

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

CASE NO: 2462/2008

1422/2009

DATES HEARD: 20-22/04/2010

6-10/09/2010 & 15-24/09/2010

25-26/01/2011

DATE DELIVERED: 15/06/2011

REPORTABLE

In the matters between:

GENTECH ENGINEERING PLASTICS CC

APPLICANT

and

SIVALINGUM KEVIN REDDY

1ST RESPONDENT

KEITH BLAKE BELLING

2ND RESPONDENT

SHELDON MAURICE ZIMMER

3RD RESPONDENT

UREFLEX CC

4TH RESPONDENT

SUMMARY: Declarators that parties in contempt of court for want of compliance with civil order of court – requisites for same – onus of proof – whether requisites established – sanction to be imposed.

JUDGMENT

KROON, J:

Introduction

- 1] This judgment is concerned in the main with two applications for the grant of declarators that the four respondents are guilty of contempt of court for want of compliance with an order of this Court, and further

ancillary relief pursuant to such declarations.

- 2] The applicant is Gentech Engineering Plastics CC (Gentech), a close corporation conducting business in Port Elizabeth *inter alia* as a manufacturer and purveyor of polyurethane products, and products associated therewith.
- 3] The first respondent is Sivalingum Kevin Reddy (Reddy), a businessman of Port Elizabeth, and a member and employee of the fourth respondent.
- 4] The second respondent is Keith Blake Belling (Belling), a businessman of Port Elizabeth, and an employee of the fourth respondent.
- 5] The third respondent is Sheldon Maurice Zimmer (Zimmer), a businessman of Port Elizabeth, an employee and formerly a member of the fourth respondent.
- 6] The fourth respondent is Ureflex CC (Ureflex), a close corporation carrying on business in Port Elizabeth *inter alia* as a manufacturer and purveyor of polyurethane products, and products associated therewith.
- 7] In general, the respective respondents will be referred to by their names, but where convenient they will be referred to collectively as 'the respondents'.
- 8] In one of the two applications and in other associated proceedings certain other persons or entities were joined as further respondents. As will be indicated below, however, these further respondents have fallen out of the picture, and only where necessary will further reference be made to them.

Relevant legal principles

- 9] Contempt of court embraces *inter alia* the unlawful and intentional

violation of the authority of a judicial officer in his or her judicial capacity or of a judicial body, and accordingly the unlawful and intentional disobedience of a court order constitutes a crime (and may be prosecuted as such). This approach accords with constitutional principles.¹

10] It is, however, not only the State (by way of a prosecution – which, it may be recorded, is hardly ever instituted) that may pursue the imposition of a criminal sanction for the wrongful and intentional failure to obey a court order. A private litigant who has obtained a court order requiring an opponent to do or not to do something (*ad factum praestandum*) is permitted to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party to be in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-compliant party to fulfil the terms of the previous order.²

11] The test applicable when answering the question whether disobedience of a civil order constitutes contempt is whether the breach was committed ‘deliberately and *mala fide*’. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself to be entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).³

12] When committal to prison for contempt of court is sought the criminal standard of proof beyond a reasonable doubt is applicable (and thus constitutional imperatives are recognized).⁴ However, the proceedings are not only criminal in nature; their civil character remains, and civil

¹ *Fakie NO v CCH Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para [6]; *Burchell v Burchell* (ECD case no. 364/2006, [2006] JOL 16722 (E)) paras [8] – [13].

² *Fakie*, n 1 above, para [7].

³ *Ibid*, paras [9] and [10].

⁴ *Ibid*, paras [19] and [20]; *Burchell*, n 1 above, para [26].

mechanisms designed to induce compliance, short of committal to prison (or other criminal sanction), eg a declarator that the respondent is in contempt of court with associated civil relief (such as not suspending the order pending appeal and barring the contemnor from access to the civil courts until the contempt is purged) is competent even when the contempt is proved only on a balance of probabilities.⁵

13] The obligation of the applicant is to prove the requisites of contempt (the order, service or notice, non-compliance and wilfulness and *mala fides*) beyond a reasonable doubt (or on a balance of probabilities, as the case may be). But once the applicant has discharged the onus it bears of establishing knowledge and non-compliance, a presumption in its favour arises, and the respondent bears an evidentiary burden in relation to wilfulness and *mala fides*. Should he fail to advance evidence that establishes a reasonable doubt (or reverses or neutralizes the balance of probabilities in favour of the applicant) as to whether the non-compliance was wilful and *mala fide* the applicant will have proved contempt beyond a reasonable doubt (or on a balance of probabilities, as the case may be).⁶

14] The requisites of wilfulness and *mala fides* will, of course, be present when the non-complier wittingly breaches the terms of the order in question. Direct intention is, however, not essential. Intention in the form of *dolus eventualis* will suffice, ie where the non-complier subjectively foresees the possibility of his act being in contempt of court and he is reckless as to the result.⁷

15] The subjective state of mind of the non-complier is seldom capable of direct proof. Subjective foresight, like any other factual issue, can, however, be proved by inferences drawn from the party's conduct and the circumstances in which the breach of the order was committed.⁸

⁵ *Ibid*, paras [11] and [17]; *Burchell*, n 1 above, para [27].

⁶ *Fakie*, n 1 above, paras [41] and [42].

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

⁸ *Ibid*, at 518I.

16] As will appear below, part of the defence invoked by the respondents to the charges of contempt of court was that they sought, and acted upon, legal advice from their attorney, Mr Friedman. In this regard, it may be noted that it is not open to a party, in interpreting a court order, to seek legal advice in a search for ways improperly to evade the effect of the court order.⁹ Moreover, the defence of 'legal advice' requires that the circumstances under which the advice was sought and given must be fully set out, so that it may be determined whether or not the advice was predicated on incorrect facts/*mala fide* instructions.¹⁰

Background

17] Reddy, Belling and Zimmer were all previously employed by Gentech. Having earlier worked for Gentech from 1985 to 1991 Reddy resumed such employment on 31 May 1995 as production and development manager. During 2005 he became a sales representative within Gentech's sales team. He resigned from Gentech on 11 June 2008, with effect from 1 July 2008.

18] Belling was appointed by Gentech on 28 November 1988 as a sales specialist. During the following year he was promoted to sales manager. In 2000 he became general manager, but after nine months, pursuant to internal restructuring, he reverted to the position of sales manager. On 1 July 2008 he was initially suspended from his employment and subsequently, after the launch of the interdictory proceedings referred to below, his employment was terminated.

19] Zimmer commenced employment with Gentech during approximately 1988 as an internal sales clerk. After a short break of a few months during 1991 he rejoined Gentech and in May 2001 was promoted to product/specialist manager. He, too, was initially suspended from his employment on 1 July 2008 and subsequently dismissed.

⁹ *Ibid*, at 521H.

¹⁰ *Ibid*, at 522B.

20] The employment of all three respondents was subject to restraint of trade and confidentiality provisions.

21] After the respective terminations of their employment with Gentech the respondents commenced employment with Ureflex.

22] Ureflex was incorporated by Reddy and Zimmer during 1998. In papers filed in the interdict proceedings (referred to below) it was admitted by all four respondents that the incorporation of Ureflex was with the intended purpose of commencing operations in competition with Gentech. Such competing operations in fact commenced during 2008.

Court order of 8 August 2008

23] In the papers filed in the present proceedings, and during the hearing of oral evidence referred to below, this order was referred to as the 'Greenland Order', it having been granted in this Court by *Greenland* AJ on 8 August 2008 in case no. 1419/08. I will refer to it as the interdict order.

24] On 10 July 2008 Gentech instituted proceedings on an urgent basis against the respondents (and two other entities) in which certain interdictory relief was claimed on the basis of the alleged conduct of the first three respondents (acting *inter alia* via Ureflex). The relief was claimed in contract and in delict, the former arising from the first to third respondents' alleged breach of the restraint of trade and confidentiality provisions in their contracts of employment with Gentech, and the latter arising from their alleged unlawful competition and breach of fiduciary duties, including: the misappropriation of Gentech's confidential information, the diversion and exploitation of Gentech's business opportunities; the utilisation of Gentech's resources and infrastructure; the solicitation of Gentech's clients; and the passing off of Gentech's products.

25] It was admitted by the respondents that the first three respondents had acted in breach of their fiduciary duties and that their conduct had been disgraceful. In the result, the merits of Gentech's case were all but conceded by the respondents, and their opposition was limited to the issue of the period for which the interdict provided for in paragraph 2.3 of the interdict order was to be operative.

26] The substantive relief granted by *Greenland* AJ against the respondents read as follows:

'2. Pending the outcome of an action to be instituted by the applicant for final relief within one month from the date of this order the respondents are:

2.1 interdicted and restrained from utilising the applicant's confidential information and documentation in any manner or form, and in particular, but without limitation, any information relating to the applicant's clients, agents, suppliers, designs and pricing structures as set out in schedule "X" attached to the notice of motion and in the annexures to the replying affidavit as:

2.1.1 "R A 1";

2.1.2 "R A 4";

2.1.3 "R A 10" and "R A 11";

2.2 interdicted and restrained from unlawfully competing with the applicant;

2.3 interdicted and restrained for a period of twelve (12) months from contacting or soliciting the applicant's clients, agents and suppliers listed in annexure "X", and from continuing to deal with Cadbury (Nigeria) and Transwerk;

2.4 ordered forthwith to return to the applicant copies of all confidential information in the respondents' possession;

2.5 directing (sic) the second respondent (ie Belling) to permanently delete in the presence of representatives of the applicant all information contained on his computer mass storage device (flashdrive) and computer(s) relating to the aforesaid confidential information.'

(For convenience, the annexures listed in the order will hereinafter be referred to by their identifying letters. Annexure “X” contained *inter alia* lists of customers and of suppliers of Gentech and annexures “RA1” and “RA4” consisted of lists of a large number of drawings identified only by their numbers. Annexures “RA10” and “RA11” comprised documentation relating to a detailed analysis and comparison of Gentech’s profit/pricing structures).

27] On 3 September 2008 the respondents unsuccessfully applied for leave to appeal against the interdict order.

28] Under circumstances which it is not necessary to detail, the requirement relating to the outcome of the institution of action by Gentech referred to in the preamble to paragraph 2 of the order fell away, and the order became an absolute one.

29] The judgment of Greenland AJ embraced *inter alia* the following findings:

- a) Each of the first three respondents was a key man in Gentech’s organisation with a high level of knowledge regarding Gentech’s products, client base, customer lists and pricing structure.
- b) The respondents (and the other two entities cited) had cooperated with each other clandestinely to utilise Gentech’s confidential information, designs and processes to ‘springboard’ their new business in direct competition with Gentech. The conduct of the respondents was deviant in that it lacked the fairness and honesty required of them in the circumstances, and was unlawful.
- c) The circumstance that the first to third respondents’ contracts of employment with Gentech embraced covenants restraining them from employment in competition with Gentech (for varying periods) carried only marginal weight: the application did not seek the enforcement of the covenants.

The first contempt application

30] Under case no. 2462/08 Gentech launched application proceedings on

21 November 2008 in which the four respondents were cited. As was the case during the hearing of the oral evidence this application will for ease of reference be referred to in this judgment as the 'A & D application'.

31] The relief sought was:

- a) a declarator that the respondents were in contempt of the interdict order;
- b) orders in respect of the sanction(s) to be imposed on them;
- c) a joint and several order for costs on the attorney and client scale.

32] The founding papers were followed by opposing and replying papers.

33] In essence, the dispute between the parties centred around certain dealings that Ureflex had with a firm styled A & D Tyre Manufacture Technologies (Pty) Ltd (A & D) concerning the supply by the former to the latter of what was referred to as Barry mounts, a type of anti-vibration foot-mount (also referred to during the proceedings as a 'footpad'), and the issue whether such supply constituted an infraction of one or other provision of the interdict order.

34] Because of disputes of fact on the papers *Liebenberg* J issued the following order on 11 December 2008:

- '1. That the application is adjourned to a date to be arranged by the Registrar for the hearing of oral evidence, in terms of rule of court 6(5)(g), on the issue as to whether or not the respondents used the applicant's confidential information in designing, manufacturing and supplying the footpad to A & D Tyres (Pty) Ltd.
- 2. That the deponents to the applicants filed on behalf of or in support of the

applicant and the respondents are to be available at the hearing for examination and/or cross-examination.

3. That leave is granted to both parties to subpoena witnesses to attend the adjourned hearing. Affidavits by any witnesses the parties intend to call and who have not yet made affidavits as well as supplementary affidavits by witnesses who have already made affidavits and which deal with matters not included in the original affidavits must be filed by the parties at least 10 court days before the date of hearing.
4. That the provisions of rules of court 35, 36, 37 and 38 are to apply in regard to the adjourned hearing.
5. That the costs of the hearing on 11 December 2008 are to stand over for determination at the adjourned hearing.'

35] The date initially allocated by the Registrar for the hearing of the oral evidence was 18-20 March 2009. In the light of later developments, however, the hearing was postponed.

Anton Piller application

36] Prior to the date fixed for the hearing of oral evidence in the A & D application Gentech launched a further application, on 27 February 2009, in which *Anton Piller* type relief was sought. In addition to the four respondents two other entities were cited as further respondents, namely Graymaur CC (Graymaur) and a Mr Chellew (a businessman trading under the name and style of Raytech). In the nature of things, this application was brought on an *ex parte* basis. For convenience, this application (case no. 486/09) will be referred to as the *Anton Piller* application and the orders made therein as the *Anton Piller* orders.

37] The essential foundation invoked by Gentech for its seeking *Anton Piller* type relief was the allegations that the respondents were continuing to act in contempt of the interdict order, in more extensive respects than merely in relation to A & D, that they were breaching the interdict order by having contact with Graymaur, that they were

circumventing the provisions of the interdict order by the interposing of Graymaur and Raytech between Ureflex and entities named in the interdict order and via that stratagem supplying the latter entities with products (or obtaining supplies from them), that in so doing they were utilising Gentech's confidential information, designs and processes to achieve springboarding, that the respondents had not made proper discovery for the purpose of the oral hearing, and that the parties cited in the proceedings were in possession of documents or articles constituting vital evidence in substantiation of Gentech's allegations in proceedings already instituted and still to be instituted (ie further contempt applications), in respect of which there was a real apprehension that such evidence might be concealed or destroyed before any hearing or proper discovery has been made.

38] On 27 February 2009 *Jansen J* granted an *Anton Piller* type order subject to a series of conditions and safeguards. The nature of the items to be searched for and seized was stipulated in an annexure to the order. The premises to be searched were stipulated to be those of the parties cited in the proceedings plus any other premises to be pointed out by those parties in the event of any of the items to be searched for being at such other premises. The costs of the *Anton Piller* application were reserved for determination in the proceedings to be instituted.

39] The order was executed on 2 March 2009. Subsequently, all the parties cited filed papers opposing the order, but thereafter they consented to its 'confirmation' on 19 March 2009 by *Jansen J*. This second *Anton Piller* order allowed the representatives of Gentech to inspect and copy the documents, items and things seized by the sheriff pursuant to the first *Anton Piller* order, again subject to certain conditions and safeguards. The costs of the application for confirmation were reserved for determination at the instance of 'either party'.

40] On 27 May 2009 Gentech launched further proceedings under case no 1422/09. For convenience, as during the hearing of oral evidence, this application will be referred to as the Graymaur application. In addition to the four respondents with which this judgment is concerned Gentech also cited Graymaur and Volkswagen of South Africa (Pty) Ltd (Volkswagen) as the fifth and sixth respondents.

41] The relief sought against the four respondents was similar to that sought in the A & D application (paragraph 31 above). Again, the founding papers were followed by opposing and replying papers. The dispute between the parties in the main centred around the allegations by Gentech as to the further conduct of the respondents, as set out in paragraph 37 above, as well as in other respects, in relation, in particular, to the intended supply of goods to Volkswagen, and the issue whether same constituted an infraction of one or other provision of the interdict order.

42] The substantive relief sought against Graymaur and Volkswagen was the grant of an interdict, to be operative pending the outcome of an action to be instituted within 30 days, against the award, or execution, of any tenders for the supply of polyurethane products by Graymaur to Volkswagen, including two specified tenders.

43] In the result, Gentech reached settlements with Graymaur and Volkswagen, the tenders were not implemented and the proceedings against the latter two parties terminated.

44] In addition, further disputes between Gentech and the respondents concerned dealings, or alleged dealings, that Ureflex had with other entities listed in annexure "X", directly or indirectly.

45] The papers filed in the Graymaur application revealed a number of factual disputes between Gentech and the four respondents. *Jansen J*

accordingly issued the following order on 11 June 2009:

- ‘1. That the application for contempt of court against the first to fourth respondents is postponed for the hearing of oral evidence.
2. That at the hearing each party can call any witness that has testified in these proceedings and any other witness it wishes to call to give evidence, provided that a summary of such witness’s statement be made available to the opposing party/parties no less than 10 days before the hearing of the matter.
3. That the first, second and third respondents are to be available at the hearing for examination and/or cross-examination.
4. That the applicant is entitled to subpoena any other witness to appear at the hearing to be cross-examined by the applicant’s legal representatives.
5. That the provisions of rules 35, 36, 37 and 38 of the Uniform Rules of Court shall apply.
6. That this matter is consolidated with the matter of Gentech Engineering Plastics CC v S M Zimmer and Others, case no. 2462/2008 (Eastern Cape High Court, Port Elizabeth); the latter case already having been referred for the hearing of oral evidence on 11 December 2008.
7.
8. That should the applicant intend to rely on any other instances in support of its allegation of contempt that are not already dealt with in the affidavits, the applicant shall give notice thereof in the form of a summary to the first - fourth respondents not later than 20 days before the commencement of the hearing of the oral evidence.
9. That the issue of costs, including the wasted costs of 11 June 2009, are reserved for determination at the hearing of oral evidence.’

Further order in respect of costs

46]In a further application brought before *Froneman J* by Gentech the

following order *inter alia* was made on 20 October 2009:

'That the costs of the *Anton Piller* application in respect of the first to fourth respondents (reserved for determination in paragraph 11 of the order made by *Jansen J* dated 19 March) be determined in the contempt proceedings under case no. 1422/2009 (ie the Graymaur application) referred to oral evidence in terms of the order made by *Jansen J* dated 11 June 2009.'

(Other costs orders were also made, but it is unnecessary to refer thereto for the purposes of the present judgment).

Representation of the respondents at the hearing of oral evidence

47] At the commencement of the hearing of oral evidence on 20 April 2010 the respondents were represented by attorney *Friedman*. On 22 April 2010, however, Mr *Friedman* was obliged to withdraw from the matter – it was likely that he would give evidence. The matter was accordingly postponed *sine die*. I issued a further order, pursuant to a tender by Mr *Friedman* on behalf of the respondents, that the costs occasioned by the postponement be paid by the respondents jointly and severally, the one paying the others to be absolved.

48] In the result, when the hearing resumed on 6 September 2010, the respondents, fully aware of their rights in respect of legal representation, advised me that they would represent themselves, and I further granted leave for Ureflex to be represented by Reddy, then its sole member.

49] Subsequently, on 23 September 2010, the hearing was again postponed to 25 January 2011. Prior to the latter date Mr *Friedman* had filed papers reflecting that his firm had been reinstated as the attorneys acting for the respondents. It had been envisaged that counsel would be instructed to appear for the respondents, but Mr *Friedman* had not been sufficiently instructed on that score and because he himself could not appear for the respondents – he had been a witness at the hearing – he was obliged once more to withdraw.

The first three respondents continued to represent themselves and Reddy to represent Ureflex.

Interlocutory rulings

50] When the hearing of oral evidence commenced Mr *Friedman* moved two applications for interlocutory relief. I dismissed both applications with costs and intimated that the reasons for my rulings would be furnished later. The reasons now follow. I preface my comments by recording that in what follows I have not considered it necessary to deal with each submission and counter-submission made on behalf of the parties.

51] The first application sought an order that Gentech make available for inspection the documents referred to in an earlier notice in terms of rule 35(3) delivered by the respondents. The documents were 'all of [Gentech's] invoices, supplier notes, delivery notes, quotations and any communications in respect of business dealings [between Gentech and a number of entities] for the period January 2007 to the 31 July 2008'. The named entities comprised 21 businesses.

52] Ancillary orders sought were that, in the event of the above relief being granted, the matter be postponed and that Gentech pay the wasted costs of the postponement. These further prayers were, however, abandoned, no doubt because one of the points taken on behalf of Gentech in resisting the application was that it was a ploy to engineer a delay in the proceedings.

53] All of the 21 entities referred to above were listed as suppliers of Gentech on annexure "X" to the interdict order. Only in respect of one of them, Belting Supplies, had Gentech made the allegation that the respondents breached the interdict order, ie paragraph 2.3 thereof, in that the respondents made commercial contact with Belting Supplies.

54] Gentech resisted disclosure of the documents in question *inter alia* on the grounds that the contents of the documents were irrelevant and that the application sought disclosure of confidential information of Gentech in circumvention of the interdict order. It is necessary only to refer to the first aspect.

