

SOUTH AFRICA / JUDGMENT

Okavango Minerals (Pty) Limited v Bila Mining (Pty) Limited and Others (2018/38743) [2019] ZAGPJHC 38 (12 February 2019)

[2019] ZAGPJHC 38**COURT**

South Gauteng High Court, Johannesburg

BEFORE

L Adams

CASE / FILE NUMBER

2018/38743

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Source record**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 2018/38743****DATE:**12th
February 2019
In**the matter between:**OKAVANGO
MINERALS (PTY) LIMITED
Applicant
and
BILA
MINING (PTY)
LIMITED First
Respondent
KHOSA,
GILBERT Second
Respondent
BILA,
RICHARD Third
Respondent
KAGARO,
CORNELIUS Fourth
Respondent

JUDGMENT

ADAMS J:

[1]. This is an urgent opposed application by the applicant for an order declaring the first and third respondents to be in contempt of an order of this Court (Tsoka J) of the 28th of November 2018. The relevant portions of the Order of Tsoka J provides as follows:

‘1. Pending the final determination of the issues by the Court as provided herein below, the following interim relief is granted with immediate effect:

- (a) The first and third respondents are ordered, forthwith to continue to supply the applicant with all the material ordered and to be ordered In terms of the supply agreement concluded between the parties on 20 September 2018, a copy of which is attached to the applicant's founding affidavit marked “A” to the papers which served before Lamont J ("the agreement"), particularly (as ordered by Lamont J on 16 October 2018):
 - a. first respondent and third respondents are ordered, with immediate effect, to ensure that first respondent completes the supply of the material ordered by applicant in terms of the agreement [on 7 October 2018] namely 16,626.34 tons of chrome ore (as specified in terms of the agreement) at the price agreed in terms thereof (R260 (excluding VAT) per tonne of material), under order number P0 0000075, a copy of which is attached to the applicant's founding affidavit marked" B" (n the papers which served before Lamont J); and
 - b. first respondent shall supply any further material ordered by the applicant in accordance with the agreement at the price agreed in terms thereof.
- (b) By not later than Saturday I December 2018, the first respondent (with the assistance and cooperation of the third respondent) must resume supplies to applicant in accordance with paragraph I (a) above, in order to achieve the following supplies:
 - a. 20 000 tonnes of chrome ore (as specified in terms of the supply agreement) (including the balance of Order P0 0000075) evenly

supplied as follows:

- i. 10 000 ($\pm 10\%$ in the applicant's option) during the month of December 2018; and
- ii. 10 000 tonnes ($\pm 10\%$ in the applicant's option) during the month of January 2019 (10 000);
- b. Thereafter supplies of chrome ore (as specified in terms of the supply agreement), in accordance with the Order by Lamont J, until the issues (defined below) are finally resolved.
- c. If first or third respondents should fail to comply with paragraph I (a) & (b) above, the third respondent will forthwith be committed to prison to be held in jail until first respondent complies with this Order.

- d. The applicant is granted leave to approach this Court on an urgent basis on the same papers, duly supplemented, for further relief or directions as it may be advised in the event of continued contempt by the first or third respondent of the Orders of this Court.
1. The application for contempt of Court is referred for the hearing of oral evidence on the earliest date which is allocated by the Deputy Judge President on a joint urgent application ...
...'

[2]. The parties are involved in continuous and ongoing litigation arising from the written supply agreement concluded between the applicant and the first respondent on the 20th September 2018 ('the supply agreement'). There are at present two other Contempt of Court applications pending before this Court relating to the first and second respondents' alleged non – compliance with Orders of this Court. Those applications, one of which was called before me on Tuesday, the 5th of February 2019, when an Order was granted by consent, have been referred for the hearing of oral evidence.

[3]. Subsequently the first and third respondents have refused to comply with the terms of the Order of Tsoka J under the pretext that they were awaiting the applicant's response to a proposal by the first respondent that the applicant agrees to an increase in the price per ton specified in the supply agreement between the applicant and the first respondent, and specified in the Order of Tsoka J.

