

JCI Limited (the “Company” or “JCI”)

**UPDATE ON COMPANIES AND INTELLECTUAL PROPERTY COMMISSION
APPLICATION**

31 July 2019

1. Further to the update to Shareholders published on 1 July 2019 advising that JCI had delivered its answering affidavit and founding affidavit in support of its counter-application, the Company wishes to advise that CIPC has now filed a replying affidavit in the main application and answering affidavit to JCI’s counter-application.
2. JCI is in the process of preparing its Replying Affidavit which will be published on the JCI website once it has been filed with the High Court.
3. The CIPC replying affidavit follows, in full, hereunder.

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

CASE NO: 4976/2019

In the matter between:

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

Applicant

and

JCI LIMITED

(Registration number: 1894/000864/06)

Respondent

FILING NOTICE

DATE ON ROLL:

NOT YET ALLOCATED

DOCUMENT FILED:

**COMMISSION'S REPLYING AFFIDAVIT IN THE MAIN
APPLICATION AND ANSWERING AFFIDAVIT TO
JCI'S COUNTER-APPLICATION**

FILED BY:

**STATE ATTORNEY PRETORIA
APPLICANT'S ATTORNEY
SALU BUILDING
316 THABO SEHUME STREET
cnr FRANCIS BAARD AND
THABO SEHUME STREET
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Tel: 012 309 1507
Email: AWasserman@justice.gov.za
Enq: Mrs A Wasserman**

TO:

**THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
PRETORIA**

AND TO:

**TUGENDHAFT WAPNICK BANCHETTI
AND PARTNERS
RESPONDENT'S ATTORNEY
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Ref: D Jacobs/E Meyer/Mt001063**

**RECEIVED A COPY HEREOF ON
_____ DAY OF _____ 2019**

**_____
RESPONDENT'S ATTORNEY**

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

CASE NO: 4976/19

In the matter between:

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Applicant

And

JCI LIMITED
(Registration number: 1894/000854/06)

Respondent

**COMMISSION'S REPLYING AFFIDAVIT IN THE MAIN APPLICATION AND
ANSWERING AFFIDAVIT TO JCI'S COUNTER-APPLICATION**

I, the undersigned,

LANA VAN ZYL

hereby make oath and state that:

1. I am an adult female employed as Senior Manager in the Governance, Surveillance and Enforcement Unit of the Companies and Intellectual Property Commission ("the Commission").
2. The contents of this affidavit are, save where the context indicates otherwise, within my personal knowledge or derived from records and information under my control. They are true and correct.

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3. Where I make legal submissions this is based on advice by my legal representatives.
4. By virtue of a delegation of authority I deposed to the founding affidavit in the main application and am further duly authorised to depose to this affidavit on behalf of the Commission.
5. The parties in these proceedings are described in the Commission's main application (at page 5 paragraphs 5 and 6).

PURPOSE OF THIS AFFIDAVIT

6. I have read the contents of JCI's answering affidavit in the main application and the founding affidavit in support of JCI's counter-application and the annexures thereto.
7. The purpose of this affidavit is to jointly file the Commission's:
 - 7.1. reply to JCI's answering affidavit in the main application and answer to JCI's counter-application; and
 - 7.2. application to amend the Commission's notice of motion in the main application.
8. Given the purpose of this affidavit, I do not deal *ad seriatim* with JCI's answering and founding affidavits. Instead, I focus on the core issues that arise for the

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determination of this Court in deciding whether to grant the relief sought by the Commission.

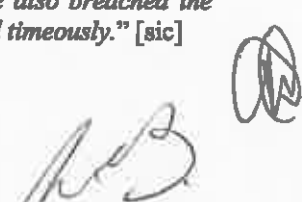
9. My failure to deal *ad seriatim* with JCI's affidavits must not be understood as a concession of the correctness of any of the contentions or allegations contained therein.

THE COMPLIANCE NOTICE

10. This matter arises from a complaint initiated with the Commission by a shareholder of JCI ("Smyth") on 20 December 2016 and on 9 March 2017. The complaint is attached to the Commission's founding affidavit in the main application as "LVZ1".
11. I conducted a thorough investigation during the period April 2017 to September 2018 which resulted in the issuance of a compliance notice which records that JCI has breached various sections of the Companies Act 71 of 2008 (as amended) ("the Act") as follows:

"The Board of Directors of JCI Limited and JCI Limited, a public company, have not prepared or provided the inspector with the Annual Audited Statements for the years 2011 to 2016 and the Board of Directors of JCI Limited and JCI Limited have consequently breached Section 30(1); (2) and (4) of the Companies Act. JCI Limited failed to publish its audited Financial Statements for each of its 2011, 2012, 2013, 2014, 2015, 2016 and 17 financial years, either in hard copy or on its website. Regulation 27 deals with the Financial Reporting Standards. The Board of JCI Limited and JCI Limited have consequently also breached Regulation 27(4) as the mentioned Annual Audited Financial Statements have not been prepared in respect of the International Financial Reporting Standards. The auditing of the 2018 Financial Statements will for the sake of completeness also be required to be submitted to the Commission upon finalization.