55] I was not persuaded that any of the counters invoked by the respondents, and echoed by Mr *Friedman* during argument, had any merit. I preface my remarks by commenting that the oft-stressed observation, both in their papers and in argument, that the respondents faced possible committal to prison should findings of contempt of court be returned against them, could not and did not found any subversion of principles, relating to both procedural and substantive law, that were otherwise applicable.

56] The main contention was that in the interdict proceedings Gentech had been guilty of exaggeration in its claims of confidential information and of its relationships with other businesses. Disclosure of the documentation sought would reveal what the true position was in respect of the 21 entities listed by the respondents, either that Gentech had no relationships with the entities or that the nature of the relationships was such that they were not worthy of protection.

57] A number of results, so it was contended, would flow therefrom. First, the 'overall credibility' of Gentech (ie its witnesses) would be adversely affected. Precisely in respect of which factual disputes that required to be resolved in these proceedings the contended for effect on Gentech's credibility would come into play, was, however, not elucidated. I was satisfied that a collateral matter that was so peripheral as that presently under discussion could not possibly have any cognizable influence on any of the issues that had to be decided in these proceedings.

58] Second, if my understanding and paraphrasing of the argument were correct, it was contended that such alleged construction of the

documents in question would enjoin a new approach to the interpretation to be attached to paragraph 2.3 of the interdict order and to the decision what would constitute an infraction thereof.

59] I digress for a moment to record that the respondents averred at one stage that Gentech had adopted the stance that the interdict order had to be complied with to its strict letter and that that literal approach entailed, eg that Belling could not make a private purchase of a bottle of wine from Makro, a large department store listed on annexure “X”, as such would constitute ‘contact’ with Makro. Suffice it to say that the respondents had clearly misread Gentech’s attitude. The attorneys for Gentech had done no more than convey that strict compliance with the interdict order would be insisted upon (without according to it the interpretation referred to). It was in fact Mr *Friedman* who, in correspondence with his clients, expressed the view that strict compliance with the order would require adherence to the interpretation in question; hence, an objection on behalf of the respondents during earlier proceedings to such an interpretation being applied. Counsel for Gentech had, however, in open court immediately put the respondents right, and, as was to be expected, stated that Gentech never had the intention to seek to apply the interpretation in question. As I put it during argument, surely no-one would seriously suggest the interpretation referred to (although that is what Mr *Friedman* did in the correspondence referred to, and in fact he sought to pursue that interpretation in his testimony during the hearing of oral evidence). What the interdict order proscribed was commercial contact with, and solicitation of, an entity listed on annexure “X” in the fields within which Gentech did business. As was stated in Gentech’s papers in opposition to the grant of the interlocutory relief sought:

‘Where the dealings in question do not encompass the commercial activities protected by the terms of the order, there can be no question of contact or solicitation in contravention of the court order’.

60] It was averred by the respondents, and repeated during argument, that

when annexure “X” was agreed upon (the respondents, it may be noted, then being represented by senior counsel) proper thought had not been given to its content, that content was in fact erroneous, as would be demonstrated if the documents of which disclosure was sought had the content contended for, in that the names of the entities concerned would then have been wrongly included in annexure “X”. The same would apply to any other entity on the annexure with which Gentech had no relationship or one that was not worthy of protection. The respondents were accordingly free to contact or solicit any such entity as they wished.

61] I enquired of Mr *Friedman* whether the effect of his submissions was in fact an invitation to me to revisit the application that came before *Greenland AJ* and to vary the terms of the order made by him. The attorney was quick to disavow any such intention and acknowledged, correctly, that such invitation would not be a valid one. Despite his disclaimer, however, the argument presented clearly did seek to do just that.

62] I turn to deal specifically with the issue relating to Belting Supplies. It is to be stressed that the case Gentech sought to make was *inter alia* that the respondents had breached paragraph 2.3 of the interdict order. I have already, in paragraph 59 above, recorded what paragraph 2.3 proscribed. Whatever the documents of which the respondents sought disclosure might have revealed, Belting Supplies was listed in annexure “X”, and the respondents were prohibited from contacting or soliciting Belting Supplies in the sense referred to in paragraph 59 above. Whether the respondents did so and were in contempt of court were the issues that I was required to resolve. The documents in question were not relevant to those issues.

63] Third, it was contended that the documents that the respondents required to be disclosed would have a bearing on the outstanding issue of the costs of the *Anton Piller* application, reserved for decision in the present proceedings. It was averred in the respondents’ papers filed in

the interlocutory application, and sought to be stressed by Mr *Friedman* during argument, that in the Graymaur application the papers filed in the *Anton Piller* application were incorporated by direct reference.

64] It is so that substantial portions of the *Anton Piller* papers were incorporated by direct reference into the Graymaur application. But I did not understand how the documents at present in issue would bear on the issue of the costs of the *Anton Piller* proceedings. What I would stress is that, save for Belting Supplies, none of the entities named by the respondents featured in the Graymaur application.

65] Echoing sentiments already recorded earlier in another context, it was contended on behalf of the respondents that the documents could expose exaggeration on the part of Gentech in respect of its confidential information and trade relationships, also in its papers filed in the *Anton Piller* application, which would be a relevant consideration when I exercised my discretion in making an order in respect of the costs of that application.

66] There is a short answer to that submission. It may be recorded that in his judgment of 20 October 2009 *Froneman J* explained why he ordered that the costs of the *Anton Piller* application (in respect of the present respondents) be determined by the Court finally hearing the Graymaur application (paragraph 46 above), namely because that Court would be in a better position to decide whether the grant of the *Anton Piller* order had any material effect on the outcome of those proceedings. Notwithstanding that both the A & D and the Graymaur matters were referred for the hearing of oral evidence, the present proceedings remained application proceedings. The Court will not lightly allow further oral evidence in application proceedings (which on analysis was what the respondents were seeking) if the only issue on which that evidence might have a bearing relates to costs. Instead, the Court will do the best it can with what is before it (cf *Eskom v Rini Town Council* 1992 (4) SA 96 (E) at 99D).

67] The other application brought on behalf of the respondents at the commencement of the hearing of oral evidence sought relief of a two-fold nature. First, the respondents sought orders amplifying or varying the two earlier orders referring the present applications for the hearing of oral evidence. Second, an order was sought that Gentech produce certain items at the hearing.

68] The first amplification sought applied to both earlier orders. The respondents requested that the words 'unless the court otherwise directs' be inserted at the end of paragraph 3 of the order in the A & D application (paragraph 34 above) and at the end of paragraph 2 of the order in the Graymaur application (paragraph 45 above).

69] However, it will suffice to say that it was always open to this court to give such directions in the case of any further witness either side wished to subpoena, and there was no necessity for any order amplifying the earlier order.

70] The further amplification sought by the respondents of the earlier order made in the A & D application was the insertion of a new paragraph, to be numbered 3(a), and reading as follows:

'Either party is entitled to subpoena any other witness to appear at the hearing to be cross-examined by that party's legal representative.

71] The variation sought of the earlier order made in the Graymaur application was the substitution for paragraph 4 thereof of a new paragraph reading as per the proposed new paragraph 3(a), set out in paragraph 70 above.

72] The items which the respondents desired should be produced by Gentech were described as follows:

- '1. the master sample in the applicant's storeroom of the McCain's de-husking roller (the original product);
- 2. the original drawing in respect of the McCain's de-husking roller;
- 3. the applicant's de-husking roller manufactured in accordance with its own drawing.'

73] Mr *Friedman* again sought to lay stress on the fact that the respondents were facing a possible criminal sanction, and submitted that fairness required that the respondents be given the sinews of war requested. I do not find it necessary to add anything to what I have already said on this score in paragraph 55 above.

74] I will deal first with the issue of the de-husking roller. In the *Anton Piller* application it was alleged on behalf of Gentech that it had designed a de-husking roller for a customer styled McCains, and supplied same to it, and that the respondents had made use of the design. The relevant drawing is one of those referred to in the interdict order. Mr *Friedman* advised me that it was the respondents' averment that the allegations on behalf of Gentech were false in that the article produced by Gentech had in fact been cloned from an original product by an employee of Gentech, a Mr Booysen.

75] However, it is important to stress that no contempt proceedings have been instituted by Gentech in respect of any alleged dealing by any of the respondents with McCains or any alleged use by them of the drawing referred to above. It was argued on behalf of Gentech that the de-husking roller issue was therefore irrelevant to the present proceedings.

76] Mr *Friedman's* counter submission was that the de-husker issue was 'part and parcel of the contempt proceedings'. I disagree. I agree that it is irrelevant. In so far as the attorney's argument once again embraced the contentions that Gentech had been guilty of exaggeration and that its overall credibility was compromised, the remarks I have made earlier on this score are *mutatis mutandis* of application. Again, it was emphasised that I was being asked also to

make a costs order in respect the *Anton Piller* application, and it was argued that the de-husker issue was relevant to that issue. Again, however, the remarks made earlier in respect of the undesirability in application proceedings of permitting oral evidence to be tendered if the only issue on which that evidence might have a bearing relates to costs, find application.

77] In elucidation of the need for the respondent to have the benefit of the amplification of the earlier order made in the A & D application quoted in paragraph 70 above Mr *Friedman* advised me that it would enable him to subpoena and cause a Mr Gomes, an employee of Gentech, to enter the witness box. The evidence he wished Gomes to give (unless, as it was put, he perjured himself) was confirmation of the testimony that he, Mr *Friedman*, stated Reddy would give, namely to the following effect: that he, Reddy, had obtained a foot-mount manufactured by a firm styled Ashton Seals; that he cloned same and the resultant product was handed by him to Gomes for a drawing thereof to be prepared by the latter; that Reddy approved the drawing; it was that drawing that Gentech used in the manufacture of its foot-mount and in respect of which it was asserting confidential information, which in the circumstances it was not (apart from the fact that the respondents also claimed that the foot-mount they supplied to A & D was materially different from Gentech's product). This evidence would stand in contradiction of Gentech's case that its drawing was unique and that same had been utilised by the respondents to make the article supplied to A & D.

78] Mr *Friedman* further stated that he anticipated that Gomes would prove to be uncooperative, if not hostile, and would likely not be prepared to attend a consultation and make an affidavit.

79] Adverting to Mr *Friedman's* statements from the Bar as to what Reddy's testimony would be Mr *Ford*, for Gentech, pointed out, first, that in the papers filed in the A & D application *Reddy had confirmed Belling's statement* that after he had replicated the foot-mount obtained

by him it was *he, Reddy*, who prepared the drawings of the resultant product. Second, Mr *Ford* pointed out that Mr *Friedman's* statements from the Bar as to what Gomes's attitude might be were no more than expressions of opinion.

80] Counsel then adopted a question I put to him, whether the application moved by Mr *Friedman* was not in any event premature and developments in the case should be awaited, eg the content of the evidence that Reddy would give, more concrete information about the stance of Gomes, and the respondents' decision on whether they would persist in seeking Gomes's presence in the witness box. I raised the same question with Mr *Friedman* and I understood him to concede that evidence given by Reddy would indeed be relevant and could possibly dispose of the perceived need to call Gomes as a witness, and to accept that he could bring an application for the relief he sought, later in the proceedings, if so advised.

81] In passing, Mr *Friedman* also mentioned Booyesen as a possible witness in the A & D application. The remarks made above would, however apply in respect of Booyesen as well.

82] Finally, Mr *Friedman* advised me that the need for the variation of the referral order in the Graymaur application arose out of his wish to call Booyesen as a witness to give evidence as foreshadowed earlier in respect of the McCain de-husking roller issue. His submissions were of the same ilk as those made in respect of Gomes and the foot-mount. The reasons furnished earlier why I refused to issue an order that Gentech produce its de-husking roller also rendered it inappropriate to receive the evidence of Booyesen thereanent which Mr *Friedman* stated from the Bar would be given. Again, a basis for ordering the variation sought was absent.

83] The costs orders made by me in respect of the two interlocutory applications dealt with above were in accordance with the general rule that costs follow the event. These costs should of course be paid by

the respondents on a joint and several basis.

84] When, after the postponement referred to above, the hearing resumed on 6 September 2010, Mr *Ford* applied for an order that the respondents comply with a request in terms of rule of court 35(3) filed earlier by Gentech. The respondents were required to make available for inspection the files and other documentation relating to the advice given by attorneys Friedman Scheckter to the respondents, whether before or after the termination of the employment of the first three respondents with Gentech, with regard to the respondents' conducting business in competition with Gentech.

85] The background to the application was the frequent reference by Belling, who had not yet completed his spell in the witness box, to the respondents' having from time to time acted on legal advice received from Friedman, and, second, the delivery by the respondents of a statement authored by Friedman, with annexures thereto (including certain correspondence between him and the respondents), which foreshadowed the evidence he would give when called to testify on behalf of the respondents, in respect of legal advice he had furnished to the respondents.

86] Mr *Ford* submitted that without access to the further documentation required to be disclosed, his further cross-examination of Belling, and of the other respondents which was to follow, would be unjustifiably restricted, and he pointed out that there had clearly been a waiver of privilege on the part of the respondents in respect of the advice in question. Mr *Ford* recognized, however, that he could not seek a blanket disclosure of the documentation in question, but only of those documents or portions of documents in respect of which the waiver of privilege operated and which were of a relevant nature. He therefore accepted that any order I make should provide for 'checks and balances' to safeguard the interests of the respondents against unwarranted disclosure.

87] The attitude adopted by, or on behalf of the respondents, was that there was no objection to the order sought, provided that the 'checks and balances' referred to were incorporated.

88] I accordingly granted the following order, the terms of which were agreed upon between the parties (the respondents clearly having had the benefit of advice from Friedman):

- '1. Subject to paragraphs 2 to 4 below, the first to fourth respondents (collectively, "the respondents") be and are hereby directed to make available for inspection by the applicant and/or its legal representatives the files and documentation of attorneys Friedman Scheckter, the respondents' erstwhile attorneys, pertaining to the following matters before this Honourable Court:

- 1.1 Case no. 1419/08;
- 1.2 Case no. 2462/08;
- 1.3 Case no. 468/09;
- 1.4 Case no. 1422/09,

in relation to advice given by the said attorneys regarding the conduct by the respondents of business in competition with the applicant whether before or after the termination of the first to third respondents' contracts of employment with the applicant in June and July 2008.

2. Mr GJ Friedman is hereby afforded an opportunity until 12 noon, 7 September 2010 to review the said files and documents and remove therefrom all documents which he considers irrelevant to the matters identified in paragraph 1 above.
3. Upon completion of the exercise referred to in paragraph 2 above, Mr Friedman shall deliver to:
 - 3.1 the applicant's attorneys those portions of the files which he considers relevant to the identified matters; and
 - 3.2 Mr RH Parker of Pagdens Attorneys all or any documents removed by Mr Friedman for Mr Parker to review and consider whether the documents so removed are, in his opinion, relevant to the matters referred to in paragraph 1 above.
4. Mr RH Parker shall complete his review within 24 hours of delivery to him of

the documents so removed by Mr Friedman.

5. Should a dispute arise between Messrs Friedman and Parker regarding the relevance of any document such dispute shall be referred to this Honourable Court for decision.'

89] Neither side pressed for any costs order in respect of the application.

That attitude was correct as the application was no more than part of the day's proceedings in the course of the oral hearing. In the result, no dispute arose as to what documentation should be discovered.

90] At the same time Belling, on behalf of all of the respondents, made a new application for leave to call witnesses without the need to submit prior affidavits or statements by them (which, it was said, could not be obtained). Two of the witnesses referred to, a Mr Nel and a Mr de Reuck, had, however, deposed to affidavits filed in the proceedings on behalf of Gentech and it was accordingly open to the respondents, without an order from me, to require their attendance in the witness box for the purposes of cross-examination, if that was a course the respondents were advised to follow. The remainder of the application was in fact a renewal of the applications made earlier by Mr *Friedman* in respect of the witnesses Gomes and Booyesen, to which a third name, Britnor, was added. No basis for the grant of the relief was laid before me and the respondents were advised by me that if, in the light of further developments in the hearing, they were advised to seek the presence of the witnesses in the witness box, they were entitled to renew the application, with a proper basis being laid therefor. Accordingly, no order was made on the application. Again, no costs order was warranted. (In the result, although afforded an opportunity later, the respondents did not renew the application).

91] The next interlocutory application was brought by Gentech on 15 September 2010, for leave to call a Mr Stuurman as a witness notwithstanding that a summary of his evidence was not made available within the time limit fixed by the court when the matter was referred for the hearing of oral evidence. In fact, a copy of the

witness's statement was handed to the respondents at the time the application was moved. The application was formally opposed by the respondents. I granted the application, but without giving reasons for my ruling. Those reasons, in brief, now follow.

92] Stuurman was an employee of Transwerk, an entity specifically named in paragraph 2.3 of the interdict order, as well as being included in annexure "X", also dealt with in the same paragraph of the order.

93] In short, his evidence was to relate to an alleged visit paid to him at his place of employment during December 2008 by the first three respondents and a fourth person (whom Gentech alleged was Chellew), for the purposes of soliciting business from Transwerk for Ureflex. The alleged meeting was placed in dispute.

94] The nature of the evidence had been foreshadowed in the papers filed on behalf of Gentech in the *Anton Piller* proceedings. And the respondents had also then put up their counter to the evidence. In addition, the issue had also been canvassed during the part of the oral hearing that had taken place prior to the application being brought, namely during the cross-examination of Belling, Chellew and Reddy.

95] Initially, Stuurman's attitude was that he was not prepared to make an affidavit or become involved in the proceedings between the parties, notwithstanding that he had telephonically consulted with Mr Gough. Gentech's attorney, who had thereafter addressed a letter to Stuurman recording the content of the consultation. Thereafter, however, a subpoena was served on him, and shortly before the interlocutory application was brought Stuurman relented and signified his willingness to testify and favoured Gough with the statement referred to above.

96] The objection of the respondents to the grant of the application was simply the formal one that the time period prescribed for the furnishing of a witness statement had not been complied with. The respondents conceded, however, that they did not seek to argue that the grant of

the application would occasion them any prejudice. I was satisfied that in the circumstances the late furnishing of the statement had been adequately explained, and that in the light of the absence of prejudice to the respondents, and the other history set out above, the interests of justice required the grant of the relief sought by Gentech. No costs order in respect of the application was sought or warranted.

97] On the same date, and despite opposition by the respondents, I made a further order granting Gentech leave to call a Mr Rudolph notwithstanding that a statement by him had not been furnished to the respondents. The reasons for that ruling follow.

98] An affidavit by Nel was filed in support of Gentech's application. It was, in short, to the effect that after Chellew had given evidence, on 9 September 2010 (and Nel had formed the impression that Chellew had 'attempted to downplay his involvement in the market for polyurethane products'), Nel decided to have another look at the documentation discovered pursuant to the *Anton Piller* proceedings. A bank statement of Raytech (the vehicle through which Chellew conducted business) reflected that in December 2008 a payment of some R35 000,00 had been made to a firm styled Powertech Calidus (Powertech), which carried on business in Johannesburg. The latter was a supplier of Gentech listed in annexure "X". As will appear later, it was part of Gentech's case that in order to circumvent the interdict order the respondents had utilised the services of Raytech as a front for Ureflex. Nel contacted Rudolph, a former employee of Powertech. He was advised that Zimmer had telephonically contacted him at Powertech with an enquiry about a certain product (which Powertech was supplying to Gentech for onward sale to other parties), and that Zimmer had left Rudolph under the impression that the enquiry was being made on behalf of Gentech. Subsequently, Zimmer telephoned him again to advise that an order for the product would be placed by Raytech. This was done; hence, the payment referred to earlier. The above events were recorded in an email addressed to Gentech on behalf of Rudolph on 13 September 2010.

99]The opposition to the grant of the leave sought by Gentech was founded on a two-fold basis. First, it was contended that Gentech had been guilty of considerable delay in securing the information in question – the investigation required could have been undertaken at the time access to the *Anton Piller* documentation had been secured during March 2009. Second, the possibility was posed of prejudice to the respondents should the end-user of the product obtained by Raytech from Powertech not be available to state whether or not Zimmer had been in contact with him.

100]Neither objection had merit. As Mr *Ford* sought to stress, the documentation disclosed pursuant to the *Anton Piller* proceedings was voluminous, and no weighty criticism was to be levelled at Gentech for its failure earlier to pick up the payment in question and the significance thereof. In any event, the delay contended for was insufficient to justify refusing Gentech the leave it sought. Nor was I satisfied that the possible prejudice contended for was present. Apart from the speculative nature of the non-availability of the end-user in question I was persuaded that it would be neither here nor there whether Zimmer had been in contact with him or it.

101]The nature of the evidence to be given by Rudolph (who, I was told, was reluctant to be involved in the proceedings and would have to be subpoenaed) was, in my view, sufficiently foreshadowed in the email referred to above. In all the circumstances the interests of justice dictated that Gentech be granted leave to call Rudolph as a witness. No costs order in respect of the application was sought or warranted.

