

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 2219/2024

In the matter between:

MAYFIELD CLAYS (PTY) LTD

Applicant

and

MAKANA LOCAL MUNICIPALITY

First respondent

MUNICIPAL MANAGER OF

MAKANA MUNICIPALITY *NOMINE OFFICIO*

Second respondent

THE EXECUTIVE MAYOR OF

MAKANA MUNICIPALITY

Third respondent

REASONS FOR JUDGMENT

LAING J

[1] This was an application for an order declaring the respondents to be in contempt of court. An order to that effect was granted on 30 July 2024. The respondents have requested reasons, which follow below.

Background

[2] In the applicant's founding affidavit, it explained that it conducted kaolin mining operations on properties situated at or adjacent to Mayfield Farm, which was owned by

the first respondent. On 31 October 2023, Pakati J granted an order under case number 3136/2023, directing the first respondent to comply with the agreement concluded on 9 September 2021 with the applicant. This included: the maintenance of an additional buffer zone along the perimeter of the properties mined by the applicant; the clear demarcation thereof with a fence or a line of painted boulders; the removal of anyone found on the properties; obtaining an interdict to prevent the unlawful occupation or invasion thereof and to prevent the erection and occupation of any structures thereon; and the removal of any materials found on the properties in question.

[3] On 12 December 2023, the sheriff served a copy of the order on the first, second, and third respondents. The sheriff also served a copy on the remaining respondents.

[4] The applicant alleged that it had a licence to mine kaolin for a period of 30 years. The licence required the applicant to, *inter alia*, take steps to safeguard the environment, the mining area, and any persons entitled to use the area against damage or injury. In terms of the regulations made under the Mine Health and Safety Act 29 of 1996 ('MHSA'), the applicant had to take reasonable measures to ensure that no blasting activities were carried out within 500 metres of, *inter alia*, any public thoroughfare or place where people congregated. This entailed the creation and maintenance of a buffer zone, allowing the applicant to continue with its blasting activities and mining operations.

[5] Recently, informal settlements have become established on adjacent land that is either owned or administered by the first respondent. By permitting unlawful occupation of the land in question, the first respondent has placed the applicant's mining operations at risk. This prompted the applicant to approach the first respondent, resulting in the conclusion of an agreement to enforce and maintain the buffer zone. The agreement placed certain obligations on the first respondent, which informed the order made by Pakati J on 31 October 2023.

[6] The first respondent, averred the applicant, failed to comply with either the agreement or the order. Consequently, the applicant was unable to proceed safely with its mining operations. The applicant alleged that members of the community continued to encroach onto Mayfield Farm and the buffer zone itself, bringing them within the prescribed 500-metre blasting radius and placing them at considerable risk. The first respondent was aware of the situation, stated the applicant, but had done nothing about it.

[7] On 21 February 2024, the applicant's attorneys called upon the second and third respondents to comply with the order. A meeting was held on 25 March 2024 with the respondents' attorneys and an inspection *in loco* took place on 2 April 2024 at the mining area. Representatives of the applicant, the first respondent, and the respective attorneys were present. This culminated in the first respondent's undertaking to furnish a report during the week of 22 April 2024 on the implementation of the order. No report was furnished. The applicant's attorneys demanded the report by no later than 30 April 2024, failing which contempt proceedings would be instituted. No response was received.

[8] The applicant pointed out that the respondents had been aware of the order since 12 December 2023. The respondents had failed to take any steps to give effect thereto. Consequently, the applicant made application for the respondents to be declared in contempt of Pakati J's order and sought their committal, subject to their making use of the opportunity to purge such contempt by implementing the measures contained in the order within the stipulated timeframe.

Proceedings on 30 July 2024

[9] The applicant instituted contempt proceedings on 28 May 2024. The respondents delivered a notice of opposition on 26 June 2024 but failed to deliver their answering papers. On 30 July 2024, the matter came before court on the uncontested opposed roll. In the absence of any papers from the respondents and mindful of the serious

nature of contempt proceedings, it is necessary to summarise what occurred at the hearing itself.

[10] The applicant's counsel informed the court that the respondents had, at the eleventh hour, delivered notices in terms of rule 6(5)(d)(iii) and rule 35(12). The respondents' counsel explained that she had only just been briefed. A request was made to the applicant to allow further time for the completion of investigations and the delivery of the outstanding report, but this was rejected. The first respondent proceeded, nevertheless, to prepare a draft report that it provided to its legal team during the evening of 29 July 2024, i.e. on the eve of the contempt proceedings.