[4]. At 11:34 on Wednesday, the 6th of February 2019, the first and third respondents were informed of the applicant's rejection of the proposal. Thereafter, the reason

advanced for not supplying the applicant with the material, was due to the fact that the first respondent had 'other customers',

who had made payment prior to the applicant and who accordingly would have been given preference. This claim by the respondents was demonstrated by the applicant to be false, whereafter a different excuse was then advanced to the effect that there was not sufficient material to supply the applicant. It was thereupon pointed out by the applicant's representative on site that there was a large amount of material available for loading in the stockpile of material on the mine of the first respondent.

[5]. By all accounts, the first respondent is not complying with Order of Tsoka J and they have attempted to justify their non – compliance by recourse to a number of excuses, the most significant of which is to the effect that they were awaiting a response from the applicant to their proposal that the applicant pays a purchase price higher than that agreed upon in the supply agreement. The first and third respondents persisted with the non – compliance of the Court order until approximately 13:30 on Wednesday, the 6th of February 2019, when they agreed to supply the applicant with the material in accordance with the supply agreement and to comply with the order.

[6]. However, at approximately 16:00 on that day, being Wednesday, the 6th of February 2019, the fourth respondent, on behalf of the first respondent, informed the applicant that the first respondent would

not be allowing the trucks of the applicant to load any material on the following morning, that being Thursday, the 7th of February 2019, thus persisting with its non – compliance of the Court Order.

[7]. It is the case of the applicant that it is being severely prejudiced by the first and third respondents' conduct because it is at risk for failing to fulfil the orders of its purchasers and enormous costs are wasted when trucks are despatched for loading, but forced to return empty. Hence this urgent application to have the first and third respondents declared to be in contempt of the Order of Tsoka J.

[8]. No relief is sought against the second respondent and fourth respondents.

[9]. In their opposing papers the first and third respondents reiterate their stance that the reason why they were not complying with the Court Order was due to the fact that they were awaiting a response to their proposal that the applicant pays a price higher than that agreed upon in the supply agreement. They also stated that at the time of the alleged contempt of Court, they did not have sufficient material to supply the applicant as the available material was earmarked for other clients. How this justifies non – compliance with a Court Order remains unexplained.

[10]. The respondents therefore oppose the application on the basis that their failure to comply with the Court Order dated the 28th November 2018 does not constitute contempt of court. The first and third respondents contend that for the reasons alluded to infra there was no wilfulness on their part, and therefore the applicant has not proven one of the essential requirements for civil contempt

of court. They however seem to admit that they have not complied with the letter of the court order in that they have failed to deliver the material ordered and paid for by the applicant pursuant to the supply agreement.

[11]. The conduct alleged by the applicant to constitute contempt of the Court Order is denied by the respondents.

The Law and its application in casu

[12]. In *Fakie v CCII Systems (Pty) Ltd*,

[2006] ZASCA 52; 2006 (4) SA 326 (SCA), the court held that:

‘The essence of contempt of court *ex facie curiae* is a violation of the dignity, repute or authority of the court. ... Deliberate disregard is not enough, since the non – complier may genuinely, albeit mistakenly, believe that he is entitled to act in the way he claimed to constitute the contempt. ... Even a refusal to comply that is objectively unreasonable, may be *bona fide*.’

[13]. The applicant was required to prove three requirements, that being wilfulness, mala fides and unreasonable non – compliance, before it can be said that the conduct of the first and third respondents constitute contempt of court. As regards the question of the unreasonableness of the non – compliance, see *Consolidated Fish (Pty) Ltd v Zive*, 1968 (2) SA 517 (CPD) at 524 D.

[14]. In the *Fakie* matter (supra) Cameron JA held that the applicant in civil contempt of court proceedings is required to prove beyond a reasonable doubt the following requirements: the Court Order, service thereof and / or actual knowledge thereof and wilfulness or mala fides. Once these are established, so Cameron JA held, the respondent then bears an evidential burden to rebut wilfulness and mala fides, by raising only a reasonable doubt, which is the test applicable in criminal matters.