102]The final interlocutory order I made was pursuant to an application made by the respondents on the morning of Monday 20 September 2010. Leave was sought to adduce certain further oral evidence, including that of witnesses to be recalled (in certain instances without filing a summary of the envisaged evidence), and, second, a postponement of the proceedings was sought in order to afford an

opportunity to the respondents to gather the evidence in question.

103]An immediate postponement was not requested, however, as there was other evidence available that was to be led. In fact, the day was fully occupied and the matter was then postponed to Wednesday 22 September 2010 – the next witness, Friedman, was not available on 21 September 2010. Judgment on the application was reserved until 22 September 2010.

104]I granted only some of the relief sought and reserved the issue of costs. I gave reasons at the time for my rulings and it is unnecessary to repeat same in this judgment. I will merely record the relief that was granted.

- (a) I granted leave to the respondents to recall Chellew, who had already testified, to the witness box to give evidence bearing on that given by Rudolph, who had been called as a witness by Gentech.
- (b) Leave was granted for Zimmer, who had already testified, to return to the witness box to canvas his telephone records for the period 1 – 12 December 2008.
- (c) Similar leave was granted in respect of the recall of Reddy to the witness box to canvas the telephone records of Ureflex for the same period.
- (d) Similarly, leave was granted to adduce the evidence of representatives of telephone companies concerning certain relevant telephone records (if need be, and with my further leave, without the filing of affidavits by the witnesses or summaries of their evidence).

105]I subsequently amplified the orders by giving directions for the furnishing of summaries relating to the evidence to be given of telephone records. In the result, the further evidence tendered was that of Belling (*in lieu* of Reddy) relating to Ureflex's telephone records, of Zimmer relating to his cellphone records, and of Chellew in response

to the evidence given by Rudolph.

106]Friedman gave evidence on 22 September 2010 and Chellew was recalled to the witness box on the following day. Thereafter the matter was postponed to 25 January 2011. Both sides agreed that no question of costs arose. That attitude was correct. The application referred to above was properly to be regarded as an integral part of the day's hearing, and the costs attendant thereon were accordingly properly costs in the cause. The hearing would not have been completed on 24 September 2010, the last day of the third term, and the hearing would therefore inevitably have had to be postponed. Therefore, no wasted costs were occasioned by the postponement.

Aspects to be proved

107]It is common cause that the interdict order was granted and that the respondents received notice thereof. It is in dispute, however, whether Gentech established that the respondents committed the breaches of the interdict order alleged by the former, and same had accordingly, to be proved by Gentech. If it be found that Gentech discharged the onus resting on it in respect of that proof, the next enquiry would be whether the respondents satisfied the evidentiary burden on them in respect of the requisites of wilfulness and *mala fides* (paragraphs 11 *et seq* above).

108]It is to be emphasised that it was required of Gentech to establish a case against each of the four respondents. However, where applicable the principles of the doctrine of common purpose would be operative – and it is Gentech's case that throughout the respondents acted in concert - and as regards Ureflex the maxim *qui facit per alium facit per se* would also find application. In fact, subject to one qualification, it was not placed in dispute that the first three respondents had throughout acted in concert and on behalf of Ureflex. There was in fact evidence that the first three respondents had entered into a 'partnership agreement' in terms of which they would conduct the

affairs of Ureflex. The qualification referred to was founded on the allegation that at a certain stage Zimmer dissociated himself from the common operation and withdrew from the activities of Ureflex, at least for a period of some months. I will return to this issue when it becomes relevant for the purposes of this judgment.

Aspects not constituting issues

109]It requires to be emphasised that the enquiry with which the present proceedings were concerned was solely whether the respondents deliberately and wittingly acted in breach of one or other of the provisions of the interdict order. The proceedings were not launched in order to secure the enforcement of any restraint of trade covenants incorporated in the contracts of employment the first three respondents had with Gentech.

110]Accordingly, the fact that Mr *Ford* succeeded, during the hearing of oral evidence, in extracting concessions from the respondents that their employment with Gentech had been subject to restraint of trade provisions was neither here nor there. It may be that in appropriate circumstances unlawful competition is properly restrained by way of enforcement of a restraint of trade provision. However, notwithstanding that the interdict order, in paragraph 2.2, proscribed unlawful competition by the respondents with Gentech, reliance on restraint of trade provisions did not form any part of the case made out by Gentech in its papers.

111]Two allied aspects are the following. First, a charge levelled by Mr *Ford* during cross-examination of the first three respondents was that the latter, in participating in certain of the transactions or conduct that were the subject of Gentech's complaints, had utilised Gentech's alleged confidential information in the form of the relationships that had developed between Gentech and the customers/suppliers in question (ie entities not listed in annexure "X"), and had therefore competed unlawfully with Gentech.

112]However, while, in appropriate circumstances, relationships that a business had developed with its customers/suppliers may constitute protectable interests that would justify the enforcement of a restraint of trade covenant, such relationships (in contradistinction to eg customer/supplier lists) do not, in my judgment, constitute confidential information. And on a proper analysis and interpretation of the interdict order, the intention thereof was not to protect relationships beyond those with customer/suppliers identified in annexure “X”. Had a blanket protection of all customer/supplier relationships been intended the interdict order would have been so worded. It matters not therefore that it was conceded, notably by Zimmer, that Gentech’s relationships with its customers/suppliers constituted part of Gentech’s confidential information.

113]Second, it was put to the respondents by Mr *Ford* that their use at Ureflex of the skills and know-how they had acquired during their employment at Gentech was a breach of the interdict’s prohibition against the use of Gentech’s confidential information (ie apart from confidential information relating to eg Gentech’s designs, processes and pricing structures), and, again, constituted unlawful competition.

114]However, counsel’s propositions to the respondents were unqualified by a restriction to skills and know-how that were not in the public domain, but referred to any skills and know-how the respondents acquired. There was also no endeavour to show which skills and know-how, if any, fell outside the public domain. It is therefore appropriate to record that in *Automotive Tooling*¹¹ approval was given to the following passage in *Aranda Textile*:¹²

‘A man’s skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work *and has thereby provided the workman with knowledge*

11 *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* [2007] 4 All SA 1073 (SCA) para [8].

12 *Aranda Textile Mills (Pty) Ltd v Hurn* [2000] 4 All SA 183 (E) para [33].

and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills *in the public domain* became attributes of the workman himself, do not in any way belong to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.'

115]The interpretation of the interdict order must be in accordance with these principles.

Alleged deficient disclosure by the respondents

116]Mr *Ford* sought to emphasise that an analysis of the papers and evidence in the various proceedings painted a clear and unambiguous picture of persistent reticence on the part of the respondents to play open cards with the Court as to wrongdoing on their part, and an attitude of concealment, until, from time to time, further information placed before the Court by Gentech, rendered disclosure inescapable.

117]The effect thereof, so counsel argued, was two-fold. The credibility of the respondents was exposed as being seriously wanting. Second, the attitude of the respondents *vis-à-vis* the Court revealed by their selective candour, enjoined circumspection in the assessment of their claims of *bona fides* in the matter of compliance with the interdict order. In my judgment, the argument of counsel was well-founded. Counsel invoked *inter alia* the aspects referred to in the paragraphs that follow.

118]As recorded in paragraph 24 above, Gentech, in launching the interdict proceedings, set out a series of allegations against the respondents which *inter alia* charged the respondents with clandestinely setting up a new business, via Ureflex, to operate in competition with Gentech, using the latter's confidential information and trade secrets, and which they in fact commenced operating prior to

leaving Gentech's employ, as they in due course intended to do; in short, a 'springboarding' exercise.

119]In the main answering affidavit, dated 18 July 2008, deposed to by Belling, and confirmed by Reddy and Zimmer, limited admissions of alleged misconduct by them, and breaches of their fiduciary duty towards Gentech, were made. It was, however, averred that Gentech had grossly exaggerated the position. Belling stated in terms:

'I, together with Reddy and Zimmer, am filing an affidavit making a full and complete disclosure of all our activities to the allegations of unlawful behaviour and breach of fiduciary duty towards the applicant.

.....

I state categorically that the truth of the matter is comprehensively set forth in this affidavit.'

120]The respondents did not, however, live up to these undertakings. What, in the main, was admitted, was that preparations had been set in train to go into business with two other entities (in direct competition with Gentech), that business from Cadbury (Nigeria) was directed from Gentech to one of these entities, that Reddy had removed a 'tool kit' of Gentech (an integral part of Gentech's equipment), and that attempts were made to secure custom from other clients of Gentech.

121]While it was admitted that Ureflex had taken certain steps towards setting up the infrastructure to enable it to commence business (in competition with Gentech) and had manufactured some samples, it was categorically denied that any of the respondents had as yet commenced trading and it was alleged that Ureflex was in fact still dormant. Any other alleged unlawful activity than that set out in the answering papers was denied.

122]While giving evidence during the oral hearing Belling was confronted with a document, dated 14 February 2008 and styled 'START UP/TIMING PLAN (annexure FA13 to the founding papers in the Graymaur application). The document was one of those discovered

pursuant to the *Anton Piller* proceedings. In short, this document, of which Belling was the author, recorded comprehensive proposals adopted by the first to third respondents concerning a time-table for various steps to be taken in respect of the setting up of a business to compete with Gentech. A paragraph therein recorded the following:

'We will have customer history, pricing structures and supplier information presently utilised by Gentech.'

123]Under cross-examination Belling admitted that he had thought of copying the information referred to, which was on his computer in his office at Gentech, but had decided against doing so after receiving legal advice from Friedman that he should leave Gentech without taking anything with him. He claimed, however, that, he having worked with the information at Gentech for such a long period, it was 'in his head'. Be that as it may. There was no mention in the answering papers in the interdict proceedings either that this information was 'available' to the respondents or that it was their intention to utilise same to compete with Gentech (which, the document added, would have a crippling effect on Gentech). This is fairly to be stamped as a material non-disclosure. It may be noted that Belling further conceded that he was not suggesting that Friedman advised him that as long as he took no documentation away with him he was free to use Gentech's confidential information. His belated comment thereafter that he did not consider the information to be confidential to Gentech, carried its own refutation.

124]For the sake of completeness it may be noted that the document revealed the first to third respondents' plans to subvert Gentech from within by, eg filching key staff and securing the termination of agency agreements held by Gentech. The plans were characterised by their furtiveness and were labelled by the respondents themselves as a 'conspiracy', and their expectation was that their envisaged conduct would be viewed as 'springboarding, unfair competition, disclosure of confidential information.'

125]After the answering papers in the interdict proceedings were filed further information came to Gentech's attention. It was discovered that the first to third respondents had prior to their departure from Gentech surreptitiously commenced steps towards a detailed analysis and comparison of Gentech's profit/pricing structures. The relevant documents were annexed to the replying papers as annexures "RA10" and "RA11".

126]The second discovery was of a computer disc in Belling's office onto which, on Belling's instructions, a co-worker at Gentech had downloaded over 4000 of Gentech's drawings (annexure "RA1" to the replying papers had reference). Similarly, Belling caused one of Gentech's draughtsmen to prepare 23 drawings of parts manufactured by Gentech (annexure "RA4" to the replying papers).

127]In the light of the above Gentech filed an amended, amplified, notice of motion which included a reference to the annexures referred to above as well as the incorporation of new prayers 2.4 and 2.5 (and the order granted by the Court followed suit).

128]In respect of annexures "RA10" and "RA11" the first three respondents, in a fourth set of affidavits, admitted that they had busied themselves therewith, during March/April 2008. It was alleged, however, that at about the same time relations with one of the other entities with whom the respondents initially wished to join in a business to compete with Gentech, deteriorated. On consulting with his attorney Belling was advised that in the light of that development full information of the respondents' plans would probably become available to Gentech, and Belling was warned that the respondents should conduct themselves 'correctly'. The documents prepared by the respondents were accordingly returned to Belling's office where they remained until the end of June, when, just before his suspension, Belling allegedly made use thereof for another, allegedly legitimate, purpose. The original failure to mention that the respondents had busied themselves

at all with the analysis was in itself a material non-disclosure. To the extent that the respondents' explanation set out above sought to reflect that consequent upon the advice from their attorney they had abandoned their intention to utilise the analysis, it may be noted that the claim does not square with the fact that on 21 May 2008 Belling gave an instruction to Mrs Rose-Innes (a credit controller at Gentech, who had been targeted by the respondents to join them in the enterprise that was to compete with Gentech) to undertake a refinement of the analysis (annexures FA23-24 to the founding papers in the Graymaur application have reference – documents retrieved during the execution of the first *Anton Piller* order, and which also had not been the subject of earlier disclosure by the respondents). During his oral testimony Zimmer admitted that he was aware of Belling's analysis of the price structures which would be useful in identifying the most profitable products on which to focus their envisaged business.

129]The earlier incomplete disclosure was persisted in by the respondents in their answering papers in the A & D application, which were filed on 28 November 2008 (ie, before the *Anton Piller* proceedings were launched). In those answering papers the respondents merely affirmed that the issue of Gentech's client and supply lists had been dealt with by them in the interdict proceedings.

130]During his oral evidence this issue was again raised with Belling. Initially, he reiterated that in doing the pricing analysis he was legitimately doing work assigned to him in his capacity as sales manager; he had commenced same in December 2007 and had not completed the task by June 2008. Immediately thereafter, however, when pressed on this score, he admitted that he had since February been furthering the interests of the business he was planning to enter, and that his alleged legitimate 'function' 'ran in conjunction with the bad things [he] was doing,' and that he was killing two birds with one stone. Belling also confirmed that the following comments made by Friedman to Mr Baker, the attorney for Volkswagen, in a letter dated 13 May 2009, correctly reflected his, Belling's, instructions to Friedman: he,

Belling had organised the departure (ie of the first three respondents from Gentech); instead of just packing his bags and leaving, he had wanted to stay on at Gentech for a 6 month period whilst 'he got his act together' to manufacture polyurethane products in competition (with Gentech); he did not need to take documents, information or anything, as it was all stored in his head, as it was with the other two; nevertheless, he had been caught red-handed.

131]Further oral testimony by Belling during his cross-examination that was relevant to the aspects dealt with above was the following. The consultation with Friedman referred to in paragraph 128 above arose out of the deterioration of the relations between the respondents and the other entities referred to (who were the further parties cited by Gentech in the interdict proceedings). The advice received embraced the statement that the dealings with the entities was unlawful and that the copying of Gentech's documents for proposed use in the business envisaged was likewise unlawful. Belling claimed that the respondents then ceased copying documents. However, Belling's oral testimony under cross-examination embraced the following passage:

'And what happened after your deal had gone bad with the [other entities] was that you carried on, notwithstanding whatever advice Mr Friedman had given you about springboarding, to set up Ureflex in direct competition with Gentech utilising the information that was in your head and on whatever documentation you had until you were caught out, until you were stopped by reason of an interdict in July and August 2008. You had no regard to Mr Friedman's advice at all. Am I right? --- Yes, you are right.

.....

You knew it was unlawful and you carried on and you did it anyway. Am I right? --- Yes.'

(It was then that Belling made the averment referred to in paragraph 123 above, that he did not consider the information to be confidential).

132]It was also in the answering papers in the A & D application that the respondents first disclosed (in answer to an allegation on behalf of Gentech that they had conducted a detailed analysis of Gentech's

price/profit range) that an analysis was prepared of items that were in a good profit range. It was, however, claimed, unpersuasively, that nothing came of the analysis in that the allegedly half completed document was left behind in Belling's office when he left the employ of Gentech.

133]In respect of annexures "RA1" and "RA4", the respondents did not dispute that Belling had acquired the drawings. The only response to Gentech's allegations on this score (which included the unchallenged statement that one of the drawings on annexure "RA4" was of a chevron seal manufactured by Gentech for Transwerk, seals which a video taken at Ureflex premises on 1 July 2008 reflected were being manufactured by Ureflex) was a claim (which was said to be applicable to the issue of the profit/pricing analysis as well) that any confidential information that Belling may have had on his flash drive or computer or elsewhere under his control had been deleted by him. It was on that basis that the respondents offered their restricted opposition to the amplified prayers in the amended notice of motion, viz to the grant of prayer 2.5 thereof. Again, in respect of Belling's doings with the drawings referred to there had earlier been a material non-disclosure.

134]Further documents retrieved pursuant to the *Anton Piller* proceedings, the contents of which were not disclosed during the interdict proceedings (nor for that matter during the A & D proceedings), included *inter alia* the following annexures to the founding papers in the Graymaur application:

- (a) annexure FA25, an e-mail, dated 20 June 2008, addressed by Belling to Mrs Rose-Innes, setting out a list of Gentech's suppliers, together with details of their contact particulars;
- (b) annexure FA18, dated 18 February 2008, an e-mail addressed by Reddy to Servochem (a supplier to Gentech of chemicals used in the production of polyurethane), in which the former announced his intention of embarking on an

enterprise in which he would duplicate the manufacturing processes of Gentech, and requested information relating to the supply of various items and materials;

- (c) annexure F19, dated 23 January 2008, an e-mail from Belling to Reddy explaining how to cost the supply of polyurethane products to a particular Gentech customer (which had not been allocated by Gentech to Reddy);
- (d) annexures FA20-22, e-mails sent by Belling to Reddy on various dates between February and March 2008, setting out lists of Gentech's supply of products to customers during the preceding 12 month period, and a costing sheet in respect of polyurethane products (of which Reddy had no need in order to perform his duties with Gentech.)

135]As to the assertion by the respondents that Ureflex had not yet commenced trading, the following further documents annexed to the founding papers in the Graymaur application (and also seized during the execution of the first *Anton Piller* order) established the contrary: annexures FA26-41, bearing dates between May to July 2008, being till slips, order forms and invoices in respect business expenses incurred by or on behalf of Ureflex (including acquisitions of office equipment and entertainment expenses), quotations, order forms, invoices and statements of account in respect of the supply by Ureflex of polyurethane products to various customers or suppliers of Gentech. In his oral evidence Belling was constrained to concede that it was wrong of him to have earlier stated that Ureflex was dormant. He sought to explain his earlier statement that Ureflex had not commenced trading by saying that he should have referred to 'structured trading'. He had difficulty in explaining what this phrase was intended to convey. It was clear that he was trifling with the court and attempting to mislead me.

136]As will be set out later, at least as from 15 July 2008 Ureflex was actively engaged with Graymaur (an entity listed on annexure “X”) in respect of the intended supply by the latter to Volkswagen (also an entity listed on annexure “X”) of polyurethane products. No disclosure of those activities was initially made by the respondents. Documents relating thereto were recovered pursuant to the *Anton Piller* proceedings.

Demeanour of the witnesses who gave viva voce evidence.

137]I will later in this judgment have occasion to consider various other aspects arising out of the content of the testimony given during the hearing of oral evidence which have a bearing on the credibility of the respective witnesses. At this stage I would record some brief comments on the narrow question of the demeanour of the witnesses in the witness box. In doing so I do not lose sight of the oft-quoted dictum that demeanour is a tricky horse to ride and is no guarantee of either the witness’s reliability or the lack thereof. More important is the content of the witness’s testimony seen in the light of the totality of the evidence and the probabilities emerging therefrom. Nevertheless, I record the following comments.

138]The three witnesses who testified on behalf of Gentech, Nel, Stuurman and Rudolph, all created a favourable impression on me. The first two answered the questions put to them in a straightforward and candid manner and presented as credible witnesses. Rudolph was on occasion a confusing or confused witness, but on the essence of his evidence he stood firm and on that score he, too, presented as a credible witness. Belling, Reddy and Zimmer were each somewhat loquacious and at times difficult to understand, and Zimmer was an uncomfortable witness (possibly due to his nervous disposition). More important is the fact that at times each was an evasive and contradictory witness (to which may be added that it was clear at times that they wittingly gave false evidence). Myburgh was at times a vague, evasive and contradictory witness. Chellew was an

unsatisfactory witness, evasive, belligerent and argumentative. Friedman was at times argumentative (possibly due to the fact that he was the respondents' legal advisor).

The A & D application

139]As recorded earlier (paragraph 33 above), the dispute between the parties centred around the supply of anti-vibration foot-mounts by Ureflex to A & D.

Were commercial dealings simpliciter between the respondents and A & D prohibited by the interdict order?

140]Part of the case sought to be made out by Gentech in its founding papers was that A & D was one of the clients of Gentech that the interdict order prohibited the respondents from dealing with. It was averred that all of the respondents were aware of this, particularly Zimmer in that whilst in the employ of Gentech he was allocated A & D as a customer. It was also alleged that A & D was listed in annexures "X" and "RA1".