The Board of Directors of JCI Limited and JCI Limited have also breached the Section 61(7)(b) as the Annual General Meetings were not held timeously." [sic]



[Compliance notice, page 58]

12. Section 30 deals with requirements relating to annual financial statements and the relevant provisions are reproduced herein for ease of reference:

“(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7).

*(2) The annual financial statements must—
(a) be audited, in the case of a public company;”*

13. JCI also contravened the regulations which deal specifically with the transparency, accountability and integrity of companies, in particular, Regulation 27(4) which requires that all public companies (whether listed or unlisted on an exchange) prepare financial statements which comply with the applicable standard of IFRS, which is defined in Regulation 26(1)(b) as the International Financial Reporting Standard as issued from time to time by the International Accounting Standards Board (“IFRS”).

14. A compliance notice was issued, in accordance with Section 171(2)(a), directing that JCI and its board of directors:

“(1) Submit for the Commission the Group Annual Audited Financial Statements for the years ending 31 March 2011, 31 March 2012, 31 March 2013, 30 June 2014, 30 June 2015, 30 June 2016, 30 June 2017 and June 2018, fully compliant with Section 30(1), (2) and (4) of the Companies Act No 71 of 2008, as amended as well as Regulation 27(4) in respect of the International Financial Reporting Standards, in respect of each company, including JCI Limited, required to be audited;

(2) Convene an Annual General Meeting on the basis required by Section 61(7) of the Act for the approval of the above mentioned Group Annual Audited Financial Statements fully compliant with Section 30(1); (2) and (4) of the Companies Act No 71 of 2008 and Regulation 27(4) for the financial years ending 31 March 2011, 31

March 2012, 31 March 2013, 30 June 2014, 30 June 2015, 30 June 2016, 30 June 2017 and 30 June 2018; and to

(3) Submit as proof to the Commission (i) the Notice of Annual General Meeting, [sic] (ii) the list of the shareholders to whom the invitation was send; (sic) (iii) a certified copy of the Memorandum of Incorporation outlining the required quorum for the meeting; (iv) a certified copy of the attendance list, (v) the approved Group Annual Audited Financial Statements referred to in (2) above and (vi) the draft minutes of the Annual General Meeting held before or on 28 November 2018."

[Compliance notice, page 58]

15. The compliance notice was duly issued in terms of Section 171 of the Act and is attached to the Commission's founding affidavit as "LVZA".
16. After numerous discussions, the parties subsequently reached a settlement agreement. The terms of the settlement agreement were recorded in a draft consent order which the Commission sought to make an order of court in application proceedings in terms of Section 173(1)(b) of the Act. JCI filed a postponement application of these application proceedings in order to file opposing papers.
17. The compliance notice remains in force until set aside or until the requirements therein are satisfied and the Commission has issued a compliance certificate. It is not JCI's case that the impugned conduct has been corrected. There is no basis upon which to set the compliance notice aside in circumstances where the company admits to not having complied with the provisions of the Act as contemplated in the compliance notice.
18. JCI has indicated that it will argue that the initial complaint filed on 20 December 2016 was time-barred in respect of the financial years ending 2011, 2012 and 2013

in terms of Section 219 of the Act. JCI's ongoing non-compliance does not constitute separate offences frozen in time and constitute a course of conduct or continuing practice and on this basis, the time-bar provisions are not applicable. There is also no evidence that the conduct or practice complained of ceased three years before the complaint was submitted to the Commission. As stated, the evidence shows that the conduct or practice complained of continued without any stop.

JCI'S ONGOING NON-COMPLIANCE WITH THE ACT

19. Section 185(1) establishes the Commission as an organ of state within the public administration of South Africa. The Commission is guided by constitutional values and principles which, in accordance with Section 195(1)(g) of the Constitution include the responsibility of fostering transparency through the provision of timely, accessible and accurate information to members of the public. In performing this and all its other functions, the Commission must be impartial and act without fear, favour or prejudice.

20. To allow the Commission to perform this function efficiently and effectively all companies have the reciprocal statutory obligation of maintaining copies of all annual financial statement required by the Act for seven years after the date on which such statement is issued.