[11] To this, the applicant's counsel confirmed that the respondents had indeed informed the applicant's attorneys about the draft report during the evening before. They had served the notices in terms of rule 6(5)(d)(iii) and rule 35(12) on the applicant's attorneys at 09h15 the next day, just before the commencement of motion court proceedings. Counsel contended that the respondents' last-minute attempts to deal with the contempt application had been in keeping with the pattern of conduct that they had displayed throughout the course of the matter.

[12] The respondents' counsel contended, in turn, that the underlying agreement with the applicant was invalid. Furthermore, the applicant no longer had any rights to the properties on which mining operations were being conducted.

[13] The matter was stood down to allow the parties a final opportunity to reach common ground. After the lunch adjournment, the respondents' counsel indicated that they wished to bring a postponement application later that afternoon. This was necessary to bring the draft report to the court's attention, explaining the steps that had been taken by the respondents to deal with the order and demonstrating why the respondents had served the notices in terms of rule 6(5)(d)(iii) and rule 35(12). The respondents' defence to the contempt application would be readily apparent therefrom; there were numerous families presently staying inside the buffer zone and the lease

agreement that permitted the applicant access to the land for mining operations had expired on 31 May 2023. Consequently, it no longer enjoyed *locus standi*.

[14] To the court's questions about why the respondents had only reacted at the very last minute to the application, counsel stated that the reasons were canvassed in the draft report. An opportunity was requested for the matter to be stood down further so that the respondents' affidavit and the draft report could be placed before the court. The respondents intended to seek a postponement of two weeks to allow them to get their affairs in order and would tender the costs thereof.

[15] To this, the applicant's counsel pointed out that the respondents were attempting to revisit a matter that had already been finalised, as reflected in Pakati J's order. There were indeed numerous families staying inside the buffer zone. The respondents' failure to comply with either the agreement or the order had created such a situation. There could be no prejudice were the contempt application to be to be granted because the respondents would be afforded an opportunity to purge their contempt; the timeframe envisaged in terms thereof would allow them to challenge the underlying agreement should they be so advised. Counsel contended that there would be no point in granting a postponement. The past conduct of the respondents demonstrated their lack of cooperation with the applicant; this would simply continue unabated. The applicant was presently at risk of losing its mining licence because it could not conduct proper mining operations. Any blasting activities would place the families staying inside the buffer zone in physical danger.

[16] Making a final attempt to persuade the court, the respondents' counsel raised the possibility of a rule *nisi*, which would grant the relief sought by the applicant but also permit the respondents an opportunity to place their affidavit and the draft report before court. The applicant's counsel objected to such an approach, saying that it would hardly take the matter further.

Issues to be decided

[17] Whatever the issues might have been in relation to the lease agreement, or the agreement concluded by the parties on 9 September 2021, the correct issues before the court were those strictly in relation to the contempt application. There might well be merit to the respondents' intended challenge to the above agreements; then again, there might not. It was of critical importance, however, to distinguish between the two sets of proceedings.

[18] Ultimately, after considering the requirements for an order for committal, the court was required to determine whether the respondents' non-compliance with the order of Pakatai J, made on 31 October 2023, was wilful or *mala fide*. A brief overview of the relevant principles follows.

Legal framework

[19] Generally, all orders of court, whether correctly or incorrectly granted, must be obeyed until properly set aside.¹ This is a principle that is fundamental to the rule of law and is enshrined in section 165(5) of our Constitution.² The role of the judiciary as the third branch of government is indispensable for individual liberty.³ Non-compliance with an order of court undermines not only the judiciary's role but also disturbs, sometimes imperceptibly, at other times blatantly, the democratic values of dignity, equality, and freedom, upon which our constitutional democracy is built. Contempt of court proceedings must be considered within such a context.

[20] The requirements for issuing an order of committal for contempt of court are well-known. The commentary in *Herbstein & Van Winsen* indicates that an applicant must show:

¹ AC Cilliers (et al), *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (Jutastat e-publications, 5ed 2009), ch38-p1110.

² Section 165(5) provides that 'An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

³ GE Devenish, 'Constitutional Law', *LAWSA* (Vol 5 Part 3, 2ed, LexisNexis Butterworths, 2004), at paragraph 285.