141]The above contention of Gentech was misplaced. A & D was in fact not listed on annexure "X" (which was a list found on Belling's computer and which Gentech incorporated in its founding papers). Nor did annexure "RA1" purport to identify A & D – it was merely a list of a substantial number of drawings identified by the numbers allocated to them, but the corresponding names (of clients) to which the respective drawings related had earlier been deleted from the annexure on behalf of Gentech on the basis that they constituted confidential information. Accordingly, as contended by the respondents, the mere fact that the respondents dealt with A & D, albeit a customer of Gentech, did not constitute an infraction of the interdict order. For the sake of completeness, it may be recorded that the legal advice received by the respondents from Friedman was to the effect that they were free to do business with any entity that was not listed on annexure "X", albeit it

was a customer of Gentech, provided they did not do so unlawfully, ie by utilising Gentech's confidential information.

142]This conclusion is not affected by the following facts, which were common cause:

(a) In omitting the name of A & D (and indeed a host of other names) annexure "X" was incomplete in that there was a business relationship between A & D and Gentech, the former having been from time to time a purchaser of a variety of polyurethane and other products from the latter, including foot-mounts which A & D would supply to its customers.

(b) Some of the drawings reflected on annexure "RA1" specifically related to products for A & D, including foot-mounts, and on the original of the annexure the names of Gentech's relevant customers, including A & D, were reflected opposite the numbers of the individual drawings.

Did Ureflex indirectly deal with a Gentech customer listed in annexure "X"?

143]It was also (finally) not in dispute:

(a) that an entity styled Bridgestone/Firestone (Bridgestone) was a customer of Gentech that was listed in annexure "X", and that amongst the products directly supplied by Gentech to Bridgestone were foot-mounts;

(b) that a further drawing on annexure "RA1" (identified therein by its number, 08-0319-02A1, on page 635 of annexure "RA1") related to a loose bolt foot-mount supplied by Gentech to Bridgestone;

(c) that amongst the customers to which A & D supplied foot-mounts was Bridgestone;

(d) that the foot-mounts supplied by Ureflex to A & D were required by the latter for onward supply to Bridgestone.

144]In its founding papers Gentech *en passant* made reference to the fact

that the items supplied by Ureflex to A & D were destined for Bridgestone. However, the case was not made out in the founding papers that because Bridgestone was listed in annexure “X”, the respondents had in the circumstances breached the interdict order, albeit indirectly. The averment that the respondents had infringed the interdict order in that they had contacted or solicited Gentech’s ‘clients, agents and suppliers’ was in the context related only to the fact that the respondents had dealt with A & D (a contention that I have already recorded was misplaced).

145]It was only in Gentech’s replying papers that an allegation, premised on the fact that the respondents were aware that the product they supplied to A & D was for the benefit of Bridgestone, was made that the respondents had thus ‘indirectly dealt with one of [Gentech’s] customers listed in annexure “X”’.

146]It was not permissible for Gentech to invoke this cause of action for the first time in its replying papers. Nor did Nel, in the course of his oral evidence seek to pursue the point. In any event, I am persuaded that the respondents’ answer adequately met the point. It was averred that A & D was a supplier to the tyre industry as a whole and sourced their manufactured products from a myriad of engineering/sales concerns. That was why (as will appear below) both Gentech and Ureflex were asked to quote in respect of the foot-mounts required by A & D. The supply of foot-mounts to A & D by Ureflex was pursuant to a relationship that came into being when the former approached the latter in connection therewith. There was no conspiracy between Ureflex and A & D (in respect of a circumvention of the interdict order). That Bridgestone was to be the end-user was therefore neither here nor there. It was in fact not the case that Gentech sought to make out that there had been a joint endeavour by the respondents and A & D to circumvent the court order.

Gentech’s remaining case

147]The remainder of Gentech's case related to the issue whether in manufacturing and supplying the foot-mounts to A & D the respondents had breached the provisions of paragraph 2.1 (read with paragraphs 2.1.1 and 2.1.3) and/or paragraph 2.2 of the interdict order in that they used Gentech's confidential information relating to its designs/drawings and/or pricing structures, and thereby competed unlawfully with Gentech.

148]Gentech adduced the evidence of Nel, a member of Gentech, who both deposed to affidavits and testified at the oral hearing. Confirmatory affidavits by other employees of Gentech were filed. The respondents relied on an affidavit by Belling (confirmed by Reddy and Zimmer) and also *inter alia* an affidavit by Mr Myburgh, the project manager of A & D's press shop, as well as the oral evidence of Belling, Reddy, Zimmer and Myburgh.

149]Gentech's factual evidence in its founding papers proceeded as follows. During September 2008 Myburgh approached Gentech, and spoke to de Reuck in connection with the supply of foot-mounts. He brought with him 'a sample of anti-vibration footpads which [Gentech] had manufactured for Bridgestone in April 2008'. In previously manufacturing and supplying foot-mounts to A & D Gentech had modified its design for Bridgestone (the reference being to the drawing referred to in paragraph 143(b) above).

150]Myburgh, who needed the foot-mounts urgently, placed an order (to be executed immediately) for 16 of the foot-mounts, and requested that a (formal) quotation be sent to A & D to complete the paperwork. The quotation, sent on 3 October 2008, reflected a unit price of R325,00. The foot-mounts were in fact manufactured thereafter. However, Ureflex had, on 7 October 2008, also submitted a quotation to A & D reflecting a unit price of R295,00, which had been prepared by Zimmer. In the result, A & D did the business with Ureflex.

151]As indicated earlier, it was the remaining contention of Gentech in its

founding papers that Ureflex, in manufacturing and supplying the foot-mounts to A & D, had, in breach of the interdict order, unlawfully utilised Gentech's confidential information, namely its drawings, designs and pricing/profit structures, and accordingly at the same time competed unlawfully with Gentech. Nel explained in the founding affidavit that the drawing in question was confidential, and accordingly a copy thereof was not annexed to the founding papers.

152]The following may be noted. In addition to mentioning the sample brought by Myburgh and the drawing referred to in paragraph 143(b) above, Gentech's founding papers further stated that the drawing reflected the subtle modifications effected thereto pursuant to specific design requirements of A & D. No further elucidation of the foot-mounts supplied by Ureflex to A & D was furnished or, save as set out below, of the basis on which the manufacture and supply thereof was allegedly an infraction of Gentech's interests in its confidential information, designs and pricing/profit structure, as protected by the interdict order. Gentech contented itself with an averment of an inference to that effect, based on the allegations set out earlier plus the further allegation that the drawing contained all the specifications of the foot-mounts and was necessary for the manufacture thereof. (It became clear that, as pointed out by the respondents, Gentech's papers in the application were filed prior to anyone from Gentech having seen the foot-mounts supplied by Ureflex to A & D).

The respondents' answer

153]While admitting Gentech's prefatory allegation that during their employment at Gentech the first to third respondents had access to, and came into possession of, Gentech's trade secrets and confidential information, the respondents firmly disputed the contentions of Gentech referred to above.

154]The answering papers sought to counter Gentech's contentions on a number of fronts. The first answer was historical in nature. It was to

the effect that what was referred to as 'the vibration foot-mount manufactured by Gentech', was not its own design. Instead, as foreshadowed in paragraph 77 above, it was alleged that a Gentech client had handed a foot-mount to Reddy that had been manufactured by an overseas entity, styled Ashton Seals, with the request that Gentech manufacture a replica. Reddy did duplicate the product (allegedly without deviation) and prepared the drawing thereof, which, as it was further alleged, was the drawing relied upon by Gentech. Accordingly, Gentech's 'design' and the drawing thereof did not represent a unique design that was protected by the interdict order. (As will appear below, the Gentech foot-mount in question was a fixed bolt one).

155]An allied aspect was the averment by Belling that the article supplied by Ureflex to A & D was in any event cognizably different from the article previously supplied by Gentech to A & D, for onward supply to Bridgestone, more particularly in that the former had a loose bolt whereas the latter had a fixed bolt (a modification that was effected because Myburgh had requested same). Gentech had in fact never supplied A & D with any foot-mount with a loose bolt. Ureflex had accordingly not utilised Gentech's design or drawing. He added that Reddy had prepared a drawing in respect of the foot-mount Ureflex would be making and supplying to A & D. A copy of the drawing would, however, not be annexed to the respondents' papers (allegedly for fear of Gentech's fabricating a false drawing for the purposes of the litigation).

156]According to the respondents the *other* differences between the foot-mount supplied to A & D and that previously supplied by Gentech for onward supply to Bridgestone were the following: The 'thickness' was different; the size of the bolt was different, being 24mm and 16mm, respectively; the 'contours' were different.

157]It was further alleged that Ureflex's original quotation to A & D had been R345,00 per unit (in regard to which the comment was made that

the quotation was in fact more than the quotation submitted by Gentech). At Myburgh's request that Ureflex 'sharpen its pencil', it submitted a revised quotation of R295,00 per unit. Its quotations had not been influenced by Gentech's pricing structures. It was then added that in fact Gentech's pricing structure was in the public domain in that same was available on Gentech's website. And, in fact, the price for Gentech's foot-mount listed on the website was R395,00 per unit.

158]The contract with A & D had come about as follows. Myburgh approached Reddy for a quotation on anti-vibration foot-mounts. He furnished Reddy with a sample of a foot-mount (with a fixed bolt that had broken off at the point of entry into the housing), that had been manufactured by Gentech, to illustrate why he needed a different type of foot-mount, ie one with a loose bolt. Reddy referred him to Zimmer. In his discussions with Zimmer he explained that the foot-mount supplied to A & D by Gentech was not acceptable, in that the bolt was fixed to the mounting, and any movement rendered the bolt liable to break. He accordingly required Ureflex to manufacture a loose bolt foot-mount. He further specified that the foot-mount have a 'one inch BSW thread' (the reference apparently being to the diameter of the bolt, and accordingly the recess in the mounting that would house the bolt required to be of a compatible diameter). Subsequently, at the request of Zimmer, the 'thread' of the foot-mount to be supplied was changed to 24mm. Myburgh also conveyed other specifications to Zimmer.

159]In his affidavit Myburgh confirmed that he had the discussions with Reddy and Zimmer referred to in the preceding paragraph (save that he made no mention of other specifications than the loose bolt and the diameter of the thread). He also recorded that he had earlier furnished the same explanation to de Reuck, the representative of Gentech with whom he dealt, as to why he required a foot-mount with a loose bolt. He denied, however, that he had in fact placed an order with Gentech, and averred that he had merely asked for a quotation. (This last dispute does not require resolution). He further confirmed the evidence

of the respondents in respect of the quotations submitted by Ureflex to A & D.

160]Myburgh listed what he termed the further differences between the two foot-mounts in question, ie apart from the bolt being a loose one, as follows: the Gentech foot-mount had contours/ridges at the bottom, whereas the Ureflex one was flush (the reference being to the base); the Gentech foot-mount was galvanised whilst the Ureflex one used 'raw materials'; the dimensions of the foot-mounts differed materially in thickness and look.

Gentech's reply

161]The replying affidavit filed on behalf of Gentech was again deposed to by Nel. As will appear below, it furnished a measure of clarification, as well as correction, of aspects canvassed in the founding papers.

162]In the first place, it was unequivocally stated that Gentech had designs for both a fixed bolt as well as a loose bolt foot-mount. It was denied that Gentech had copied the design of its fixed bolt foot-mount from an article produced by the overseas entity styled Ashton Leads. Reddy and Belling had in fact designed the foot-mount and had overseen its manufacture.

163]Reddy and Belling were still in the employ of Gentech when, during March 2008, Gentech designed a loose bolt foot-mount for Bridgestone, and supplied it during April 2008 to Bridgestone. Zimmer, who was servicing both Bridgestone and A & D, had in fact attended to the sale of these foot-mounts to Bridgestone. (It will be remembered that in the answering papers of the respondents the only reference to the issue whether Gentech had earlier dealt in loose bolt foot-mounts was the averment that Gentech had never before supplied a loose bolt foot-mount to A & D. The question whether Gentech had supplied other customers with such foot-mounts was not adverted to).

164]The relevant drawing of Gentech which related to the loose bolt foot-mount to be supplied to Bridgestone, was the drawing referred to in paragraph 143(b) above. A copy thereof was annexed to the replying papers as annexure “R1”. It reflected that it was drawn by one C Davis on 19 March 2008, and related to a product to be made for and supplied to Bridgestone. (Incidentally, it is clear that this drawing, which is the one on which Gentech founded part of its case, was not the one that Mr *Friedman*, in moving one of the interlocutory applications discussed earlier in this judgment, stated Reddy would claim had been prepared by Gomes (paragraph 77 above)).

165]When Myburgh approached Gentech during September 2008 the sample that he made available was in fact a fixed bolt foot-mount that Gentech had produced for Bridgestone (a drawing of which was included in annexure “RA1”). He stated, however, that he wished to have a loose bolt foot-mount (the bolt to be supplied with the foot-mount) which was to be precisely in accordance with the design of the product which Gentech had supplied to Bridgestone since April 2008, save that the diameter of the recess in the housing (to house the bolt) should be altered from 18mm to 25mm. De Reuck had sourced the relevant drawing (the one referred to in paragraph 143(b) above) and effected the modification thereto requested by Myburgh. This modification had been effected manually as reflected in the copy of the drawing annexed to the papers.

166]It appears therefore that Gentech’s founding papers, insofar as they embraced the factual averments recorded in paragraphs 149 and 152 above, were in certain respects inaccurate and incomplete. There had been a failure to reflect that the sample that Myburgh had made available was of a fixed bolt foot-mount previously manufactured by Gentech for Bridgestone (and in fact reference had been made to a sample of the foot-mount which Gentech had manufactured for Bridgestone in April 2008, which was in fact a loose bolt foot-mount) or to state that what Myburgh wanted was a loose bolt foot-mount, (save that there was a reference to the foot-mount manufactured in April

2008). (In fact, the sample made available to both Gentech and Ureflex was exhibit 2, the polyurethane base of a foot-mount with part of the (fixed) bolt which had broken off still embedded therein). It had been wrongly stated that Gentech had modified its design for Bridgestone when it had previously supplied foot-mounts to A & D, whereas the reference should have been to the modification which Myburgh desired should be effected to the article that Gentech would still have to supply. It had not been made clear that the drawing in question related to the loose bolt foot-mount that Gentech had supplied to Bridgestone (and to which Myburgh required a modification). It is a fair inference that the above features were attributable to misunderstandings between Gentech and its attorneys.

167] Nel contended, initially, that the only difference between the loose bolt foot-mount previously designed and supplied to Bridgestone by Gentech and the article supplied by Ureflex to A & D was that the diameter of the recess had been increased from 18mm to 25 mm. The inference is that, not having seen either the article itself or a drawing thereof, Nel had in mind that Ureflex's article was also to be in accordance with the instructions given by Myburgh to Gentech. He later adverted to the allegation by the respondents relating to 'contours' (Myburgh referred to 'contours/ridges'), and pointed out that the contoured/ridged polyurethane base of the foot-mount manufactured by Gentech required a specific mould which was time-consuming and costly to manufacture (and he ventured the opinion that the respondents had opted for the cheaper flat base because of financial constraints). He further averred, however, that the difference relating to the diameter of the recess was a minor one, to the extent that it could be endorsed on the drawing in manuscript and no modification of Gentech's tooling was required to accommodate the change. He contended further that the modifications did not materially change the nature, purpose and, most importantly, the fundamental design of the product or the drawing.

168]Nel amplified his earlier contention that, in order to manufacture the items it supplied to A & D, Ureflex must have utilised Gentech's drawing, by adding the alternative that Ureflex could not have produced the items to be supplied to A & D without having had regard to the sample produced to it by Myburgh, which, Nel sought to emphasise, Ureflex, on its own showing, knew had been manufactured by Gentech, and had been supplied *inter alia* to Bridgestone.

169]With respect to the respondents' claim that in dealing with A & D it had not had regard to Gentech's pricing structures, Nel made the following averments. First, the respondents were wrong in asserting that Gentech's pricing structure was freely available by way of accessing Gentech's website. In fact, the respondents were aware that, for the protection of Gentech's highly confidential information pertaining to *inter alia* its pricing, access to its website was restricted to only authorised employees and customers. Only authorised users to whom a password had been assigned were permitted to access such information. Belling was a registered user who could access the pricing structure on the website.

170]Second, Nel adverted to the fact that Ureflex, through the other respondents, knew that the price quoted in the website for a foot-mount with a fixed bolt was R395,00. Hence, so he contended, their undercutting price of R345,00. What they were apparently unaware of was that Gentech's quotation of a price of R325,00 per unit was in respect of the foot-mount *sans* bolt. When they 'sharpened their pencil' at the behest of Myburgh they came up with the further undercutting price of R295,00 (inferentially, so it was contended, having then been made aware of the receipt by A & D of a quotation of R325,00 per unit from Gentech).

171]Accordingly, so the contentions continued, in manufacturing and supplying A & D with foot-mounts the respondents had utilised: (a) Gentech's drawing of a loose bolt foot-mount supplied to Bridgestone, a drawing included in annexure "RA1", alternatively, had utilised the

design of Gentech's foot-mount, made available to them by Myburgh (a drawing of which was also included in annexure "RA1"); (b) Gentech's pricing structure.

172]In either case, the respondents had breached the terms of the interdict order, namely, firstly, the provisions of paragraph 2.1, read with paragraphs 2.1.1 and 2.1.3 thereof (relating to Gentech's confidential information and documentation concerning designs or pricing structures, as the case may be) and, secondly, the provisions of paragraph 2.2 thereof (relating to unlawful competition).

Further papers filed by the respondents

173]In a fourth set of affidavits the respondents enclosed the drawing alleged to have been made by Reddy relating to the foot-mount supplied by Ureflex to A & D.

174]Belling, the deponent to one of the affidavits, now comparing Reddy's drawing with that of Gentech relating to its loose bolt foot-mount, listed a number of differences between the two. The respondents further filed an affidavit by a Mr Exley, a mechanical engineer, who also tabulated differences between the two drawings, which substantially coincided with those mentioned by Belling. Exley's wording is easier to understand and the tabulation set out below largely follows that wording. In the tabulation the letter '(a)' has reference to the foot-mount manufactured by Ureflex and the letter '(b)' to Gentech's item. It may be pointed out that Exley recorded that what was made available to him was not only the drawing by Reddy referred to in the preceding paragraph as well as the drawing of Gentech referred to in paragraph 143(b) above, but also physical examples of the Ureflex and Gentech loose bolt foot-mounts. (As will appear below, during his oral evidence Nel disputed that Exley could in fact have had regard to a physical example of the loose bolt foot-mounts manufactured by Gentech for Bridgestone. Be that as it may.)

175]The tabulated differences were the following:

- (1) Bolt size:
 - (a) 24mm;
 - (b) 20mm.
- (2) Location points between bolt and recess:
 - (a) Shapes on both, hemispherical;
 - (b) Shapes on both, flat.
- (3) Metal housing containing recess:
 - (a) Flat and of mild steel;
 - (b) Conical and plated.
- (4) Connection between polyurethane base and metal housing:
 - (a) Bonding;
 - (b) Base fastened in metal housing recess by means of screws.
- (5) Shape of polyurethane base:
 - (a) Flat;
 - (b) Ridged (or contoured).
- (6) Overall dimensions different.

Accordingly, so it was contended, this comparison indisputably revealed that, other than serving the same purpose, the article produced by Ureflex bore no relation to the item manufactured by Gentech. It was further averred that because the price of a polyurethane product was dependent on the volume of polyurethane involved, the flat base version was in fact more expensive to produce.

176]To meet Nel's averments concerning Gentech's website it was alleged that after the commencement of the proceedings in the A & D application an acquaintance of Reddy, using the alias '*Kobus Greyling*',

had accessed Gentech's website and retrieved the pricing information therein adverted to by the respondents in their answering papers. Each person logging into the website has to furnish his specific identity and Gentech could establish the time and date when '*Kobus Greyling*' accessed the website.

Hearing of oral evidence

177]In respect of the A & D application it is necessary only to have regard to those aspects canvassed during the hearing of oral evidence that are dealt with below.

The alleged use of Gentech's pricing structures

178]The evidence of Reddy was that on his request an acquaintance of his sought access to Gentech's website after the launch of the A & D application, the acquaintance succeeded in doing so by going onto the internet and filling in his credentials (using the alias '*Kobus Greyling*'), whereafter he was electronically furnished with a password that enabled him to access the website and retrieve information concerning Gentech's pricing structure. In other words, a password was there for the asking.

179]In his oral testimony Nel repeated that a password was needed to gain access to the pricing structure on Gentech's website. However, in contradistinction to his statement in the papers that Belling was a registered user who could access the pricing structure on the website, his oral testimony was that he did not know whether any of the first three respondents were able to access that part of the website that embraced the pricing structure.

180]I do not find it necessary to decide whether Reddy was correct in this assertion that a password was, as it were, automatically furnished to anyone requesting same. The fact remains that on Reddy's version there was a process that had to be followed in order to obtain a

password to enable access to the pricing structure on the website. I will further assume, without deciding, that because of the necessity for that process to be followed the pricing structure was not in the public domain and was therefore confidential to Gentech.