[15]. In sum, the applicant alleges that the first and the third respondents are in contempt of the Court Order of the 28th of November 2018. They have wilfully and in a mala fide manner not delivered the material as they were required to do in terms of the said Order. It is a fact that the first and third

respondents did not deliver the material ordered and paid for by the applicant in accordance with the Court Order. The only question is whether such failure amounted to contempt of court in that it was mala fide and wilful.

[16]. The respondents contend that they have a valid excuse for not delivering the products. Those explanations have been alluded to above.

[17]. The question which I need to decide is whether the applicant has made out a case in support of the relief sought. In other words, having regard to the version of the first and third respondents, did the applicant prove beyond a reasonable doubt that the respondents are wilfully and in bad faith not complying with the Court Order by not delivering the material ordered by the applicant?

[18]. In my judgment, the above question must be answered in the affirmative. I reject as false, beyond a reasonable doubt, the claim by the first and third respondents that they refuse to deliver the material because they were awaiting a response to their proposal and that, in addition, the available material was earmarked for other clients. I do so for the reasons alluded to above, most notably the fact that the version of the respondents in that regard is irrelevant. It is not a justification for non – compliance with a Court Order that one has struck a better deal with a third party. That just cannot be right.

[19]. This then means that, in my judgment, the applicant has proven all of the elements necessary to have the first and second respondents declared to be in contempt.

[20]. In the circumstances, I am of the view that the applicant is entitled to the relief sought in the notice of motion. I however intend granting an Order which is at variance with the relief sought in the applicant's Notice of Motion. My Order accords with the Draft Order handed up by Mr Badenhorst, Counsel for the applicant, at the hearing of the matter.

Costs

[21]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[22]. I can think of no reason why I should deviate from this general rule.

[23]. As far as the fourth respondent is concerned, it is so that the applicant indicated in its notice of motion that it would be applying for an order joining the fourth respondent in these proceedings. The applicant also indicated that it would be seeking an order against the fourth respondent that he is in contempt of Court. At the commencement of the hearing of the application it was indicated by Mr Badenhorst that the applicant did not intend pursuing any relief against the fourth respondent. His cost, if any, should therefore be paid by the applicant.

[24]. I therefore intend awarding cost against the first and third respondents in favour of the applicant, who, in turn, will be ordered to pay the cost of the fourth respondent.

Order

Accordingly, I make the following order:-

1. This application is urgent and the forms and service provided for in the rules of this Court are dispensed with.
2. The first and third respondents are held to be in contempt of the Court Order granted on the 28th of November 2018 by Tsoka J under case number 37941/2018, in that they have refused to deliver material to the applicant as per the purchase order of the applicant of the 4th February 2019.
3. Mr Richard Bila, the third respondent, be and is committed to prison for a period of imprisonment for one month for his contempt of Court, which sentence is suspended for a period of one year on condition that he (the third respondent) and the first respondent comply fully with the terms of the Order of Tsoka J of the 28th November 2018.
4. For its contempt of court, the third respondent is fined R100 000, similarly suspended for a period of one year on condition that the first and third respondents comply fully with the Court Order of Tsoka J.
5. The first and third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's cost of this urgent application, which costs shall include the cost consequent upon the employment of two Counsel, one of which is Senior Counsel
6. The applicant shall pay the fourth respondent's cost of this application.

L ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

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HEARD ON: 8th February 2019

JUDGMENT

DATE: FOR THE APPLICANT: 12th February 2019 Adv C H J Badenhorst, together with Adv P G Louw INSTRUCTED BY: Ulrich Roux & Associates FOR THE FIRST, THIRD & FOURTH RESPONDENTS: Adv S Kroese INSTRUCTED BY: Marie van Collier Incorporated

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Prepared on 12 October 2026 · Esheria