explain them. In addition, the information in the financial statements stood in direct contrast with the respondent's pleaded defence, which the court held was 'clearly untenable and is rejected on the papers'. The present matter is analogous in the sense that the explanation around the Red Pine - Trade 245 relationship would need to be very detailed and persuasive to displace the arbitrator's findings, especially when it is common cause that no evidence was led at the arbitration on critical issues pleaded by the respondents. There is no explanation for this omission.

[125] I am therefore inclined to 'take a robust view of the matter' as *Wightman* enjoins: the radically changed approach which resulted in a severely minimalist accounting has not been sufficiently explained, and speaks to the likelihood that a decision was made to render the order nugatory by (1) providing an accounting only in relation to Trade 245 (the company) and (2) adopting the position that Trade 245 (the business) fell under the exclusive aegis of Red Pine as well as the exclusion in the arbitrator's award and was thus not subject to any accounting.

[126] Accordingly, not only was the respondents' interpretation of the order incorrect for the reasons already stated, but the order in my view was deliberately misinterpreted to find a way out of the respondents' bind. This speaks to a wilful and mala fide breach of the order, and for this reason I find the respondents to be in contempt of court.

[38] *H.A.E v H.S.E* (3350/2022) [2024] ZAFSHC 114 (25 April 2024)

Liability for criminal contempt?

[127] Having reached the conclusion that the respondents have not displaced the presumption of wilfulness and mala fides on the papers, and are therefore in contempt, it is now necessary to reach some conclusion on the appropriate remedy.

[128] I have already explained why I have rejected the denial of wilfulness and mala fides by the respondents based on a robust approach to the papers. However, the nature of the curious hybrid that is contempt proceedings in our law now comes to the fore. Although I have found that it is unlikely that the respondents innocently misinterpreted the order, I do not think this finding can extend to one where such contumacy has been established beyond reasonable doubt on these papers. It remains conceivable that the respondents may establish, perhaps by oral evidence, that they genuinely believed that the documentation from Standard Bank would be 'voluminous' or that they could exclude the Trade 245 business from the accounting based on the carve-outs in the arbitration award.

[129] In this regard the allowance for criminal contempt proceedings to be brought on motion, and the resultant inevitable application of the *Plascon-Evans* test, is awkward.[39] But this allowance is one which has nonetheless been deemed necessary and appropriate to allow for the expeditious vindication of a court's authority.[40]

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[39] In *Fakie* para 12 the procedure is described as a 'peculiar amalgam'.

[40] As held in *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at paras 34 and 35, a contemnor is 'not an 'accused person' as envisioned by s 35 of the Constitution, and the protections afforded to a contemnor should not supersede the capacity of a non-state litigant who may not have the administrative might to establish motive. Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this

[130] In the present matter, I have found that the respondents' explanation for the volte-face in their correspondence is inadequate and that their minimalist approach to the accounting was probably deliberately designed to render the order nugatory. That finding is made on a balance of probabilities and is sufficient for a civil contempt finding. But the criminal standard requires more: it must be established beyond reasonable doubt that no genuine, if mistaken, belief in compliance existed. In motion proceedings that threshold is a high one. Given the complexity of the award and the existence of an arguable (though in my view ultimately incorrect) interpretation of its scope, I cannot say that the respondents' professed belief in compliance is so manifestly contrived that it can be excluded beyond reasonable doubt on these papers alone.

[131] Thus, to my mind the imposition of criminal sanctions, even a suspended sentence subject to the respondents purging their contempt, cannot now ensue in this matter. However, this does not exclude civil remedies. In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[41] the Constitutional Court held that:

> 'The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order.'

[132] Moreover, there should be provision made in the order for the applicants to approach the court again on supplementary papers in the event that they

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evidential burden, contempt will be established. 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 behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.'

[41] 2018 (1) SA 1 (CC)

believe that the requisite criminal standard may be met either on those papers or in a subsequent hearing of oral evidence. Persistence with the current approach adopted by the respondents, or some variant, may by that stage be susceptible to a criminal contempt finding even on papers, but I obviously express no view on that now.

THE APPROPRIATE ORDER

[133] In supplementary submissions the applicants dealt with questions posed during the hearing as to whether paragraph 3.2 of the notice of motion is formulated with sufficient clarity. In this regard the applicants say that if this Court finds that Kurt is in contempt, it has a discretion to fashion a remedy appropriate to compel compliance, including an order that the respondents behave 'in a particular manner to purge the contempt'.[42]

[134] To this end, the applicants attached to their supplementary submissions a proposed draft order entailing provisions they say would conduce to the purgation of contempt.