21. Section 29(1)(a) requires that a company provide financial statements which satisfy the financial reporting standards in the form and standard prescribed in the Act. The



Act prescribes that in the case of the financial reporting standards of public companies, these must be prepared in accordance with the IFRS standard.

22. In addition, Section 29(2) requires that any financial statements prepared by a company, including the annual financial statements contemplated in Section 30, must not be false or misleading in any material aspect or incomplete.

23. It is common cause that until 2005 JCI was utilised as a conduit for fraudulent and corrupt activities (JCI Supplementary affidavit in Companies Tribunal, page 72 paragraph 6; JCI's answering and founding affidavit, pages 111 – 112, paragraph 18) and that JCI's board of directors, over a period of approximately 13 years, claim to have made attempts at "*uncover[ing] ... irregularities, tracing stolen or missing assets that rightfully belong...to JCI and had been allegedly spirited away by Kebble, and bringing some order into the affairs of JCI, with a view to returning maximum value to its shareholders*" (JCI Supplementary affidavit in Companies Tribunal, page 73 paragraph 6; also JCI's answering and founding affidavit, page 112, paragraph 19).

24. Subsequently, the board of directors, of their own accord and operating outside of the provisions of the Act, "*considered that it was not meaningful to shareholders to attempt to produce annual financial statements ("AFS") on an IFRS basis and instead chose to produce consolidated annual financial statements*" as "*it would have been a waste of considerable management time and shareholder funds to attempt to produce IFRS based financial statements...*" (JCI Supplementary affidavit in Companies Tribunal, page 76 para 20).

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25. The directors of JCI were, and remain, ultimately responsible for the preparation of the financial statements at the end of each financial year.
26. JCI and its board of directors have failed to file annual financial statement that are fully compliant with the provisions of the Act. JCI and its board of directors have knowingly and/or wilfully continuously failed to comply with the provisions of the Act in relation to the submission of fully compliant financial statements.
27. It is important that all companies comply with financial reporting standards as this allows consistency in the preparation of company financial statements and allows for comparability from one year to the next of the same company's statements as well as comparability with the financial statements of other companies, in the country and internationally. This promotes sound and consistent accounting reporting standards.
28. The directors of JCI concede their inability to comply with the requirements of the Act to file annual financial statements in accordance with the provisions of the Act. There is no legal basis upon which to condone JCI's ongoing retrospective non-compliance with standard provisions of the Act nor is there any basis upon which to permit prospective non-compliance with the financial standards required in the Act.

CONSENT ORDER

29. Pursuant to the issue of the compliance notice the Commission and JCI's board proceeded to engage in negotiations during November 2018. As a form of

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compromise the terms of the consent order signed by the Commission and JCI required the preparation and submission of audited financial statements fully compliant with the Act only for the financial years ending 2013 until 2018. These terms were agreeable to JCI.

30. JCI subsequently alleges that it is suddenly incapable of producing audited annual financial statements for the JCI Group and JCI for the financial years 2013 to 2018 which are fully compliant with IFRS as agreed in the consent order (JCI's answering and founding affidavit, page 109, paragraph 14). However, in JCI's initial application to the Companies Tribunal to set aside the Inspector's report and compliance notice the independent auditors' reports, company secretary report and chairman's report (see addendums 1 – 5 at pages 82 – 93) all indicate, as early as 2012, that the directors were unable to prepare financial statements in accordance with IFRS and further record that the board of directors opted out of producing annual financial statements on an IFRS basis. Consequently, the board of directors of JCI knew or must have been aware that it was impossible to produce statements fully compliant with the Act at that time, and it would be even more impossible to do so in the future. Yet, the directors proceeded to sign the draft consent order, presumably in the "*honest and bona fide belief that with the assistance and advice of experts, JCI would be able to overcome the burden of its history and comply with the agreed terms*". (JCI's answering and founding affidavit, page 106, paragraph 8).

31. The terms of the signed draft consent order are unequivocal. By agreement between JCI and the Commission, the draft consent order provides the appropriate



consequence for a failure to adhere to the provisions of the draft consent order. At paragraph 3.5 of the signed draft consent order the parties agreed the following:

“In the event of a failure by the Respondent [JCI] to adhere to the time frame in 3.1, 3.2, 3.3 and 3.4 of this order an administrative fine of R1 000 000.00 shall be payable to the Applicant [the Commission].”

32. JCI has failed to comply with:

32.1. the provisions of the Act relating to the submission of audited financial statements in accordance with the IFRS standard, on a conservative assessment, for an ongoing period of approximately 8 years since the financial year ending 2011(JCI’s answering and founding affidavit, page 129, paragraph 46).