181]It should also be recorded that Nel's oral evidence concerning the basis of Gentech's quotation of R345,00 per unit differed from the explanation put forward in the papers. In contradistinction to the latter explanation (that the quotation was for the supply of a foot-mount without a bolt) he testified that the employee who had fixed the price of R345,00 per unit had lost sight of the fact that the quoted price was to cover not only the foot-mount but the bolt as well and had therefore not allowed for the price of the bolt.

182]The oral evidence tendered by the respondents was, first, that the website pricing structure had not been accessed by them and, second, that no regard was had to Gentech's pricing structure when Ureflex favoured A & D with quotations in respect of the foot-mounts required by Myburgh. Instead, Ureflex undertook its own costing exercise.

183]I have already recorded that as witnesses the first three respondents fell to be severely criticised. I therefore approach their evidence with circumspection. There is, secondly, reason to view the evidence that no regard was had to Gentech's pricing structure when quoting on the supply of the foot-mounts in question to A & D, with cognizable suspicion. The proposition that it was purely coincidental that Ureflex's first quotation was less than Gentech's website price for its fixed bolt foot-mount and that the second quotation was less than the price quoted by Gentech to A & D is not an attractive one. Thirdly, there was in fact no practical reason why the respondents should not have had regard to Gentech's pricing structure.

184]However, it was Gentech's case that the first three respondents were *inter alia* privy to confidential information of Gentech relating to its pricing structure and the further evidence was that the respondents had

busied themselves with an analysis thereof before leaving the employ of Gentech. It was also the evidence of Belling that by virtue of his lengthy employment with Gentech the pricing structure was ‘in his head’. It would seem therefore that there was in fact no need for the respondents to access the website to obtain information about Gentech’s price for its foot-mount. I am therefore unable to reject the evidence that the respondents did not access the website.

185]Secondly, the respondents were capable of conducting their own costing and pricing exercise without in fact having regard to Gentech’s pricing structure. It was stated under oath that that is just what they did. It was also denied that the respondents became aware of the actual price quoted by Gentech to A & D. While Myburgh, in exhorting Ureflex to ‘sharpen its pencil’, could have disclosed the price quoted by Gentech, it was not his evidence that he did so. Notwithstanding the strictures I have passed on the credibility of the first three respondents, including that they revealed themselves as being quite ready to be less than candid with the court, and in fact to mislead me, I have come to the conclusion, not without a measure of hesitancy, that I am unable to reject the defence evidence in question. To that extent I hold that Gentech failed to discharge the *onus* resting on it of establishing that the respondents breached the provisions of paragraph 2.1 read with paragraph 2.1.3 of the interdict order by making use of Gentech’s confidential information relating to its pricing structure.

Comparisons between Ureflex’s foot-mount and the foot-mounts of Gentech

186]Before I address the evidence bearing on this issue, it is necessary that a few preliminary aspects be considered. The first relates to exhibit 4, Gentech’s fixed bolt foot-mount, and the drawing thereof, which was one of the drawings embraced in annexure “RA1”.

187]It will be remembered that the respondents’ case as to the authorship of the drawing was contradictory. In the affidavits the averment was that it was Reddy who prepared the drawing (paragraphs 79 and 154

above). In his argument in support of one of the interlocutory applications made by him Mr *Friedman* stated that Gomes prepared the drawing on the instructions of Reddy, who thereafter approved the drawing. (This is the version that Reddy preferred in his oral evidence).

188]I was not able to understand the basis of the allegation by Belling and Reddy that Gentech's 'design' and the drawing thereof did not represent a unique design that was protected by the interdict order. In the first place, it mattered not what their views on this score were. The drawing was included in annexure "RA1" and that put an end to the question whether it was protected by the order or not. Secondly, even if the clone allegedly produced by Reddy was an exact replica of an article made available to Reddy by a customer, a drawing of the replica was essential for the production of the foot-mount. That drawing (whether done by Reddy and/or Gomes) was one produced by Gentech. It was therefore not to be gainsaid that it was a drawing that was confidential to Gentech.

189]But it transpired that in fact the statement by Belling and Reddy in their affidavits that Reddy cloned an exact replica, with no deviation (exhibit 4), of the article made available to him (exhibit 1) was untrue. In their oral testimonies both Belling and Reddy stated that they changed the design: (a) in exhibit 1 the fixed bolt is screwed into the housing; in exhibit 4 the bolt goes through the housing and is imbedded in the polyurethane base; (b) the diameters of the polyurethane base and of the metal housing of exhibit 4 are bigger than those of exhibit 1; (c) the polyurethane base of exhibit 1 fits into the housing recess and is bonded to it whereas the base of exhibit 4 fits loosely into the housing recess and is not bonded to it; (d) in exhibit 1 the housing (or shroud) is a casting; the housing of exhibit 4 is machined steel; (e) the side of the housing of exhibit 1 tapers; the housing of exhibit 4 does not; (f) the housing of exhibit 1 is painted; the housing of exhibit 4 is not; (g) on both the housing and the base of exhibit 1 there is a logo; exhibit 4 has no logo. Gentech's drawing is of the changed version, exhibit 4, and to

that extent it is manifestly unique and confidential. I agree, however, with the further comment of Belling that for all practical purposes exhibit 4 is a copy of exhibit 1.

190]In my judgment, the respondents are to be severely criticised for framing their original answering papers on the basis that a comparison had to be made only between the article manufactured by Ureflex and supplied to A & D and Gentech's fixed bolt foot-mount, for making the related comment that Gentech had never supplied a loose bolt foot-mount to A & D, and for omitting any reference to the fact that Gentech manufactured a loose bolt foot-mount for Bridgestone and supplied same to it. The answering papers were nothing less than a calculated attempt to mislead me (the respondents having seized upon the unclear and incomplete nature of the founding papers). It later became clear that it was not in dispute, firstly, that Gentech had designed the loose bolt foot-mount (exhibit 5) for Bridgestone, that it had produced a drawing for it, as referred to in paragraph 143(b) above, and had since April 2008 been supplying same to Bridgestone, and, secondly, that the first three respondents had throughout been aware of all those facts. To complete the above discussion: Belling sought at one stage to suggest, and initially he was adamant in the contention, that the drawing referred to in paragraph 143(b) above, was of a foot-mount with a fixed bolt. Ultimately, however, he was constrained to concede unequivocally that the drawing related to a loose bolt foot-mount.

191]I turn now to consider the differences between exhibit 3 and 5 (the loose bolt foot-mounts of Ureflex and Gentech, respectively) which were invoked by the respondents as proof that their manufacture for, and supply to, A & D of exhibit 3 did not constitute a breach of the interdict order. The differences are those tabulated in paragraph 175 above.

192]In my judgment, the comment at the end of paragraph 189 above (that despite the differences between exhibit 1 and 4 the latter is for practical purposes a copy of the former) may be restated in respect of the two

loose bolt foot-mounts: despite the differences, for practical purposes they are similar.

193]As recorded earlier, Myburgh did not in his supporting affidavit confirm that he furnished Ureflex with any further specifications other than that the foot-mount to be supplied should be a loose bolt version and that the diameter of the bolt and recess be of the size stipulated by him. Neither did he in his oral evidence seek to say anything different. So also, neither Belling nor Reddy nor Zimmer sought to aver in their oral testimony that Myburgh had stipulated or requested that the other changes in question be effected (and on the contrary, Zimmer pertinently testified that all that Myburgh referred to was the loose bolt and the diameter thereof). In fact, there would have been no reason at all why he would have asked for the changes: no-one suggested that they served any functional purpose whatsoever.

194]On the contrary, it was the testimony of the respondents that they specifically effected the changes in question simply so that there would be differences between Ureflex's product and that of Gentech. It may be recorded here that at a late stage during his cross-examination when he was being pressed on the issue of the use made by Ureflex of the sample made available, Belling volunteered the allegation that Myburgh was told that because of the restriction imposed by the interdict order, Ureflex had to make 'its own mount'. Presumably, it was the further implicit allegation that Myburgh signified his concurrence therewith. The allegation was a fabrication. It had never featured earlier, whether in any of the papers or otherwise, and Myburgh did not confirm the allegation. It was no more than an attempt by Belling to avoid the accusation that use had been made of Gentech's design.

Was a breach of the interdict order established?

195] The position may therefore be stated as follows: the first three respondents knew that Gentech manufactured and supplied two types

of foot-mounts, one with a loose bolt and one with a fixed bolt, that Gentech had a drawing for each of them, included in annexure “RA1”, that the sample brought to them by Myburgh had been manufactured and supplied by Gentech, that the design thereof was Gentech’s, that Myburgh required a modified article, ie one with a loose bolt, with a larger diameter, that the foot-mounts were required for onward supply to Bridgestone, that Gentech had in the past supplied Bridgestone with a loose bolt foot-mount. They were also aware of the terms and import of the interdict order, specifically that it proscribed any use of whatsoever nature of Gentech’s designs and drawings, as being confidential information, and that included therein were the physical foot-mounts (of both types) and the drawings thereof. Their starting point was the sample Myburgh had supplied because it was the article which required to be modified. They were obliged to have regard to the article in order to understand and carry out Myburgh’s instructions. They were obliged to have regard to the design as well as its drawing (and indeed could not have avoided doing so) as they had the avowed intention of producing an article which differed in certain respects. They were similarly obliged, on the same basis, to have regard (and could not have avoided doing so) to the design and drawing of Gentech’s loose bolt foot-mount. In the result, they produced an article similar to Gentech’s article, albeit with certain differences, which in no way affected the functioning of the foot-mounts. To the above extent they utilised Gentech’s confidential information and acted in breach of the interdict order. The differences were resorted to solely in an attempt to circumvent the interdict order.

Was the breach wilful and mala fide?

196]As explained in paragraph 13 above, proof by Gentech of knowledge of the court order and the breach thereof by the respondents created a presumption in favour of Gentech and an evidentiary burden shifted to the respondents to adduce evidence which established a reasonable doubt (or reversed or neutralized the balance of probabilities in favour of Gentech, as the case may be) as to whether the non-compliance

was wilful and *mala fide*.

197]The first aspect to be noted is that it was not part of the respondents' case that they had been favoured with legal advice that their conduct set out above, which I have found constituted an infraction of the interdict order, was permissible. The relevant advice received by them was no more than that it was permissible for them to treat with an entity not listed in annexure "X". (Zimmer's late suggestion that the advice specifically related to A & D was contradictory, not supported by any other evidence, specifically that of Friedman, and was unpersuasive). That advice was, however, qualified with the admonition that the treating with the entity in question be lawful and specifically that it not be tainted by the use of Gentech's confidential information. What would constitute use of confidential information, and specifically whether the conduct detailed in paragraphs 194 and 195 above, would constitute such use, was not canvassed by the respondents with Friedman.

198]The respondents' case was in essence a claim that they had not utilised Gentech's confidential information and that by producing, deliberately, an article which differed in certain respects from those of Gentech, they avoided a breach of the interdict order, a claim I have rejected. They did not suggest that they *bona fide* believed that use of Gentech's confidential information in the manner detailed above was permissible.

199]The contention that they did not breach the order is rejected. The respondents have produced no evidence to found a finding that they have discharged the evidentiary burden resting on them in respect of the issues of wilfulness and *mala fide*. Insofar as it might be contended that the respondents' case embraced the implied claim that they acted in the *bona fide* belief that the use of Gentech's confidential information in the manner set out above was permissible, my conclusion is that such a claim would be without foundation and palpably false. My finding is accordingly that they did act in contempt of the interdict order.

The Graymaur application – the first issue

200]As recorded in paragraphs 37 and 41 above, the main dispute between the parties in this application concerned the alleged conduct of the respondents in relation to the intended supply of products by Graymaur to Volkswagen. This is accordingly the first issue that will be addressed. Thereafter, other issues which arose in the proceedings will be considered.

Effect of interdict order in respect of dealings by Ureflex with Volkswagen and Graymaur

201]Volkswagen was an entity appearing on the list of Gentech customers forming part of annexure “X”. Graymaur was an entity appearing on the list of Gentech suppliers forming part of annexure “X”. Accordingly, subject to what is set out in the following paragraph, it was not in dispute that the respondents were prohibited in terms of paragraph 2.3 of the interdict order, for a period of 12 months, from contacting or soliciting Volkswagen or Graymaur (ie in the sense referred to in paragraph 59 above).

202]However, the respondents’ case sought to advance an interpretation of paragraph 2.3 that would further limit the scope of the restriction on the conduct of the respondents in respect of dealings with entities named in the lists in annexure “X”. The further limit, so it was contended, was dependent on which list forming part of annexure “X” contained the name of the entity involved, ie the customer list or the supplier list. In short, proscribed dealings with entities listed as Gentech customers would comprise dealings with them in their capacity as customers, ie in connection with *the supply of goods to them*, while proscribed dealings with Gentech suppliers would comprise dealings with them in their capacity as suppliers, ie in connection with *the supply of goods by them*. Dealings with a listed supplier, but in the capacity of customer, were not proscribed, and,

similarly, dealings with a listed customer, but in the capacity of supplier, were not prohibited.

203]The distinction sought to be drawn by the respondents did not arise *vis-à-vis* Volkswagen in that any relevant dealings with Volkswagen were in fact in its capacity as a customer. It did, however, arise *vis-à-vis* Graymaur in that, as will appear later, the dealings Ureflex had with Graymaur related to the supply of products by the former to the latter, ie as a customer, whereas Graymaur was listed as a Gentech supplier on annexure “X”.

204]Gentech resisted the distinction sought to be drawn. It contended that it mattered not that Graymaur was named only in the list of Gentech’s suppliers forming part of annexure “X”, and not in the annexure’s list of Gentech’s customers. The prohibition against contact and solicitation provided for in the interdict order (with reference to entities reflected on annexure “X”) was a blanket one covering both customers and suppliers, and was not qualified by a restriction relating to the capacity in which an entity was listed in the annexure.

205]The counter-argument of the respondents was in essence that the prohibition provided for in the interdict order required to be interpreted in the context of (a) the annexure to which it referred, and specifically the division therein between Gentech customers and Gentech suppliers, and (b) the purpose of the interdict order having been to safeguard protectable interests of Gentech. That context enjoined the interpretation that the prohibition against contact or solicitation related to, and was restricted to, the capacity in which the entity in question was listed in the annexure. Accordingly (and provided that any dealings with Graymaur did not breach the other provisions of the interdict order), Ureflex was entitled to deal with Graymaur as a customer.

206]In my judgment, the contention of Gentech was correct. The relevant wording of the interdict order was not qualified by the distinction put

forward by the respondents. The wording stated no more and no less than that the respondents were prohibited for a period of 12 months from contacting or soliciting the entities named in the annexure. The interpretation contended for by the respondents was an artificial and contrived one, not justified by the language of paragraph 2.3 of the interdict order. (For the sake of completeness, it may be added here that at a stage Belling sought to draw a further distinction, namely one between entities listed on annexure “X” with which Gentech had ‘a long term relationship’ and entities with whom Gentech allegedly did not have such a relationship. And he suggested that contact with or solicitation of the latter entities would not constitute a breach of the interdict order. The distinction was fallacious and Belling well knew that).

207]It follows that the dealings in question which Ureflex had with Graymaur in respect of the supply of polyurethane products to Volkswagen, full details of which are set out below, constituted breaches of the terms of the interdict order. (Similarly, the unrelated supply of products, styled Linishing Wheels, by Ureflex to Graymaur also constituted a breach of the interdict order).

208]I will later, in the context of the issue whether the respondents acted wilfully and *mala fide* in breaching the interdict order by dealing with Graymaur, address the fact that the respondents at a stage received legal advice from Friedman that dealings *simpliciter* with Graymaur as a customer were not prohibited by the interdict order.

209]It should finally be recorded that it was correctly not argued by the respondents that the prohibition against their contacting or soliciting Volkswagen hit only direct dealings between Ureflex and Volkswagen, and that indirect dealings were not forbidden. Prohibited indirect dealings would include the following: (a) the interposing, for the purpose of circumventing the interdict order, of Graymaur between Ureflex and Volkswagen, so as to enable products manufactured by Ureflex to find their way to Volkswagen via Graymaur, and (b) Ureflex

having dealings with Volkswagen to facilitate the supply by Graymaur to Volkswagen of products manufactured by Ureflex.

Tenders requested by Volkswagen

210]At intervals (usually of some years) Volkswagen would require that it be supplied with what were referred to during the proceedings as 'dunnages'. Dunnages may briefly be described as consisting of (a) steel frames into which motor vehicle components, such as eg doors, are placed in order for same to be transported from one location to another, and (b) polyurethane supports (partitions) between the steel frames and the vehicle components, to protect the components from damage during the transportation. Volkswagen would accordingly invite tenders for *inter alia* the provision of the polyurethane products. The contracts would be worth very considerable sums of money.

211]During July 2008 Volkswagen invited tenders for the supply of certain polyurethane supports for incorporation into dunnages. Initially, the closing date for the submission of tenders was 29 July 2008, but various variations to the specifications of what was to be supplied were thereafter introduced from time to time and revised quotations were only required by later dates. Graymaur submitted various tenders from time to time in respect of the polyurethane products to be supplied. Portions of Graymaur's final tender were accepted by Volkswagen and the former was awarded two contracts (under reference 'VW 250'). The relevant two purchase orders from Volkswagen were dated 29 May 2009 (annexure WW2(a) and (b) to the answering affidavit of Williams, the managing member of Graymaur, filed in the Graymaur application). The two contract prices totalled in excess of R3 million.

212]During February 2009 Volkswagen invited further tenders for the supply of other polyurethane supports for incorporation into dunnages. Graymaur submitted a tender in respect thereof. The tender was accepted and Graymaur was awarded the contract (under the reference: 'Metro Side Panel'). The relevant purchase order from

Volkswagen was dated 25 May 2009 (annexure WW1 to the affidavit of Williams).

Gentech's case

213]Graymaur and Ureflex reached agreement that in the event of the former being awarded any contracts by Volkswagen the polyurethane products required for the execution of the contracts would be manufactured by Ureflex which would supply same to Graymaur and invoice Graymaur in respect thereof. Graymaur would in turn supply Volkswagen with the products and invoice Volkswagen in respect thereof.

214]It was Gentech's contention that because Ureflex was prohibited by the interdict order from dealing with Volkswagen Graymaur was interposed between Ureflex and Volkswagen to serve as a front for the supply of polyurethane products by Ureflex to Volkswagen. The stratagem was no more than an attempted circumvention of the interdict order, to which both Ureflex and Graymaur were witting parties.

215]The respondents denied the accusation and Williams followed suit.

Background to the arrangement between Ureflex and Graymaur

216]A prefatory comment is that, as set out earlier in this judgment, none of the first three respondents, or Williams, made a favourable impression on me as witnesses. To be added to that consideration is the fact that, as will appear below, the content of the evidence adduced on behalf of the respondents, and of Williams's evidence as well, was in a number of material respects unsatisfactory and cognizably lacking in conviction.

217]Not only the respondents, but Graymaur, through Williams, as well, were aware of the prohibition contained in the interdict order against

the respondents having commercial dealings with Volkswagen.

218]Williams was acquainted with first three respondents, particularly Reddy, and was aware that as of July 2008 the first three respondents had either already left the employ of Gentech or were in the process of doing so.

219]As of July 2008 Graymaur was in fact not equipped to manufacture polyurethane products, Williams averred that should it have become necessary he could, instead of commissioning Ureflex to undertake the required manufacture of the polyurethane products, have equipped Graymaur within two weeks to attend to same. The question arises why did he not do just that. (I will later return to address an allied aspect relating to the quotation of Ureflex to Graymaur for the supply of the polyurethane products required for the implementation of the first contract awarded by Volkswagen to Graymaur). At the first hearing of oral evidence it was Belling's testimony that Graymaur was not in a position to execute the work which was the subject of the tender to Volkswagen without the assistance of Ureflex. At the resumption, months later, of the hearing of oral evidence Belling retracted this statement and sought to furnish reasons why, as he then testified, in fact Graymaur was 'very capable of doing the job without us'. The change in stance was not persuasive. Later, Belling added the averment that Williams would also have been quite capable of drawing up a tender for Volkswagen on his own. Williams's evidence embraced the same claim. Again, the question arises: why then did Graymaur not simply tender and undertake the work itself instead of involving Ureflex?

220]The evidence on behalf of Graymaur as to how it came about that Graymaur submitted the first tender to Volkswagen, referred to above, for polyurethane supports to be incorporated into dunnages, was contradictory and confusing. In his answering affidavit in the Graymaur application Williams made the statement that Graymaur *had been asked*, long before the issue of the interdict order, to furnish a quotation

to Volkswagen (and had also, prior to the issue of the order, approached Ureflex to assist as subcontractor).

221]In the first place, the averment that Ureflex had been approached by Graymaur before the issue of the interdict order was, in the circumstances, a facile one (designed to distance the dealings between Graymaur and Ureflex from the court proceedings). In fact, the interdict proceedings had been launched, and served on the respondents, on 10 July 2008, and the respondents' notice of opposition was filed on 14 July 2008, both prior to 15 July 2008, the date on which, according to the respondents and Williams, Graymaur allegedly approached Ureflex, with drawings furnished by Volkswagen, to furnish a quotation to Graymaur in respect of the polyurethane products in question. It was therefore already known that Gentech was seeking relief in the form of a prohibition against Ureflex's dealing with Volkswagen and Graymaur.