- '(a) that an order was granted against the respondent;
- (b) that the respondent was either served with the order or informed of the grant of the order and could have no reasonable ground for disbelieving that information; and
- (c) that the respondent has either disobeyed the order or neglected to comply with it.'⁴

[21] In *Fakie NO v CCII Systems (Pty) Ltd*,⁵ Cameron JA summarized the nature of contempt proceedings as follows:

- '(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
- (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence

⁴ AC Cilliers (et al), n 1 above. The learned writers referred to *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C), at 522; *Culverwell v Beira* 1992 (4) SA 490 (W), at 493D.

⁵ 2006 (4) SA 326 (SCA).

that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.⁶

The above principles comprised the basic framework within which the matter was assessed. This is set out in the discussion that follows.

Discussion

[22] There was no dispute about the existence of the order made by Pakati J on 31 October 2023. There was no dispute that there was proper service thereof on the respondents. There was also no dispute, on the available evidence, that the respondents failed to comply therewith; this was common cause at the hearing.⁷ Consequently, wilfulness could be inferred and an evidential burden rested on the respondents to establish a reasonable doubt as to whether such non-compliance was wilful or *mala fides*.⁸

[23] The glaring weakness in the respondents' position was that there was simply no evidence before the court to discharge the evidential burden by the time that the matter was heard. Irrespective of how sincere their counsel's submissions might have been, the respondents simply failed to present any evidence that could have created the reasonable doubt necessary to have upset the inference of wilfulness or *mala fides* regarding non-compliance. If the respondents had only become aware of the contempt proceedings at the very last minute, then their conduct could possibly have been

⁶ At paragraph [42].

⁷ Admittedly, counsel for the respondents explained there were reasons for non-compliance. This must, however, be distinguished from whether there was non-compliance in the first place.

⁸ *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A), at 367; *Macsand CC v Macassar Land Claims Committee* [2005] 2 All SA 469 (SCA), at 477.

condoned. This was, however, not the case. The contempt application was served on the respondents on 4 June 2024, some eight weeks prior to the hearing. The respondents notified the applicant of their intention to oppose the proceedings on 26 June 2024. From the submissions made by counsel, it was apparent that the respondents gave instructions on how to deal with the matter less than 24 hours before the hearing. For an organ of state, the most senior manager in its administration, and the most senior of its public office bearers, this was entirely unacceptable.

[24] In terms of section 165(4) of the Constitution, organs of state are enjoined to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness. Non-compliance with a court order amounts to an abject failure to fulfil such a duty. A period of almost seven months had lapsed since the date of the order in question before the applicant launched its contempt application;⁹ a further period of eight weeks had lapsed before the hearing itself. At the very least, a single, brief affidavit could have been filed prior to the commencement of the hearing on 30 July 2024, accompanied by such confirmatory affidavits as might have been required, to explain in concise and simple terms why the respondents had not complied with the order and why a postponement was necessary. The respondents' failure to place any evidence whatsoever before the court in proceedings such as these was to heap contempt upon contempt. The court could only decide the matter on the papers before it. The inference of wilfulness, if not *mala fides*, was irresistible.

[25] The respondents have also requested reasons for why their notices in terms of rule 6(5)(d)(iii) and rule 35(12) were not considered. The plain answer is that these were not before the court; they had not been filed by the time that the matter was called. Even if they had been filed, it is doubtful that, in the absence of evidence, they could have served to establish the reasonable doubt necessary to upset the inference.¹⁰

⁹ The order was made on 31 October 2023, the contempt application was launched on 28 May 2024.

¹⁰ It needs to be added that the contents of the notices in question remain unknown. Unless they were misplaced in the registrar's office, they were simply never filed.

[26] Furthermore, the respondents requested reasons for why the application for a postponement, made from the bar, was refused. The respondents also wished to know why the matter was not stood down until the end of the roll to allow them to have brought a substantive postponement application.

[27] In *Persadh and Another v General Motors South Africa (Pty) Ltd*,¹¹ Plasket J held as follows:

‘The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent’s procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant’s inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.’¹²

[28] The set of principles described above were entirely apt in the present matter. In the absence of evidence from the respondents, showing good cause and explaining why they could not proceed, the respondents were immediately at a significant disadvantage. An informal application made by counsel from the bar was not good enough. To have tendered the costs of a postponement, moreover, was not the antidote that the respondents required. If the prejudice that the applicant would continue to suffer in relation to its mining activities was considered, as well as the risk that confronted families staying within the buffer zone, then there was a reasonable basis upon which to have refused the indulgence sought.