32.2. the compliance notice issued on 4 September 2018 and annexed to the Commission’s founding affidavit as “LVZA”; and

32.3. the provisions of the signed draft consent order annexed to the Commission’s founding affidavit as “LVZ6”.

33. Consequently, the provisions relating to the imposition of an administrative fine at paragraphs 3.5, 3.6 and 3.7 of the draft consent order remain enforceable and may be made an order of court in accordance with any changes as required by this Court as contemplated in Section 167(2)(b). Any impossibility of performance of the draft consent order is self-created and the administrative fine remains an appropriate

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sanction in the circumstances. Because of this, it is incorrect to submit that it is objectively impossible to comply with the terms of the consent order and that for that reason alone it should not be made an order of Court.

IMPOSITION OF ADMINISTRATIVE FINE

34. If the Court is not inclined to grant the draft consent order in its current form, there exists an additional and/or alternative basis upon which the court must grant an administrative fine. Section 175 read with Section 171(7) and Regulation 163 allows the Commission to apply to court for the imposition of an administrative fine where there has been a failure to comply with a compliance notice.
35. The compliance notice pertains to JCI's non-compliance with the Act in respect of financial years ending 2011 – 2016 and the consent order relates to the financial years ending 2013 – 2016. On JCI's own version, non-compliance with the IFRS financial reporting standard as required in the Act has been ongoing for financial year ends as far back as the year ending 2008 (JCI's answering and founding affidavit, page 109, paragraph 13). The compliance notice was lawfully issued in the circumstances. There is no lawful basis to have it reviewed and set aside, and none is made out in the counter-application.
36. It is difficult to ascertain the level of profit which has been derived from JCI's ongoing contravention due to the inaccurate and unreliable financial statements.

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37. The Commission also places on record that the belated postponement of the hearing of the application to make the consent draft order an order of court in circumstances where both parties had entered the consent draft order in good faith indicates a lack of cooperation with the Commission and this Court.

38. For all the above reasons the Commission seeks that the maximum statutory administrative fine of R 1 million be imposed on JCI in respect of the company's failure to act in accordance with the compliance notice, the provisions of the Act and its failure to cooperate with the Commission even after reaching agreement.

JCI'S COUNTER-APPLICATION

39. The Commission opposes all the relief sought in JCI's counter-application (annexure "PG2" to JCI's answering and founding affidavit, pages 178 – 180; pages 109 - 111), except for the order at 7 and 9.

Order 1: condoning the failure to comply with time limit imposed in Section 172(1)(a).

40. JCI has filed and subsequently withdrawn an application in the Companies Tribunal to review and set aside the compliance notice (JCI's answering and founding affidavit, page 106, para 7) and should be held to its election. There is no justifiable basis for the grant of the condonation sought.

Order 2: reviewing and setting aside compliance notice

41. JCI has failed to comply with the provisions as dealt with in the compliance notice. There is no factual or legal basis upon which to review and set aside the compliance notice.

Order 3: refusing to make the draft consent order an order of court

42. The draft consent order was signed by both parties in good faith and paragraphs 3.5, 3.6 and 3.7 can still be implemented. There is no objective impossibility in this regard. The Court must enforce the draft consent order with any appropriate changes. Alternatively, it must impose a fine of R1 million in terms of its powers under section 175 of the Act.

Order 4: declaring it impossible for the respondent to comply with s30(1), (2) and (4) for the years 2013 - 2018

43. Given the Court's discretion to impose an administrative penalty, it would not be competent nor unnecessary for this Court to make such a declaratory order. JCI has failed to comply with the provisions of the Act, the compliance order and the consent order and is liable for the imposition of an administrative fine. This Court ought not to countenance JCI's non-compliance or set a precedent that companies shall face no punishment for ongoing non-compliance.


Order 5: directing that non-compliant group financial statement be deemed sufficient compliance with the Act



44. This order is contrary to the express provisions of the Act and may not be granted.
45. The Act is unequivocal that the financial reporting standards applicable to public companies (whether listed or unlisted) is the IFRS standard. This Court may not amend these minimum statutory requirements on request by JCI or any other company in the Republic as this would set a dangerous precedent in respect of the relaxing of financial standards.
46. The purpose of the enhanced accountability provisions of the Act are not to lessen or dilute financial standards but to strengthen the transparency, accountability and integrity of financial statements by ensuring these are accurate and complete and compiled in accordance with the correct financial standard. Incidentally, Regulation 27(3)(a) of the Companies Regulations makes it clear that a company that is required to prepare its financial statements to the standards of IFRS for SMEs is not precluded from preparing its financial statements to the higher standards of IFRS. Furthermore, a company for which no financial reporting standards are prescribed is not precluded from preparing its financial statements in accordance with IFRS or some other standard. The Act seeks either the minimum standard in respect of financial reporting or an increased standard.