222]The assertion by Williams in his affidavit that Graymaur had been asked by Volkswagen to quote in respect of the dunnages polyurethane requirements was initially persisted in by him during the course of his oral testimony. It was to the effect that he had received a telephone call from Volkswagen conveying the request that he submit two tenders, one for an unrelated contract and another in respect of the polyurethane components of the dunnages, and that he should attend a site meeting at Volkswagen in connection therewith. It was alleged that the invitation to Graymaur to tender on the polyurethane contract found its origin in the fact that years before Graymaur had submitted a tender to Volkswagen for certain polyurethane products, and was therefore on Volkswagen's books as a polyurethane vendor.

223]However, later in his oral testimony it transpired that he had been contacted only in connection with the unrelated contract. It was only at the site meeting that he came to learn that Volkswagen would also be seeking tenders in respect of polyurethane dunnages components. He thereupon approached the Volkswagen representative and requested

that he also be allowed to tender in respect thereof and be furnished with the drawings necessary for the tender.

224]During the course of his testimony Williams sought to state that Ureflex had not been the only entity that he had had in mind as the subcontractor in respect of Graymaur's tender to Volkswagen for the polyurethane products. He purported to testify that he had been in contact with another concern in Johannesburg on this score. When his evidence was placed under the scrutiny of cross-examination, however, it transpired that he had been well aware from the very commencement that there could not have been any serious talk of the alleged Johannesburg concern being engaged as the subcontractor. It would, for instance, have entailed that the steel frames from Volkswagen would have had to be transported to Johannesburg to enable the subcontracting work to be undertaken, ie the bonding of the polyurethane supports to the steel frames. The costs attendant thereon, so Williams admitted, would have rendered the whole project unfeasible. Williams did thereafter suggest that he had had discussions with the Johannesburg entity in connection with the alternative of the latter setting up the necessary plant in Graymaur's premises in Port Elizabeth. In the light of Williams's other evidence concerning the tooling that would be required for the production in question, referred to below, the above evidence of Williams was a fabrication.

225]The quotation received by Graymaur from Ureflex was in respect of the manufacture and supply of the polyurethane products in question, but did not include the tooling required. Williams testified that it was his intention that Graymaur would attend to the making of the tooling, would make same available to Ureflex, would invoice Volkswagen in respect thereof and would store same at its own premises after the contract had been executed until such time as Volkswagen (who would have become the owner thereof) wished to recover possession of same.

226]Why Volkswagen would at all have wanted to become the owner of the tooling was not explained. Why Graymaur would have manufactured the tooling, but not thereafter attend to the manufacture of the polyurethane components itself (notwithstanding Williams's claim that he could have set up Graymaur as a polyurethane producer within two weeks) was not explained. In fact, when Williams subsequently purported to introduce a further entity, Pat and Mike Sales Services CC of East London (Patmike), into the arrangement between Ureflex and Graymaur (in circumstances set out more fully below) and Ureflex was required to submit a quotation to Patmike instead of Graymaur, the quotation (annexure FA51 to the founding affidavit in the Graymaur application, a document retrieved during the implementation of the first *Anton Piller*) included the price of tooling. So also, in the quotation by Ureflex to Graymaur in respect of the manufacture and supply of the polyurethane components required for the second contract awarded by Volkswagen to Graymaur (annexure FA55 to the affidavit, also a document retrieved pursuant to the *Anton Piller* proceedings), the price of tooling was included. The inference is that Ureflex was in due course to supplement its initial quotation to Graymaur to cover the cost of tooling (and in his oral testimony Belling confirmed that Graymaur would have contributed nothing to the manufacture of the products required. This latter evidence of Belling gives the lie to Williams's evidence, given in explanation of his version of an inspection of Ureflex's premises carried out by Volkswagen, referred to below, which embraced the allegation that he, Williams, was to attend to the manufacturing process in Ureflex's plant). The further inference is that Williams resorted to the evidence referred to above to advance his denial that Graymaur had been interposed between Ureflex and Volkswagen as a mere front. In any event, if indeed Graymaur was to make tooling available to Ureflex, or as Reddy put it, to make the moulds available to Ureflex, that would constitute a supply by Graymaur to Ureflex. The contact with, and solicitation of, Graymaur in respect of such supply was a clear breach of the provisions of the interdict order. No advice was sought from, or given by, Friedman on this score.

227]In explanation of the quotation to Patmike by Ureflex (during January 2009) referred to above Williams stated that he brought the concern into existence with a view to securing BEE business, for which purpose he had a person from the so-called coloured group as a partner. He wished to channel the Ureflex business through Patmike (which would in turn invoice Graymaur in respect thereof and, again, Graymaur would invoice Volkswagen) so that the latter would have on its record a vastly increased turnover, which, in turn, so Williams said, would enhance its prospects of securing BEE contracts in that the impression of successful conduct of business would be created. However, relations between Williams and his partner soured, and the plans came to nought. So Williams reverted to the original arrangement.

228]Both in cross-examination of Williams and in argument Mr *Ford* subjected the explanation of Williams to trenchant criticism, on the basis that it was no more than an apparent attempt to conceal the paper trail evidencing the connection between Graymaur and Ureflex. The criticism was not without merit. (It is not without significance that in his oral testimony Belling conceded that he could not say that at the time in question neither he nor Williams were worried about the fact that Graymaur was an entity listed on annexure "X"). In the result, however, I am not sufficiently persuaded that I should act on the criticism as constituting a contribution to a finding against the respondents that there was collusion between Ureflex and Graymaur to circumvent the terms of the interdict order.

229]The final factor to be considered as part of the background to the arrangement between Ureflex and Graymaur relates to an inspection visit paid by Volkswagen representatives to the premises of Ureflex. The inspection was held during February 2009.

230]The evidence revealed that Volkswagen, aware of the fact that Graymaur was not a producer of polyurethane products and would engage the services of a subcontractor, namely Ureflex, to

manufacture and supply the polyurethane components which were the subject of the contract for which Graymaur tendered, required that it be satisfied that Ureflex did in fact have the facilities to enable it to undertake the manufacture of the product. At Volkswagen's insistence therefore arrangements were made by Williams with Ureflex for Volkswagen representatives to attend at the premises of Ureflex and conduct an inspection of its plant. Williams was to be present.

231]The evidence of Belling and Williams concerning the inspection visit was dramatically contradictory. Belling stated that he met the inspection party at the entrance to Ureflex's premises and after being introduced to the Volkswagen representatives, admitted them to the premises. Thereafter, Belling accompanied the inspection party while it went through the plant (the visit not being a lengthy one), but he did not direct the party where to go nor, indeed, did he exchange any further words at all with any members of the party, except, presumably, to bid them farewell on their departure. As Belling put it, he 'was present only in body'. Indeed, it was Williams (who, according to Belling, had previously visited Ureflex's plant) who allegedly directed the tour and furnished the explanations as to which parts of the plant would be used to do the manufacture and the manner in which that use would be made.

232]Williams agreed that Belling met the party at the entrance of the premises, but there, so Williams alleged, Belling's participation ended, and he did *not* accompany the party during the inspection tour, of which fact he, Williams, was certain. He claimed that it was he who then directed the tour and furnished whatever explanations were necessary. In this regard it may be noted that in his affidavit in the *Anton Piller* application Williams, after recording that he was aware of the prohibition against the respondents soliciting or doing business with Volkswagen, continued as follows (the reference to Meyer being to the Volkswagen representative):

'As a consequence, I supervised the inspection with Meyer (which was at his

insistence) which amounted to nothing more than a brief stroll through the Ureflex plant under my direction.'

233]Asked why he would have been responsible for the conduct of the tour Williams stated that he 'would pretty much have managed the work' in Ureflex's plant, Graymaur would have supplied the tooling and would have directed Ureflex where to cast the polyurethane into the steel frames. Again, the question falls to be asked: Why was Ureflex to be involved at all, when Williams testified that the mixing of the polyurethane components was a simple task, and it speaks for itself that the casting could readily have been undertaken by Williams. The latter in fact said he had the skills required for that task.

234]I have no hesitation in finding that in material respects both Williams and Belling lied. Contrary to Belling's allegation (which was part of his mendacity) that Williams had been to the plant previously, Williams specifically stated that the inspection tour was the first occasion on which he had been to Ureflex's plant. It is in these circumstances not credible that Williams (who also, in fact, had no practical experience specifically relating to the manufacture of polyurethane) would conduct an inspection tour without a knowledgeable person from Ureflex in attendance. I find therefore that Belling was in attendance and that Williams's mendacity on this score was part of his endeavour to avoid the accusation that he was merely a front for Ureflex.

235]However, I also have no hesitation in finding, for what I would describe as manifestly obvious reasons, that the version of Belling as to the role he played was not only farfetched and farcical, but also a calculatedly mendacious one designed to mislead me. The scenario painted was indeed surreal. There can be no doubt, as a matter of common sense, that Belling took an active part in the conduct of the inspection tour. (If, indeed, it was Williams who conducted the tour through Ureflex's plant, it need hardly then be stated that, as a matter of common sense, he did so as a front, albeit wholly transparent, for Ureflex, in an attempt to circumvent the interdict order). In the result,

Volkswagen were satisfied as to Ureflex's capabilities.

Finding based on the above background

236]In my judgment, the only reasonable inference to be drawn from the background to the arrangement between Graymaur and Ureflex recorded above, is that the arrangement constituted a circumvention of the terms of the interdict order, and was accordingly a breach thereof (paragraph 209 above).

Did the inspection in any event constitute a breach of the interdict order?

237]Whatever the extent to which the fact of the inspection supports the contention of Gentech that Graymaur was no more than a front to enable Ureflex indirectly to do business with Volkswagen, the very inspection by itself constituted a manifest breach of the interdict order's prohibition against Ureflex contacting or soliciting Volkswagen, a client listed in annexure "X". In short, on either of the factual versions put forward on behalf of the respondents, and even more so on the finding I have made above as to Ureflex's role in the inspection, the position is that Ureflex made an undoubtedly important contribution to facilitating, by direct contact with, and solicitation of, Volkswagen, the sale of products manufactured by Ureflex to Volkswagen through Graymaur as intermediary (paragraph 209 above).

238]The validity of the claim by the respondents that in their being party to the inspection visit, reliance was placed on legal advice, is considered below.

Were the infractions referred to above wilful and mala fide?

239]The first infraction to be considered is the breach of the interdict order constituted by Ureflex's mere dealing with Graymaur (paragraphs 202 to 208 above).

240]In my judgment, the distinction (discussed in the abovementioned paragraphs) sought to be drawn by the respondents, between Gentech clients and Gentech suppliers, was so manifestly wrong that the mere *ipse dixit* of the respondents that they acted on the purported distinction would carry no weight and would not import any doubt as to their wilfulness or *mala fides*. As will be shown below, they themselves entertained real doubts on the score of the alleged distinction, and their proceeding to deal with Graymaur notwithstanding such doubts would entail an intention, wilful and *mala fide*, to breach the interdict order in the form of *dolus eventualis* (paragraph 14 above).

241]However, as foreshadowed earlier, it was the respondents' case that they at a stage received legal advice that they could legitimately do business with Graymaur (an entity listed in annexure "X" as a Gentech *supplier*) provided it was with Graymaur in the capacity of *customer*. Accordingly, they did not act wilfully or *mala fide* in dealing with Graymaur. The defence fails.

242]In the first place, the evidence reveals that the respondents dealt with Graymaur for a considerable period before they sought legal advice as to whether it was legitimate for them to do so. It was already in June 2008 that Ureflex submitted a quotation to Graymaur in respect of the supply to it of polyurethane products. In the months thereafter their dealings with each other were in connection with the supply of polyurethane products for the implementation of the contracts with Volkswagen that were envisaged, and as recorded earlier, these dealings commenced on 15 July 2008. (It may be appropriate here to record that during his oral testimony Belling admitted that he had falsely stated in his affidavit in the *Anton Piller* proceedings that Graymaur approached the respondents 'much later than July 2008').

243]The first advice given by Friedman to the respondents was by way of an email dated 13 August 2008 (annexure GJF1 to exhibit E, a summary of the evidence that Friedman was to give during the hearing of oral evidence). It was in answer to an email from Belling of the

same date in which, included as part of a series of questions, was a query worded as follows:

‘Graymaur has been a minor supplier to Gentech in the past however now they want to be a customer of ours – they have approached us for supply can we supply them.’

(It may be noted that Belling did not mention that negotiations between Ureflex and Graymaur in respect of the Volkswagen dunnages tender, were already afoot. Friedman confirmed that it was only in December 2008 that he was made privy to this information).

244]In his response Friedman recorded that he would answer a number of questions raised as to the meaning of the interdict order, specifically the provision therein for a 12 month prohibition against *inter alia* ‘contacting or soliciting [Gentech’s] clients, agents and/or suppliers listed in annexure “X”’. The first piece of advice given by Friedman was that the interdict order must be interpreted in its ordinary grammatical meaning. Then, with reference to what was stated to be an indication by the respondents that entities in opposition to Gentech wanted to place orders on them, and might wish to ‘onward supply’ to Gentech customers, Friedman stated, in general terms, that as long as the respondents were not involved in the solicitation, and manufactured for a customer on request, he did not believe that the respondents would breach the interdict by supplying a customer who was not listed on annexure “X”.

245]In the light of an earlier comment by Friedman to the effect that Gentech had to bear the consequences of annexure “X” being an incomplete list of Gentech’s customers, the advice given related only to entities that were customers of Gentech, but were not listed on annexure “X”, and did not bear on a purported distinction between customers and suppliers in annexure “X”. The advice therefore did not bear on the issue of the propriety of the respondents dealing with an entity listed in the annexure as a supplier but in the capacity of customer. That the respondents did not view the advice in a different

light, is borne out by the fact that they later sought further advice specifically in relation to their dealing with Graymaur.

246]It was only on 3 December 2008 that Friedman furnished specific advice in respect of the query by the respondents whether they could supply Graymaur. He then drew the distinction between customers and suppliers referred to earlier and opined that he could not for one moment believe that supply to Graymaur was hit by the interdict order. He added, however, that he held that view 'rightly or wrongly' and that the respondents would realise that he could not give them a guarantee.

247]The response from Belling to Friedman on the same day read as follows '[T]he phrase "cannot give guarantee" virtually nulls everything else. We need to know, who can advise you?' This clearly indicated that the respondents fully realised that in the light of the terms in which the advice was couched, they could not act on it. In fact, under cross-examination Belling conceded that Friedman had not given him 'very firm advice' and that he was 'not happy with the advice'.

248]Whether there was a response by Friedman to Belling's query recorded in the preceding paragraph was not canvassed in the evidence. It appears, however, that Belling addressed a further letter to Friedman on 11 February 2009 seeking clarity. The opening paragraph of Friedman's email to Belling dated 16 February 2009 (annexure GJF7 to exhibit E) read as follows:

'I refer to your letter of 11 February 2009 and the request for some comfort as to the position with regard to manufacture.'

In the letter Friedman reiterated that it was his view that the distinction in question entitled Ureflex to supply Graymaur. It is to be stressed, however, that he did not withdraw his earlier comments that his view might be right or wrong or that he could give no guarantee in the matter. The advice therefore remained of a nature that could not be acted upon. Belling's later equivocal evidence, that Friedman may, or must, have given him further advice on a

later occasion, carried no weight, nor was it supported by evidence from Friedman.

249]Therefore, at best for the respondents, they realised that the possibility was there that dealing with Graymaur would constitute a breach of the interdict order, but they nevertheless proceeded. Intention in the form of *dolus eventualis* is accordingly to be imputed to them; hence, wilfulness and *mala fides*. They therefore committed contempt of court.

250]The second infraction was the circumvention of the interdict order by the interposing of Graymaur between Ureflex and Volkswagen. It needs only to be said that insofar as the respondents might have sought to hide behind the advice of Friedman referred to above, the remarks made in the preceding paragraphs apply *mutatis mutandis*. However, in my judgment any suggestion that the respondents did not fully realise that what they were about was a circumvention of the interdict order, falls to be summarily rejected. The respondents acted wilfully and *mala fide* and were guilty of contempt of court.

251]The last infraction, the participation in the inspection visit, may be shortly dealt with. The claim was made by both Belling and Reddy that advice was received from Friedman that as long as Ureflex did not participate in the inspection, and it was carried out 'at arm's length', there would be no breach of the interdict order. The claim is an unbelievable one. Apart from the important circumstance that the alleged advice did not in fact feature in the advice that Friedman testified he gave, I have already found, as a matter of common sense, that Ureflex did participate in the inspection and it was not conducted at arm's length. In any event, the mere fact that Ureflex made its premises available for inspection manifestly constituted a breach of the interdict order, and any claim by the respondents that they thought otherwise must be rejected as palpably false. Again, the respondents acted wilfully and *mala fide* and were guilty of contempt of court.

The Graymaur application – the second issue

252]This issue related to Ureflex's receipt of supplies from Belting Supplies (as stated earlier, an entity listed on annexure "X" as a Gentech supplier) during December 2008. In answer to a charge by Nel in the *Anton Piller* proceedings that the respondents had not made proper discovery for the hearing of oral evidence Belling stated as follows in his answering affidavit:

'We obtained a quotation from Hudson Rubber which is on X list. This quotation was obtained only for comparative purposes. We cannot buy from Hudson Rubber and did not buy from them. Once the comparative order had been received, we ordered goods from Tensile Rubber who are not on the X list. However, we had to collect the goods from Tensile Rubber's local agent, Belting Suppliers, when we had to pay locally. We did not know this when we placed the order, namely that delivery would take place through Belting Suppliers who are on the X list.'

253]In his founding affidavit in the Graymaur application Nel stamped this explanation as false. He pointed out that since February 2007 Tensile Rubber had adopted a rigid policy that all its supply of product in Port Elizabeth would take place via its local agent, Belting Suppliers. Accordingly, while orders were placed directly on Tensile Rubber, the orders were processed through Belting Suppliers which itself invoiced the customer. In support of these averments Nel annexed an order form from Gentech to Tensile Rubber dated 6 February 2007 (annexure FA45) on which the latter had endorsed in manuscript the request that orders be placed with Belting Suppliers which had been appointed as its local agent. Belling signed the endorsed annexure. Belting Suppliers invoiced Gentech in respect of the order (annexure FA46).

254]In response Belling alleged that Gentech 'twisted' the disclosure he had made in the *Anton Piller* proceedings. He mooted the possibility that it had not been he, but his wife or Reddy, who might have placed the order with Hudson Rubber and he claimed that it was only when payment by Ureflex for the order became due that he became aware

that the order would have to be collected from Belting Suppliers and that Ureflex would pay Belting Supplies. His oral testimony was unsatisfactory. He did not dispute that his signature was on the relevant annexure, but he suggested for the first time that Gentech had refused to accept that Belling supplies be Tensile Rubber's local agents as this would lead to inflated prices, and that the 'rigid policy' was not a hard and fast rule. He further added that it was indeed he who spoke to Tensile Rubber to place the order and he claimed that in fact he told Tensile Rubber that he wanted a good price and would not purchase through Belting Supplies. He signified that Tensile Rubber accepted that position. However, when Tensile Rubber thereafter contacted Ureflex to advise that the goods ordered were ready they did not speak to him, but to someone else, and it was then said that delivery had to be taken from Belting Supplies and that payment had also to be effected to them, and that is what then happened. Shortly thereafter, when his statement in his affidavit was put to him, ie that he could not even recall if it was he who made the call to Tensile Rubber, he said that he could not remember if it was he who had initially spoken to Tensile Rubber, although it was he who placed the order. The evidence merely demonstrated that Belling was only too ready facilely to adapt his evidence when he was caught out on the falsity thereof. I find that Belling well knew that the goods would come via Belting Supplies and that Ureflex would therefore have to have contact with Belting Supplies. The respondents therefore acted wittingly.

255]Belling went on to add averments to the effect that there was in any event 'really no prohibition' against the respondents dealing with Belting Suppliers as they were 'a public domain company and supply the general public' (and, it would seem, should therefore not have been listed in annexure "X"). Suffice it to say that the averments carried their own refutation.

256]Despite what is said in the preceding paragraph, the respondents' answer to the charge of contempt of court in respect of their dealing with *Belting Supplies* was not that they *bona fide* believed that same

was permissible, but rather that they were, unwittingly, forced into the position where they were obliged to deal with Belting Suppliers. In the light of my rejection of this factual defence, the respondents were guilty of contempt of court.