[135] The respondents in their turn contend that the applicants' proposed draft order seeks impermissibly to alter the award to overcome its limitations as they are perceived by the applicants. They say that the proposed order 'proclaims the applicants' true intentions, namely to secure an accounting not only beyond the scope of the award but in fact expressly prohibited by the award', quoting the applicants' proposal with the following emphasis:

> '3.2.2 All amounts paid to First or Second Respondents in relation to *any activity* forming part of the Trade 245 business;
>
> 3.2.3 The assets and liabilities of Trade 245 (Pty) Ltd from the date of its registration and *all transactions entered into by Trade 245 (Pty) Ltd* including the sale, donation, lease,

[42] *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at para 37.

transfer or disposal by Trade 245 (Pty) Ltd of any of its assets, including but not limited to the Trade 245 business and the Trade 245 domain name and associated goodwill, or any rights associated therewith.'

[136] For the reasons already stated above it should be clear that I do not agree that the above formulation does not accurately reflect the obligations which the award imposes on the respondents. As I have said, the respondents' interpretation of the scope of the award is in my view incorrect, particularly as it relates to accounting for the Trade 245 business.

[137] It is further so that a court may issue a mandamus requiring the contemnor to behave in a particular manner to ensure compliance. Nonetheless, there remains a risk that endorsing the applicants' proposed order might, in ways subtle or unforeseen, constitute a rewriting of, or gloss upon, the original award. I therefore, for this reason only, and from an abundance of caution, do not propose to adopt the applicants' draft order. In refraining from doing so, however, I should not be seen to be accepting the respondents' contentions in regard to it.

CONCLUSION

[138] In short, the respondents have failed to comply with their obligations under the award, in particular the obligation to render a proper accounting. Their interpretation of those obligations was incorrect, and the minimalist accounting they produced was apparently the product of a designed misinterpretation of the order which renders it largely nugatory. The respondents did not displace the presumption of wilfulness and mala fides. They are accordingly in contempt of court.

[139] The standard of proof applicable to criminal contempt has not, however, been met on these papers, a result primarily of the fact that . But this court's civil contempt jurisdiction is engaged. The appropriate relief is a mandamus

compelling compliance with the relevant section of the award, together with a reservation to the applicants allowing them to approach this court on supplemented papers in the event that they persist in seeking a criminal contempt finding if the respondents remain in breach of their obligations.

[140] In these circumstances, because only the civil remedy is supportable at this stage, it would be inappropriate to grant prayers 2 and 3 of Part B of the notice of motion (pertaining to a guilty finding on the offence of contempt of court and sentencing). Instead, I reformulate the relief as set out in the order below, which compels compliance with the award in its own terms without glossing or supplementing it. The only additions I have made, to make it clear that the accounting provided to date is inadequate, is that I have stated that the respondents must 'comply fully' with paragraph (h) of the award, and the word 'proper' has also been inserted to qualify the word 'accounting'. I have also confined the contempt finding to paragraph (h) of the award as I believe that the formulation in the notice of motion, encompassing paragraphs (h) to (k) of the award, is too broad: there is yet no contempt in relation to debatement, payment and so on.

COSTS

[141] The respondents have been found to be in contempt and should bear the costs. The matter involved argument on a number of issues of some complexity. Two counsel were employed by the applicants and the respondents, and the costs of two counsel should be included where two counsel were employed. In my view a 'Scale C' costs order is appropriate.

ORDER

[142] I accordingly make the following order:

a. It is declared that the First and Second Respondents are in wilful disobedience of the provisions of paragraph (h) of the arbitration award of Sholto-Douglas SC handed down on 8 December 2023 ('the Award'), which was made an order of court by Adams AJ under case number 1247/2024 on 30 January 2025 ('the Court Order').

b. The First and Second Respondents are directed, within 30 days of the date of this order, to comply fully with their obligations under paragraph (h) of the Award (unless paragraph (l) thereof applies) by rendering to the First and Second Applicants a proper accounting (fully vouched with all supporting documentation, including bank statements) pertaining to:

    i. The conduct of the Trade 245 business from inception; and

    ii. All amounts payable to the Second Applicant (Bellacart Marketing (Pty) Ltd).

c. In the event that the First and/or Second Respondent fails to comply with paragraph b above, the applicants are granted leave to approach this Court on the same papers, duly supplemented as may be necessary, for:

    i. A finding of criminal contempt of court against them; and/or

    ii. Such further relief as may be appropriate to compel compliance, including committal to imprisonment.

d. The First and Second Respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the Applicants' costs of Part A and Part B of this application on the scale as between party and party, including the costs of two counsel where so employed, on Scale C.

[redacted]

M. GREIG

ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicants:	Adv Oosthuizen SC and Adv Cutler
Instructed by:	Kramer Viljoen Norris Inc, C de Jager
For respondents:	Adv N Konstantinides SC and Adv D L Williams
Instructed by:	Malherbe Rigg and Ranwell Attorneys, Mr J Stuart