Order 6: directing that JCI may produce audited financial statements prepared on Specific Basis of Preparation in respect of financial years 2017 onwards

47. If JCI is incapable of complying with the minimum standards required of a public company, it should not utilise this corporate structure. In the interests of the



shareholders of the Company, it is prudent that the Commission asks that this Court directs that the shareholders call a meeting to discuss and vote on the commencement of winding up proceedings.

Order 8: directing that the Commission, or any person opposing the counter-application, pay the costs of the counter-application

48. The Commission opposes any costs order against it for the opposition of the counter-application.

RELIEF SOUGHT BY THE COMMISSION

49. In the above circumstances the Commission seeks:
- 49.1. leave to amend the notice of motion in the main application in terms of Rule 28(10) of the Uniform Rules of Court;
- 49.2. that the draft consent order annexed as "LVZ6", with such changes as this Court may deem appropriate in accordance with Section 167(2)(b), be made an order of court.
- 49.3. in the alternative to the above relief, and in the event that the draft consent order is not made an order of court, the imposition of an administrative fine in the amount of R 1000 000.00;



49.4. that the respondent issue a notice and convene a general meeting of the shareholders, within 2 weeks of this court's order, for the purpose of the shareholders voting their shares to vote on the approval or disapproval of the winding up of the company and to report to this Court on affidavit within 30 days of the order that this has been done; and

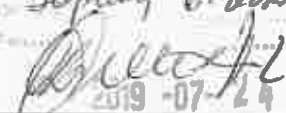
49.5. JCI's counter-application be dismissed with costs.

50. The amended notice of motion is filed together with this replying affidavit as "LVZ7".


DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Pretoria on this the 24th day of July 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied

with

Name:...	<u>Douglas Louisa Paterson</u>
Designation:...	<u>Deputy Director</u>
Signature:...	
2019-07-24	
COMMISSIONER OF OATHS	
Commissioner of Oaths	
Office, Legal Services	
The Department of Trade and Industry	
Address: 9 Street, Sunnyside, Pretoria, 0001	

Capacity:

"LVZ7"

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

CASE NO: 4976/19

In the matter between:

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Applicant

and

JCI LIMITED
(Registration number: 1894/000854/06)

Respondent

AMENDED NOTICE OF MOTION

TAKE NOTICE that on a date to be determined by the Registrar of the above Honourable Court, the applicant intends to apply for an order in the following terms:

1. Granting an order that the draft consent order attached to the founding affidavit as annexure "LVZ6" is made an order of court with such changes as required by the Court in accordance with section 167(2)(b);
2. Further or alternatively to 1. granting an order for the imposition of an administrative fee in the amount of R 1000 000.00;
3. Directing that the respondent issue a notice and convene a general meeting of the shareholders, within 2 weeks of this court's order, for the purpose of the shareholders voting their shares to vote on the approval or disapproval of the winding up of the company and to report to this Court on affidavit within 30 days of the order that this has been done;



4. Granting the applicant further and/or alternative relief; and
5. Directing the respondent to pay the costs of this application in the event of any opposition to the relief sought.

TAKE NOTICE FURTHER the accompanying affidavit of **LANA VAN ZYL**, together with annexures, shall be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed **THE OFFICE OF THE STATE ATTORNEY, PRETORIA** with its address at SALU Building, 316 Thabo Sehume Street, Pretoria as the address at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if the respondent intends opposing this application the respondent is required:

- (a) to notify the applicant's attorneys of the intention to oppose this application, in writing, no later than five days after delivery hereof; and
- (b) within fifteen days thereafter to deliver an answering affidavit, if any.

TAKE NOTICE FURTHER that you are required to appoint in the notification referred to in (a) above an address referred to in Rule 6(5)(b) of the Uniform Rules of Court at which you will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER that if no such notice of intention to oppose is given, the application will be made on the date of the hearing of the main application at 10h00 or so soon

AS



thereafter as Counsel may be heard, being not less than ten days after service of this notice of motion.

SIGNED AT PRETORIA ON THIS 24TH DAY OF JULY 2019.



THE OFFICE OF THE STATE ATTORNEY

Attorney for the applicant

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Ref: 6251/2018/Z71

**TO: THE REGISTRAR HIGH COURT
PRETORIA**

**AND TO: TUGENDHAFT WAPNICK BANCHETTI
AND PARTNERS**
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