The Graymaur application – the third issue

257]The third issue revolves around an alleged visit paid by the first three respondents and a fourth person (who was never identified, but who, so it was suggested on behalf of Gentech, was Chellew) paid to Stuurman at his place of work during December 2008 (about which Stuurman testified during the hearing of oral evidence). That place of work was the premises of the entity then known as Transwerk (and is now known as Transnet Rail Engineering). Transwerk was specifically named in paragraph 2.3 of the interdict order as an entity which the respondents were prohibited from contacting or soliciting.

258]Gentech was during 2008, and remains, a registered vendor with Transwerk and supplied, and continues to supply, Transwerk with *inter alia* polyurethane products. Stuurman was, and remains, responsible to procure and replenish, on behalf of Transwerk, stock from the various registered vendors. He would therefore be in contact with vendors from time to time and build up relationships with the representatives of the vendors. He has been employed at Transwerk for some eight years. He is now the manager of Transwerk's rolling stock department, a position he has held for three years. During 2008 the representative of Gentech with whom Stuurman used to have contact was Zimmer.

259]Stuurman's further evidence proceeded as follows. On a day during December 2008 Zimmer arrived unannounced at his office in the company of three other men. He was introduced by Zimmer to these men. He identified Belling and Reddy (who were present in court) as two of the men, but he could not say who the fourth man was.

260]The purpose of the visit was for Zimmer to advise him that he and his colleagues had left the employ of Gentech, and that they had started a new company called Ureflex. Reddy gave him the business card of Ureflex. He still had the card in his office.

261]Subsequently, during February 2009, Nel and Mr McClelland (the majority member of Gentech) paid him a visit. The evidence of Stuurman and Nel was further that Stuurman was advised that he would no longer be dealing with Zimmer as the latter had left Gentech. Stuurman in turn advised Nel and McClelland that 'they' (as to whom, in addition to Zimmer, the reference was, see below) had visited him during December and had told him the same thing, that they had left the employ of Gentech. He recognized and confirmed, when the names Belling and Reddy were put to him, that these were the names of two of the men who had accompanied Zimmer. Similarly, he confirmed that the appearance of the two men tallied with the description given to him.

262]He firmly stated that he did not have any doubt that Belling, Reddy and Zimmer were three of the four men who came to see him in December 2008.

263]He was subsequently telephonically contacted by Mr Gough, Gentech's attorney, and had a discussion with him. Gough thereafter addressed a letter to him, dated 5 March 2009, to record the contents of the discussion. Stuurman confirmed that the letter was a correct record of their discussion. (See, however, the qualifications recorded below). The letter (annexure RA2 to the replying affidavit of Nel filed in the *Anton Piller* proceedings) read as follows:

'We refer to the conversation between the writer and Mr Stuurman on 5 March 2009. Thank you for taking the time to talk to us regarding the relationship between Ureflex and Transwerk.

We would like to confirm certain aspects of our conversation, in particular, that:

- Transwerk's relationship with Ureflex was through

Sheldon Zimmer;

- You were visited by Sheldon Zimmer, together with other individuals from Ureflex during December 2008;
- The purpose of the meeting was to say “hi” and you were advised that Ureflex was involved in the polyurethane industry;
- They left a Ureflex business card;

We also confirm that you told the writer that you do not wish to become involved in the issues between Gentech and its former employees and accordingly you are not prepared to provide an affidavit with regard to the above.

Consequently, I have addressed this letter to you as a precautionary measure so as to have a record of our conversation.

Incidentally, members of Gentech, namely Barry McClelland and Fanie Nel informed us that at a meeting with you on 5 February 2009 you told them that Keith Belling, Kevin Reddy and Ray Chellew were present at the meeting referred to above. In a similar vein you also told one of Gentech’s representatives, Johnny Anderson (while showing him the Ureflex business card) that the December meeting was attended by six Ureflex representatives. Mr Hickson, also an employee of Transwerk, advised Brendon Holmes (during January 2009 when following up on the award of a contract for the urethane coating of metal securing plates and U-channels) that the award had not yet been made as there was still a quote outstanding. Mr Hickson went on to say that Elastotech and RayTech were also quoting for the business.’

264]In the *Anton Piller* proceedings an affidavit by Gough was filed in which he confirmed that he had had a telephonic discussion with Stuurman on 5 March 2009 and that the letter quoted above was a correct record of the discussion.

265]It was, however, implicit in Stuurman’s evidence that he could not, in the witness box, confirm that the name ‘Chellew’ had been mentioned by him. It was also not his evidence that the number of Ureflex members that visited him in December was *six*. The summary of his evidence, which had been made available prior to his entry into the witness box (exhibit M) also recorded that he was visited by Zimmer and three other men, whose names he could not remember. One of

them, however, was clearly an Indian (which Reddy is).

266] Each of Belling, Reddy and Zimmer (and, for that matter, Chellew as well) denied that there had been any meeting between them and Stuurman during December 2008.

267] It was put to Stuurman during cross-examination by Zimmer that during the last week of July/the first week of August 2008 there had been a meeting between him and Belling, Reddy and Zimmer. During that meeting Stuurman mentioned that approximately two weeks earlier Nel and McClelland had visited him and advised him that the first three respondents were no longer employed at Gentech (or had at least been suspended). Stuurman, however, firmly rejected the proposition and affirmed his earlier evidence.

268] I drew Stuurman's attention to the fact that Zimmer's proposition had included the averment that at the alleged July/August meeting he, Stuurman, had also said that Nel told him that Reddy had copied some Gentech seals (or a drawing thereof). Stuurman responded by saying that he was reminded thereby that sometime after the visit of Nel and McClelland to him during February 2009 'they' (including Zimmer) had come again in order, so his impression was, to see someone in Transwerk's procurement department, and Zimmer had also come to see him and it was then that he told him that the allegation against Reddy had been made by Nel during their February meeting.

269] It was put by Zimmer that it was he and Belling who had come to see Stuurman, to which Stuurman agreed, but he could not confirm that it was during March. In the nature of things Stuurman could not comment on the proposition that it was on legal advice that Zimmer and Belling had come to see him, but he agreed it was in connection with the allegation that there had been a meeting in December. It was put to him that he had been very livid and had intimated that he had not wanted to get involved. He confirmed that he had made it clear that he had not wanted to get involved and that he had referred to the fact the

Ureflex party had visited him in December, Nel and McClelland in February and now there had been the further visit by Belling and Zimmer. Similar questions put by Belling elicited the same responses, but then Stuurman particularly said that he had not become angry, and had merely indicated his unwillingness to get involved.

270]In his affidavit (in answer to allegations by Nel in the *Anton Pillar* proceedings concerning the visit to Stuurman by the Ureflex party) Belling stated that when he (with Zimmer) had gone to see Stuurman during March 2009 to establish why Stuurman had made the averment of the meeting, the latter stated that he had made no such allegation. In his oral evidence statements were variously made by Belling *inter alia* that Stuurman acknowledged that 'he had not met with all of them', that he could not remember who it was that he met with, that 'he was not sure about anything' and that he finally conceded in effect, that there had been no such meeting and the Ureflex party had not been to see him. Not only was the evidence, in its entirety, extremely confusing, but I also have no hesitation in stamping Belling's allegations – which, incidentally were not put to Stuurman when he subsequently entered the witness box – as blatant fabrications. The same applies to Zimmer's allegation that Stuurman stated to him and Belling that they (ie the Ureflex party) had not been to see him in December. Zimmer had not put same to Stuurman, who testified before him.

271]Stuurman further confirmed that a system was in place at the entrance gate which required visitors to fill in and sign documentation, and the employee whom they came to see to record (with signature) the time they left. He pointed out, however, that he had not had any appointment with the Ureflex party in December, they had come to see someone else and had simply popped into his office, and therefore there might not be any record of his signature in respect of their departure. He further indicated that there would not always be a record of visitors signing in; frequent visitors who were known to the security personnel, were simply allowed entry. Although afforded an

opportunity later to pursue the aspect of the entrance gate records, the respondents did not do so.

272]I have taken cognizance of possible inconsistencies relating to Stuurman's evidence, as opposed to misunderstanding (paragraph 265 above), but I do not think same is of any moment. His version was otherwise consistent throughout, he had no axe to grind in the matter and his calibre as a witness was far superior to that of the first three respondents who, as I have recorded earlier, did not present as credible witnesses. Stuurman appeared to be a responsible and reliable person. The suggestion that his evidence was made up, or even that it might have been mistaken, is not a palatable one. I have no hesitation in accepting his evidence and rejecting that of the respondents as false.

273]To complete the discussion of the issue, reference should be made to the fact that Zimmer alleged (and was supported by his colleagues in the allegation) that because of what he referred to as 'all the litigation', and the fact that the respondents were under surveillance by agents of Gentech, he, who was of a nervous disposition, could no longer take the strain, and accordingly he decided to withdraw from Ureflex (which he did on 8 October 2008) until after the 12 month period fixed in the interdict order. (The litigation that had occurred prior to his alleged withdrawal was the interdict proceedings and the launch of an application by the respondents to secure an order that Gentech retract a certain circular letter it had sent to its customers and suppliers, which in the result was subsequently dismissed). It was only during August 2009 that he rejoined Ureflex. These allegations were invoked as support for the respondents' denial that they had met with Stuurman at his office in December 2008 as he had testified.

274]I have reservations about the claim of Zimmer's withdrawal from Ureflex on the date mentioned. First, it may be of significance that Gentech had secured documentary evidence (annexure FA8 to Nel's founding affidavit in the A & D application) that it was on 7 October

2008 that Zimmer had prepared the quotation submitted to A & D referred to in paragraph 150 above, and the allegation of the respondents that it was on the very next day that Zimmer withdrew from Ureflex, is a convenient one.

275]Second, in the Graymaur application Nel made reference (albeit on a hearsay basis) to a letter of introduction of Ureflex to an entity styled Lotus Engineering which Belling had personally handed to the representative of the firm on 18 May 2009 (annexure FA10 to Nel's founding affidavit). The first two paragraphs of the letter read as follows:

'We take this opportunity to thank you for your time and the opportunity to introduce ourselves and Ureflex CC to you and your company.

Ureflex is a new manufacturing business operating under ISQ Standards, fully BEE compliant, its members being Kevin Reddy, Sheldon Zimmer and Keith Belling.'

Thereafter a tabulation of the services which Ureflex could offer was set out.

276]Belling's answering affidavit (filed on 10 June 2009) embraced an admission that he had in fact handed the letter of introduction to Lotus Engineering. He sought to aver, however, that Reddy was the only official member of Ureflex (but that as between Reddy and him, they were equal members), that Zimmer was at that stage not a member, that the letter of introduction was incorrect insofar as it referred to Zimmer, and had been printed 'from a draft prepared a long time ago when Zimmer was involved'.

277]It need hardly be stated that this explanation lacked credence.

278]On the other hand, there is documentary evidence of written communications between Belling and Zimmer and between Friedman and Zimmer during October 2008 relating to Zimmer's having given notice of his intention to withdraw from Ureflex. It is also so that Friedman testified that, as he put it, Zimmer was in a shell-shocked

state of mind; hence, his wish to withdrawn from Ureflex and ‘sit out the restraint’.

279]However, even if Zimmer had withdrawn as an employee of Ureflex as claimed, that would not have been a bar to his being a member of a Ureflex party that sought to make contact with Stuurman in December 2008. In fact, there would have been every reason why Zimmer would have been included in the party: he had previously been Gentech’s contact with Stuurman and a relationship between them existed, his presence would make the visit more effective, and Zimmer was in due course to rejoin Ureflex.

280]Indirect support for Gentech’s case relating to the December meeting deposed to by Stuurman is to be found in the evidence, dealt with under the succeeding heading, of further dealings by Zimmer on behalf of Ureflex with another entity at about the same time.

281]I find therefore that the visit did take place. It was correctly not disputed that such a visit contravened paragraph 2.3 of the interdict order. No basis was put forward to question whether the contravention was wilful and *mala fide*. The respondents accordingly acted in contempt of the interdict order.

The Graymaur application – the fourth issue

282]This issue concerned alleged dealings involving Ureflex and a Johannesburg entity styled Powertech Calidus (Powertech). Powertech had for years been a regular supplier of requirements needed by Gentech, and was listed on annexure “X” as a supplier.

283]The witness Rudolph was called to adduce evidence on behalf of Gentech at the hearing of oral evidence, ie during September 2010. He had previously been in the employ of Powertech, in the position of production manager. While he had not personally met Zimmer, he testified that in the course of the business relationship between

Gentech and Powertech, he had had occasion to speak to Zimmer on 'hundreds of occasions' in connection with the supply of products by Powertech to Gentech, ie in relation to the price thereof, whether Powertech could undertake the supply and what the approximate date of delivery would be. In fact, Gentech was favoured with special prices. He would then attend to the execution of the orders placed.

284]Mr *Ford* placed exhibits O and P before the witness. The former was a copy of a tax invoice from a Johannesburg entity styled UTI Sun Couriers, dated 11 December 2008. It reflected that a consignment delivery had been made by the couriers from Powertech to Raytech in Port Elizabeth on behalf of a firm styled Brake Supplies. (I interpose to record that Brake Supplies was a part time delivery firm run by Belling's wife in Port Elizabeth, and on Belling's evidence, shared Gentech's premises). Exhibit P was a copy of a bank statement of Raytech which reflected that on 8 December 2008 Raytech effected payment into the account of Powertech of the sum of R35 251,29.

285]Asked whether Powertech was involved in such a transaction at that time Rudolph replied in the affirmative and stated that it was pursuant to telephone calls made to him by Zimmer. Zimmer had telephoned him to confirm the price of a product (ie insulation boards) and, as usual, he assumed that Zimmer was acting on behalf of Gentech, which had a price list from Powertech. After confirming that Powertech had the stock to fulfil an order and the date of delivery Zimmer placed the order.

286]Zimmer thereafter telephoned him again and requested details of Powertech's bank account. Rudolph referred him to Powertech's accounts department to secure the details. The accounts department advised Rudolph some two days later that payment for the order had been made into Powertech's account, and the order could therefore be executed. Rudolph had to see that the goods ordered would be taken to the store and Zimmer was to arrange the courier services to make delivery of the consignment to the consignee. The transfer to the store

would have taken place two or three days after the payment. The above events occurred roundabout the beginning of December 2008.

287]At no stage had Zimmer enlightened Rudolph that he was no longer attached to Gentech. He, Rudolph, only learnt of that fact when Nel and Anderson, another representative of Gentech, had a meeting with Rudolph and Powertech's sales manager in Johannesburg during January/February 2009.

288]For the sake of completeness it may be mentioned that Rudolph testified that the firm to which he is at present attached has dealings with Zimmer.

289]Under cross-examination by Zimmer Rudolph stated that he bore no knowledge of a letter circulated by Gentech after 8 August 2008 recording that the respondents were interdicted and restrained from dealing with Gentech's suppliers. He confirmed that the calls made by Zimmer to him would not have been recorded.

290]Zimmer then questioned Rudolph about a telephone call he had made to him, allegedly on 5 August 2008 (which, Zimmer advised me, was the last telephone call he had made to Rudolph). Rudolph's responses were not a model of clarity. He conceded that because there had been telephone calls there might have been one on 5 August (but he could not confirm the date). He appeared to concede that it could be that a Ureflex drawing was submitted to him to enable him to quote in respect of an order and that he stated that because Ureflex was not a customer it would have to pay cash, and that Zimmer then asked for his banking details. However, when I then asked him where he got the name 'Ureflex' he said he picked up the name during the later conversation with Anderson (in January/February 2009).

291]Questioned by Reddy as to whether he might not have confused an alleged conversation during December 2008 with the conversation that Zimmer had put took place in August, Rudolph was firm in his negative

answer. The conversation during December he could recall quite clearly.

292]Questioned thereafter again by Zimmer he was taxed with his statement that they had spoken on hundreds of occasions. He conceded the proposition that it was 'mainly once every three or four months' while Zimmer was working for Gentech that the telephone calls took place. His initial evidence was therefore an overstatement (although Zimmer himself later testified that it was over a period of some eight years that there was contact between him and Rudolph). But he rejected the next proposition that anyone who telephoned could easily say that he was 'Zimmer' with the rejoinder that Zimmer had a very distinctive voice, that he was able to recall. (The epithet 'very distinctive' remained, correctly in my view, unchallenged by Zimmer. In fact, he conceded in his own evidence that his voice was distinctive and would 'obviously' be recognised by Rudolph).

293]The further evidence tendered on behalf of the respondents related to *inter alia* telephone records. It would be convenient to refer first to the evidence of Zimmer. He placed before me his cellphone records for the first part of December 2008 (exhibit AA) (as well as exhibit BB, a letter from Rudolph stating that he had been contacted by Zimmer; exhibit CC, a fax invoice from Brake Supplies confirming a delivery on 11 December 2008 of a consignment to Raytech; exhibit DD, stated to be an order placed by Raytech with Powertech on 17 November 2008).

294]Zimmer pointed out that his cellphone records did not reflect any calls to Powertech. He reiterated that he had withdrawn from Ureflex on 8 October 2008 and that a number of calls made from Ureflex's premises to Powertech during 1 to 12 December 2008 (as reflected on exhibit Z, which Belling had already handed in after his recall to the witness box) were not, and could not have been, made by him.

295]In explanation of a relatively large number of calls to Belling and Reddy reflected on exhibit AA, Zimmer stated under cross-examination

that they were in connection with the A & D application (at which time Gentech's replying papers in that application had already been filed) and with the liability of each of the respondents in the sum of R50 000,00 in respect of the costs of the interdict proceedings. Zimmer denied that these telephone calls evidenced his continued involvement with Ureflex.

296]He agreed that the order placed with Powertech in the name of Raytech was an order for products required by Continental Tyres, a client of Gentech. He, Zimmer, had had a good relationship with representatives of Continental Tyres, and had supplied them with similar products previously.

297]As indicated earlier Belling introduced into evidence Ureflex's telephone records for the period 1 to 12 December 2008 (exhibit Z), which reflected a number of calls to Powertech. His further evidence was that he had no knowledge of the Raytech order placed with Powertech. At no time during the period in question was Zimmer at the premises of Ureflex and therefore the calls could not have been made by him. The only possible persons who could have done so were Belling, Reddy, Belling's wife, Chellew or someone called Austin (who worked for Brake Supplies). As far as Chellew was concerned, it was Belling's averment that he made use of the facilities of Ureflex from time to time (which Chellew, who on this score testified before Belling, mooted as a possibility). He did, however, record that on his enquiry Raytech had not been able to shed any light on the telephone calls.

298]Taxed with the fact that the legal advice received from Friedman was that Ureflex had to keep itself at arm's length from Chellew, Belling averred that that advice covered an admonishment against Ureflex feeding Chellew with the names of customers to be approached, and did not relate to Ureflex making their facilities available for use by Chellew.

299]I turn now to consider the further evidence of Chellew adduced

pursuant to my having granted leave to the respondents to recall him as a witness. (I deal under the next heading with the coming into being of the relationship between Chellew and Ureflex). Belling led Chellew in evidence. Preparatory to doing so Belling handed in a number of documentary exhibits. Exhibit W2 was a fax dated 17 November 2008 allegedly addressed by Chellew to a certain Noni (said to be someone employed by Powertech). The fax requested a quotation on the supply of a quantity of insulation boards in accordance with the accompanying drawings. It concluded as follows:

‘Please fax quotation to 086 531 0312 – thank you!’

300]Exhibit W1 was a quotation dated 19 November 2008 submitted by Chellew (Raytech) to Continental Tyres for the supply of insulation boards. Exhibits W3 – 5 were said to be drawings of insulation boards. Exhibit W4 – 5 were rough drawings and exhibit W3(1) and (2) were formal drawings dated 8 November 2008. Exhibit W6, later handed in by Chellew, was a sales order acknowledgement dated 5 December 2008 addressed by Powertech to Chellew in respect of insulation boards. It was sent to fax no. 041 373 0811.

301]Chellew testified that in the course of what he termed a normal sales call on Continental Tyres an enquiry was made of him by a Mr Weyers of Continental Tyres concerning the supply of insulation boards. Chellew measured up some boards on the premises and made rough sketches thereof (exhibits W4 – 5, drawn in his diary on pages dated 4 and 5 November 2008). He thereafter prepared the final drawings, exhibits W3(1) and (2).

302]He thereafter faxed exhibit W3 to Noni, received a quotation from him, and thereafter submitted a quotation to Continental Tyres (exhibit W1). Exhibit W6 was Powertech’s invoice to him.

303]He had known how to contact Powertech as he had ‘googled’ it on the internet and secured their telephone number, and had called them.

Zimmer had nothing to do with the order in question. He, Chellew, had never heard of a man called Rudolph at Powertech.

304]With reference to exhibit W2 Mr *Ford* enquired of Chellew if the fax no. therein was Chellew's. Chellew confirmed that it was and stated that he was sure; it was, he said, 'a G-mail fax'. Mr *Ford* then showed Chellew exhibit Y, a Ureflex business card earlier made available by Belling, and pointed out that the fax no. on exhibit W2 was the same as that on the business card. The response was that Chellew (who was clearly discomforted) would have to check. When pressed Chellew mooted the possibility that at the time he might have been 'busy setting up fax lines'.