¹¹ 2006 (1) SA 455 (SECLD).

¹² At paragraph [13].

[29] As to why the matter could not have been stood down in the circumstances, the question is akin to asking why a football match could not be suspended after kick-off to allow a team to find a proper striker and a goalkeeper. The team was required to have been ready when the whistle was blown. There was no suggestion in the present matter that the applicant set it down for hearing unfairly. There was also no suggestion that the respondents had insufficient time to answer the case brought against them. To attempt to persuade the court to allow a final opportunity to prepare a substantive postponement application, after the commencement of the hearing and in contempt proceedings such as these where an organ of state and its leadership were the respondents, was, quite frankly, outrageous. If any application was to have been brought in this regard then it ought to have been done on reasonable notice to the applicant and the court; at the very least, it ought to have been brought prior to the start of the proceedings.

Relief and order

[30] Ultimately, the court was satisfied that the applicant had met the requirements for an order of committal to have been made. The harsh effects thereof were ameliorated by affording the respondents an opportunity to purge their contempt. The intervening period would also have allowed the respondents a chance to challenge the underlying agreements and to seek to suspend the implementation of the order for committal, alternatively as might have been advised.

[31] Regarding costs, the order on an attorney and client scale reflected the court's displeasure with (and disapproval of) the respondents' conduct. Enough has been said about that already.

[32] In the circumstances, the following order was made:

1. The first, second and third respondents be and are hereby declared to be in contempt of court by failing to comply with the order of the above Honourable Court granted under case number 3136/2023 on 31st October 2023.
2. A warrant of arrest be and is hereby authorised committing the second and third respondents to imprisonment for contempt of court for a period of 30 calendar days, which warrant is wholly suspended for a period of one (1) year on condition that the respondents, jointly and severally, purge their contempt as follows:
 - 2.1 the respondents are directed to maintain the additional buffer zone along the perimeter of the applicant's mining rights upon the property Remainder of Portion 8 (Portion of Portion 3) of the Farm Tempe No 240, owned by the Provincial Government, Eastern Cape, and the property Remainder of Portion 2 of the Farm Brakkefontein No 240, Division Albany, and which is described in the diagram attached to the memorandum of agreement marked "FA15" and annexure "MC2" to the main application;
 - 2.2 the respondents are directed to demarcate the buffer zone depicted at coordinates F, G, H, J and K in annexure "MC2", clearly with a fence line and/or a line of large painted boulders located no more than 50m from one another within 15 court days of the granting of this order;
 - 2.3 the respondents are directed to institute eviction proceedings to remove persons to be found on the property Remainder of Portion 8 (Portion of Portion 3) of the Farm Tempe No 240 and the property Remainder of Portion 2 of the Farm Brakkefontein No 243, Division Albany, and the area generally and commonly known as Mayfield Farm, district of Makhanda, in terms of the relevant legislation, within 15 court days of the granting of this order;

2.4 the respondents are directed to apply for an interdict from the above Honourable Court, as might be advised, within 15 court days of the granting of this order, to:-

2.4.1 prevent the unlawful occupation, or invasion, of the property Remainder of Portion 8 (Portion of Portion 3) of the Farm Tempe No 240 and the property Remainder of Portion 2 of the Farm Brakkefontein No 243, Division Albany, and the area generally and commonly known as Mayfield Farm, district of Makhanda, by any persons, and;

2.4.2 prevent the erection, completion, and/or occupation of any structure on the property Remainder of Portion 8 (Portion of Portion 3) of the Farm Tempe No 240 and the property Remainder of Portion 2 of the Farm Brakkefontein No 243, Division Albany, and the area generally and commonly known as Mayfield Farm, district of Makhanda, by any persons, including the erection, completion, and/or occupation of municipal infrastructure relating to roads, electricity supply, and water and sewage supply and services.

3. Should the respondents fail to purge their contempt in any manner as set out in paragraph 2 of this order, the applicant may approach the above Honourable Court, with papers duly supplemented, if necessary, to implement the committal of the second and third respondents.

4. The respondents are to pay the applicant's costs on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved.

JGA LAING
JUDGE OF THE HIGH COURT

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Date of request for reasons:

12 August 2024.

Date of delivery:

29 August 2024.