305]He confirmed that he had never spoken to Rudolph on the telephone. He had, however, had several telephone conversations with Noni, who had queries about his drawings, but he specifically stated that these had taken place during November 2008.

306]During questioning by me Chellew stated that he had sent the fax to Noni, exhibit W2, from his, Chellew's, 'home fax'. Asked to explain the reference to Ureflex's fax no. in exhibit W2 he suggested that it might have been a mistake on his part. The quotation from Noni, so Chellew confirmed, was sent to his 'personal home fax at the time' because he had not 'set up his fax' (ie a 'free fax on G-mail'). How it came about that Powertech's quotation (which Chellew said he had at home, but never produced) came to be sent to Chellew's home fax no., and not to the number stated on exhibit W2, was not initially explained by him. His evidence became increasingly confusing. It was then stated that he had sent exhibit W2 from his home (although that is nowhere reflected on the exhibit) and that is why the quotation came back to his home fax no., and he added that he was sure that he had told Noni to send the quotation, not to the no. recorded on exhibit W2, but to another no. He pointed out that exhibit W6 was sent to his home fax no., but immediately thereafter stated that he did not recognise the recipient fax no. on exhibit W6, and could offer no explanation of why

Powertech would have utilised that number. Chellew then resorted to the suggestion that he might have used someone else's fax no. Asked how it was that Ureflex's fax no. appeared on exhibit W2 he said he might have used it because his fax was not yet set up and he was dealing with Ureflex at the time concerning polyurethane products. His intention was that when Ureflex received the quotation from Powertech they would pass it on to him. He suggested that he might have communicated with Ureflex on that score because he did not have a fax no. at home at the time. Ureflex would have been a convenient port of call for him, as he was picking up parts there and getting quotations. Eventually, he stated that he did not think that there was any response from Noni to the Ureflex no. reflected on exhibit W2; then said that the quotation was sent to his home fax no. which he had already set up, or possibly it was sent to his wife's fax no. at her work (a possibility not explained by him).

307]Under further cross-examination by Mr *Ford* he stated that the number on exhibit W6 was *not* his personal fax no. at home, and he did not recognise it. His next suggestion was that his next door neighbour might have 'loaned' him a fax, as he could connect any fax no. to his home telephone no., a suggestion that graduated to a firm averment.

308]It may be noted that there was no suggestion by Chellew that, apart from the possibility that he might have used Ureflex's fax facilities, he also made use of Ureflex's telephone. In fact, he excluded that he had any telephone conversations with Powertech during December 2008.

309]In large measure the remarks made earlier in respect of the credibility of Stuurman *vis-à-vis* that of the respondents apply *mutatis mutandis* in respect of the credibility of Rudolph *vis-à-vis* that of Zimmer. Again, Zimmer's claim that he withdrew from Ureflex on 8 October 2008 does not enhance the credibility of his evidence. It may be added that Zimmer's last proposition to Rudolph carried no persuasion. It was not in dispute that the dealings in question were with Rudolph and that the transactions recorded in exhibits O and P followed thereon. It is

inconceivable that the person with whom Rudolph had the dealings would, for some reason or other, have passed himself off as Zimmer.

310]It is clear that telephone calls were made from Ureflex's premises to Powertech during the first part of December 2008. These calls tie in with Rudolph's evidence. They were not made by Chellew. There was no reason why anyone from Brake Supplies would have had the calls (12 in number) with Powertech. It must therefore have been someone from Ureflex. Chellew's evidence was of such a poor calibre that little store can be set by it. How his alleged dealings with Powertech fitted in with Zimmer's contact with Rudolph need not be decided. The only inference is that there was collusion between Raytech and Ureflex in respect of the transaction with Powertech.

311]I accept the evidence of Rudolph as true and reject that of Zimmer (on behalf of himself and the other respondents) and the parts of Chellew's evidence inconsistent with that of Rudolph, as false. The dealings with Powertech by, and on behalf of, the respondents, clearly constituted a breach of paragraph 2.3 of the interdict order. Again, no basis was put forward to question whether the contravention was wilful and *mala fide*. The respondents accordingly acted in contempt of the interdict order.

The Graymaur application – the fifth issue

312]This issue revolves around Gentech's contention that for the purposes of circumventing the terms of the interdict order Ureflex and Chellew, trading as Raytech, devised an arrangement whereby Raytech would be interposed between Ureflex and entities listed on annexure "X", and that Raytech would merely be a front for Ureflex in dealings with such entities.

Chellew's background

313]Chellew is Belling's brother-in-law. He is also acquainted with Reddy and Zimmer, the lastmentioned living in the same area as he. He was

aware that these three respondents had commenced conducting business under the banner of Ureflex.

314]Chellew was previously employed by an entity styled Multitrade, another enterprise of McClelland (the majority member of Gentech), involved in the sale and distribution of cutting tools. After three years in that employment he left same during 1993. Multitrade shared office premises with Gentech, but Chellew had not in any way been concerned with the conduct by Gentech of its business, and his work had nothing to do with polyurethane products.

315]After leaving Multitrade Chellew entered another sector of the engineering industry where he was involved in sales. As a result of a downturn and fall off in business in 2008 Chellew went into what was referred to as semi-retirement as a consultant for Culconi, the firm he was then working for. It was a business of a Mr Buzzy van Vuuren.

316]During 2008, in circumstances to be sketched below, Chellew emerged from semi-retirement to enter the polyurethane business under the style of Raytech. In his affidavit filed in the *Anton Pillar* proceedings Chellew voiced a bare denial of an allegation that he had no knowledge of the polyurethane business. Conspicuous by its absence was any detail furnished by him of what the knowledge was that he had acquired and the manner of the acquisition. Chellew had in fact never before been involved in the polyurethane industry and he did not at any stage acquire any experience of the manufacture or costing of polyurethane products. His testimony during the hearing of oral evidence merely underscored that while he was an experienced businessman, and had general knowledge of engineering and manufacturing concerns in the Port Elizabeth area, and what their requirements might be, which enhanced his marketing abilities, he had no experience in the marketing of polyurethane products, and, specifically, the costing and quotations in respect thereof.

317]Chellew's testimony during the hearing of oral evidence, as to how it came about that he entered the polyurethane business, proceeded as follows. Van Vuuren telephoned him to advise that he could expect a call from Friedman. That call came and Friedman asked him to come and see him and enquired whether he would be interested in starting a business selling polyurethane products. On his enquiry, he was told that the products would be sourced from Ureflex. He said he was interested and went to see Friedman to discuss the matter with him.

318]He advised Friedman that he was Belling's brother-in-law. Friedman said that he should not be in contact with Belling. Chellew was aware of the interdict order and stated that he consulted Friedman in connection therewith, and was advised that he could not discuss any clientele with Belling. The advice in fact related to each of the first three respondents. He did not do so and in fact at no stage did he discuss with Belling how his business would operate.

319]Friedman advised him, however, that when he needed to submit quotations to any entities, he should take the relevant drawings (and/or other specifications) received from an entity, to Belling. The latter would then give him a quotation, on which he in turn could base his own quotations to the entity. That was the only purpose for which he visited Ureflex's premises.

320]Further comments by Chellew were that, as he put it, he knew everybody in Port Elizabeth and exactly where all products were sold in Port Elizabeth. Virtually all the relevant firms in Port Elizabeth used polyurethane products. He therefore did not require any leads as to which firms he should approach. His only source of polyurethane products was Ureflex and he knew that he was dealing with many customers of Gentech. While he had not previously worked with polyurethane products, his forte was achievement as a sales person.

321]It requires to be recorded that Belling's oral testimony as to the

contact Chellew had with Ureflex was substantially coincident with that given by Chellew.

322]Friedman's evidence in chief in respect of Chellew was as follows. He had developed a relationship with van Vuuren from whom he purchased a farm. Van Vuuren was suffering from cancer and became very depressed. (He passed away during 2009). At a stage after the interdict order had been granted (of which van Vuuren was aware) Friedman, in an attempt to get van Vuuren to shake off his depression, sought to encourage him to go back into business. What he suggested was the polyurethane business, the profits of which had become apparent to Friedman. Van Vuuren suggested that he get in touch with Chellew; if the latter were interested, perhaps he, van Vuuren, would be interested.

323]Friedman telephoned Chellew and told him to contact van Vuuren. Chellew must have done so as he soon afterwards came to see Friedman (ie during August/September 2008, not long after the grant of the interdict order). In the final result, van Vuuren did not want to get involved as he was too sick. When Friedman conferred with Chellew he was startled to learn that Chellew was Belling's brother-in-law. He accordingly advised Chellew that if he was going to go into the polyurethane business, he would have to do so 'at arm's length' *vis-à-vis* Ureflex; he should not get involved in any conspiracies or collusion with his brother-in-law.

324]He, Friedman, gave similar advice to Belling; if Chellew wanted to enter the polyurethane business that would be his decision, but Belling would have to keep his distance. Friedman's email of 5 September 2008 to Belling (exhibit B) read *inter alia* as follows:

'10. As far as Raymond Chalut is concerned, my understanding is that he is working part time for Kulkoni. As he worked for Gentech, he knows exactly what is going on with their business. The question as to whether or not Raymond going into opposition would not be arms length is easily answered.

11. The answer is the following:
 - 11.1 He knows the business as well as anybody else;
 - 11.2 He is semi-retired from Kulkoni;
 - 11.3 He has no love for Gentech;
 - 11.4 He is Keith's brother-in-law and knows all of you quite well too.
12. If he wants to go into business one cannot challenge his motives.
13. As long as it is arms length and Raymond goes into business independently there is nothing anybody can do about it.
14. If it is his intention to do so, then I would prefer it if he consulted me so that I can be sure that the structure is not capable of being seen as an extension of your business.
15. I say this not to try and avoid or circumvent the Court Order, but to create a legitimate structure that does not circumvent the Order.
16. Your books of account are going to be inspected under the microscope in the forthcoming trial. We have to be certain that you do not expose yourself to additional damages.'

325] There was a follow-up email dated 7 September 2008. Part of that communication read as follows:

- '4. As far as doing future business is concerned, I understand that Raymond Chalut is considering going into business in opposition to Gentech.
5. You may recall that I acted for Ray when he left Gentech and went to work for Buzzy Van Vuuren (Kulkoni).
6. Raymond knows the business better than anybody else. The fact that he is Keith's brother-in-law is of no consequence. If Raymond wants to go into business, he is free to do so and he is also free to support you in whatever manner he sees fit.
7. What you are not allowed to do is breach the terms of the court order by utilising confidential information for the benefit of any third party or by visiting the customers.

8. If Raymond wants to go and see Transwerk and take orders from Transwerk, he is free to do so and is free to place the order on you. You may not deal with Transwerk. Raymond may.
9. However, it is important that this relationship (if it transpires) is completely arms length. There are going to be allegations made that Raymond is Keith's brother-in-law and that Keith, yourself and Kevin are feeding Raymond. That is not to happen under any circumstances. Raymond is more than capable of doing business on his own account and if his motives are to give business to Keith, then well and good. There is nothing wrong with having such a motive.
10. The Order against you is going to be policed in whatever form. You need to be sure that you keep your nose clean.
11. To cut a long story short, this is the position.
12. You are free to do business with any customer not listed on Annexure X.
13. You are free to do business you want with Raymond Chalut, or any third party who places orders on you, even if those orders are to be delivered to Transwerk or customers listed on Annexure X.
14. You are not free, however, to involve yourself in discussions with these potential customers for the onward supply. It has to be arms length.
15. Why I like the idea of Raymond is that he really knows all the Gentech customers and he has relationships with most of those people. He can call upon these people and take whatever orders he wants and establish whether he can place the orders on yourselves.'

326]Certain of the statements in the correspondence were factually incorrect: Chellew had never worked for Gentech, he did not know exactly what was going on in Gentech's business, he did not know the business as well as anyone else, he did not know all the Gentech customers, nor did he have relationships with most of them. In fact, as indicated earlier he knew very little of Gentech's business. On analysis, however, I am not persuaded that these incorrect statements affect the decision to be made on the issue presently under discussion.

327]Asked during cross-examination why he felt it necessary to get

Chellew involved, Friedman intimated that that was not the way to put it. His intention was to encourage van Vuuren to put some purpose back into his life. It was because van Vuuren intimated that he would do business with Chellew that there was contact between Friedman and Chellew, with the former requesting the latter 'to do something' with van Vuuren. Van Vuuren, however, decided against involvement, and thereafter Chellew came to see him, Friedman. Because of the relationship between Chellew and Belling, he, Friedman, was on his guard and had to address the issue properly.

328]It is not surprising that the dealings between Ureflex and Chellew were viewed askance by Gentech and that the latter invoked the contention that the arrangement was in essence the interposing of Raytech between Ureflex and entities listed on annexure "X", with a view to circumventing the provisions of the interdict order. The history of the matter and the deficient credibility of the respondents and of Chellew underscore such an approach. And I must also immediately express reservations about the validity of the advice given by Friedman.

329]However, on Friedman's evidence, it was by chance, as it were, that Chellew became interested in entering the polyurethane business in competition with Gentech, and whatever suspicions one may harbour, there is insufficient basis for a finding that it was with the connivance of the respondents, with the specific view of circumventing the interdict order, that Chellew made his decision to enter the polyurethane market. In fact, Belling testified that he had no involvement in Chellew's entering the polyurethane market.

330]It is so that of necessity (a necessity of which the respondents must have been aware) Ureflex would have had to be indirectly involved in Raytech's dealings with entities listed on annexure "X". But even if it were to be found that factually the arrangement set in place constituted a breach of the interdict order, the fact remains that Friedman gave the advice referred to above, and there is again an insufficient basis to

found a rejection of the respondents' assertion that they acted on the advice in the *bona fide* belief that they would not be contravening the interdict order, and I am unable to hold that the advice was so manifestly wrong that the respondents must have realised that they could not, or should not, act on it. Accordingly (subject to the one qualification referred to below), wilfulness and *mala fides* were not established, and no declaration of contempt of court can follow.

331]That is, however, not the end of the matter. I have already found that Ureflex and Raytech acted in cahoots in the matter of obtaining supplies from Powertech, an entity listed on annexure "X", for onward supply to Continental Tyres, also an entity listed on annexure "X". This constituted an attempt to circumvent the interdict order and at the same time amounted to contact with and solicitation of, Powertech, and indirect dealing with it and Continental Tyres by Ureflex. This conduct was clearly not of the arm's length type embraced within Friedman's advice. A breach of the interdict order by the respondents was established. No basis was put forward for questioning whether the infraction was wilful and *mala fide*. The respondents were accordingly guilty of contempt of court.

The Graymaur application – the sixth issue

332]This issue concerned certain conduct on the part of Reddy which Gentech contended constituted contact by Ureflex with *Goodyear*, an entity listed on annexure "X", and which, so it was submitted, at the same time had a bearing on the relationship between Ureflex and Raytech.

333]During January 2009 Gentech and Raytech submitted tenders to Goodyear for the supply of certain polyurethane products. The Goodyear representative in its purchasing department that dealt with the matter was a Mr Nagan. It appears that after receiving the quotations of Gentech and Raytech he called in Gentech's representative, pointed out to him that Raytech's quotation was more

detailed and requested him to submit a revised quotation which dealt with the additional detail. Gentech was in the result awarded the contract in question.

334] Reddy became aware of the above events. Being of the alleged view that Nagan's conduct, in disclosing a tender received from one entity to a competing tenderer, had been unethical, Reddy sent an email to Mr Clarke, Goodyear's purchasing manager, registering a complaint in those terms against Nagan. Reddy intended the email to be anonymous, but unfortunately for him the email was traced back to him.

335] It was put to Reddy that he was aggrieved because the plan, alleged by Gentech, of interposing Chellew between Ureflex and entities with which Ureflex could have no dealings, had in this instance failed; hence, the email. It was in any event, so it was contended on behalf of Gentech, contact between Reddy and an entity listed on annexure "X", and therefore a breach of the interdict order. Reddy resisted both propositions, and affirmed that his sole purpose had been to bring what he perceived to have been unethical conduct of a Goodyear representative to the attention of the latter's senior.

336] Whatever merit there was in Mr *Ford's* argument on this score, I consider it unnecessary to make any finding thereanent.

Finding

337] My conclusion is accordingly that in the various respects set out earlier in this judgment the respondents were in contempt of court.

Sanction

338] As already mentioned, contempt of court proceedings are often resorted to, although not invariably so, for the purpose of securing compliance with the court order in question. The 12 month period fixed

in paragraph 2.3 of the interdict order for the prohibition against the respondents contacting or soliciting the entities envisaged in the order has elapsed. However, there remains the question of the flouting of the authority of the court, which must attract an appropriate censure. In addition, the provisions of paragraphs 2.1 and 2.2 of the interdict order remain in operation and the terms of the censure decided upon by this Court must in part act as an inducement to the respondents to keep their future conduct within the confines of the restraints provided for in the order.

339]I am persuaded that the present is a serious case of contempt of court. The conduct of the respondents was calculated, devious and persistent, and that was so despite various proceedings being instituted against them. To a large extent the defence raised to Gentech's contentions was a dishonest one.

340]Having said that, I am not persuaded that censure in the form of immediate direct incarceration is merited. As far as the personal respondents are concerned it seems to me that a prison sentence which is suspended on appropriate conditions will fit the bill of bringing home to them the seriousness of their conduct and this Court's severe and unambiguous disapproval thereof. The conditions of suspension of the sentences of imprisonment will hopefully at the same time act as an inducement to the respondents not again to contravene the interdict order or any other court order.

341]A sanction in the form of incarceration does not arise in the case of the fourth respondent, Ureflex, which is a close corporation. It would, however, be appropriate for a fine to be imposed.

342]The sanctions I have decided upon will be set out at the end of this judgment.

Costs

343]I have already issued costs orders in respect of a postponement and certain interlocutory applications made during the course of the proceedings. For completeness sake these will be included in the costs orders recorded below. These are costs on the party and party scale.

344]In respect of the two contempt of court applications there is no reason why the general rule that costs follow the event should not apply. Mr *Ford* pressed for a punitive order of costs on the attorney and client scale. He pointed, first, to the very nature of the proceedings which sought to uphold the dignity of the court, and, second, the nature of the respondents' conduct, which I have found proven, as well as the unacceptable manner in which the respondents conducted the various proceedings. I agree with the submissions.

345]The remaining costs relate to the *Anton Piller* proceedings (instituted against the present respondents) which were reserved for decision by the court during the Graymaur application. In my view, as this judgment reflects, cognizable use was made of documentation retrieved during or pursuant to the *Anton Piller* proceedings sufficient to justify a costs order in respect thereof against the respondents, the institution of the proceedings also having been reasonable in the circumstances. However, I am not persuaded that costs on the punitive scale are warranted in this case.

346]Mr *Ford* pointed out that at stages in the various proceedings Gentech was represented by two counsel and he submitted that the employment of two counsel had been a prudent course. Accordingly, where applicable, the costs ordered should include the costs of two counsel. I am persuaded that the submission was valid. He also pointed out that at certain stages counsel was briefed to settle papers and that unless a specific order on that score was made the costs attendant on the briefing of counsel would not be allowed on taxation. Again, I am persuaded that an appropriate order should issue.

Order

1. In case no. 2462/2008 and case no. 1422/2009 the four respondents are declared to be in contempt of court in the respects set out in this judgment, relating to non-compliance with the order of this Court in case no. 1419/2008 dated 8 August 2008.
2. In respect of the said contempt of court (taken together for purposes of sanction):
 - (a) each of the first, second and third respondents is sentenced to imprisonment for a period of nine months, wholly suspended for a period of three years on condition that he is not again found guilty of contempt of court in the form of non-compliance with an order of court, which is committed during the period of suspension;
 - (b) the fourth respondent is sentenced to pay a fine of R10 000.00 (TEN THOUSAND RAND).
3. The costs occasioned by the postponement of the proceedings on 22 April 2010 (paragraph 47 above) will be paid by the four respondents, jointly and severally, the one paying the others to be absolved.
4. The costs of the two interlocutory applications referred to in paragraphs 50 to 83 of this judgment will be paid by the four respondents, jointly and severally, the one paying the others to be absolved, such costs to be taxed on the party and party scale.
5. The applicant's costs in case no. 2462/2008 and

case no. 1422/2009, to be taxed on the scale as between attorney and client, will be paid by the four respondents, jointly and severally, the one paying the others to be absolved.

6. The applicant's costs of the proceedings against the four respondents in case no. 486/2009 will be paid by the four respondents, jointly and severally, the one paying the others to be absolved.
7. Where applicable, the costs referred to above will include the costs attendant on the employment of two counsel, and the costs attendant on the employment of counsel to settle papers.

F. KROON

JUDGE OF THE HIGH COURT

APPEARANCES:

For applicant: EAS Ford SC, instructed by
Rushmere Noach Incorporated

For respondents: GJ Friedman of Friedman
Scheckter, thereafter, in person