



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

Case No.: 5614/2020

In the matter between:

XIAMEN FUXIA IMPORT AND EXPORT CO. LTD

First Applicant

SU JIANFENG

Second Applicant

and

MILLION RISE TRADING (PTY) LTD

First Respondent

SIZISA UKHANYO TRADING 830 CC

Second Respondent

SU, JIANQIANG

Third Respondent

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Fourth Respondent

REGISTRAR OF DEEDS, KIMBERLEY

Fifth Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY

Sixth Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 07 FEBRUARY 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicants seek an order declaring the third respondent in contempt of three court orders, and his incarceration for a period of 90 days, or such other period as may be appropriate. At the time the proceedings were launched, they also sought other ancillary relief which is no longer necessary, due to developments since the launching of the proceedings.

[2] Although the proceedings were launched on an urgent basis on 8 December 2023, the parties agreed to a court order postponing the matter to 18 March 2024, including a timetable for the exchange of pleadings which included delivery of the answering affidavit by 9 February 2024. The third respondent's answering affidavit was only delivered on 5 March 2024, and he has brought an application for condonation of its late filing, which, although it is opposed in the papers, was no longer opposed at the hearing. The explanation for delay leaves much to be desired, especially in the context of contempt proceedings. However, the one-month period of delay was minimal, and it has not been shown to have resulted in any prejudice to the applicants who were afforded opportunity to deliver a replying affidavit. I am of the view that it is in the interests of justice to consider the third respondent's version in the adjudication of the matter. The matter was eventually argued before me on 31 October 2024.

B. THE FACTS

[3] The second applicant and third respondent are brothers and businessmen who originate from the People's Republic of China (China). The second applicant is a director of the first applicant, a company registered in China whose business is mining, manufacturing and exporting of natural stone minerals. He is also a managing director and chairman of the board of directors of the first respondent ('Million Rise'), which is a company in South Africa.

[4] In 2009 the third respondent moved to South Africa and facilitated a transfer agreement for the purchase of a membership interest in the second respondent ('Sizisa') and a close corporation called Business Zone 1604 CC. The question of whether the third respondent acted at the behest of the applicants when he bought the members' interest is the subject of pending legal proceedings between the parties. The applicants state that they paid the full price of R8 000 000, 00 for the purchase. When these proceedings were launched on 8 December 2023, the third respondent held 70% members' interest in Sizisa and had exclusive control over its affairs, while 30% was held by Sizisa's black empowerment partner, Ms Mymona Van Wyk.

[5] On 27 March 2012, Million Rise was registered, while Business Zone ceased trading. The shareholding of Million Rise is in dispute and is also the subject of the pending legal proceedings. The sole director and controlling mind of Million Rise was the third respondent, whilst he also continued in his role as the sole controlling mind over Sizisa. It is common cause that the applicants have no insight into the financial affairs of Sizisa and Million Rise. In 2014 Million Rise obtained a mining permit.

[6] On 1 October 2016 Sizisa, represented by the third respondent, purchased the Upper and Lower Zwart Modder Farms (collectively referred to as the 'Zwart Modder Farm' or 'the farm') for R10 520 640.80, where it had previously been conducting mining operations in terms of a lease agreement. The ownership of the farm is also the subject of the pending litigation between the parties.

[7] The second applicant has repeatedly demanded transfer of the 70% members' interest in Sizisa to it, while the third respondent has steadfastly refused to oblige. As a result, a litany of litigation has ensued over the years. On 12 November 2019 the second applicant sought and obtained an interdict restraining the third respondent from transferring the 70% membership in Sizisa, which was made final on 4 February 2020. He also obtained an arbitration award granting transfer of the membership interest to him. The third respondent challenged the arbitration award in review proceedings launched in China, which were subsequently dismissed. Still, the third respondent refused to transfer the 70% membership interest.

[8] On 30 April 2020 the applicants launched urgent proceedings seeking a variety of relief, including an order making the arbitration award an order of court. In terms of an order of court dated 21 November 2022 by Maher AJ, the arbitration award was made an order of court whilst the remainder of the relief sought was referred to trial. The third respondent subsequently brought applications for leave to appeal in the Supreme Court of Appeal (SCA) and the Constitutional Court, both of which were refused on 26 June 2023 and on 6 October 2023, respectively.

[9] When the third respondent continued his refusal to transfer the 70% members' interest following the Constitutional Court's order, the applicants launched these proceedings on 8 December 2023. But unbeknown to the applicants, Sizisa had ceased trading in August 2023, when, according to the third respondent, its mining permit and prospecting right lapsed, and it thereafter ceased operating in October 2023. It was thereafter, on 21 February 2024 and after the launching of these proceedings, that the third respondent handed over the membership interest in Sizisa by providing the second applicant with a signed CK2 form and other documents necessary to transfer 70% of the members' interest in Sizisa to him.

[10] Another significant set of events concerns a company known as Golden Tropic Mining Pty (Ltd) (Golden Tropic) which applied for a mining right and associated

environmental authorization and waste management licence in about June 2021, proposing to mine granite on a portion of Zwart Modder Farm. The sole director of Golden Tropic was Ms Van Wyk, and the address indicated in the mining right application is the residential address of the third respondent. It is common cause that Golden Tropic is currently conducting mining operations on the Zwart Modder Farm.

C. THE COURT ORDERS

[11] The first of the court orders that are the subject of these contempt proceedings is dated 26 May 2020, and its relevant terms were the following:

- “2. [Million Rise, Sizisa and third respondent] are interdicted and restrained from shipping, disposing of, selling, transferring, dissipating, distributing or disseminating, or in any way relinquishing possession and control to any third party of any mining products (whether on route or otherwise) excavated or derived from Million Rise or Sizisa’s mining operations;
3. [Million Rise, Sizisa and third respondent] are interdicted and restrained from moving, disposing of, selling, transferring, dissipating, distributing or disseminating or in any way relinquishing possession and control to any third party of any of Million Rise or Sizisa’s other assets (including any mining equipment);
4. [Third respondent] is interdicted and restrained from applying for or attempting to procure, or causing any third party from applying for or attempting to procure a prospecting right, mining right or mining permit from the sixth respondent in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (“The MPRDA”) in relation to any minerals in any of the properties whereupon Million Rise and Sizisa’s mining operations are situated.

5. The third respondent is interdicted and restrained from selling, transferring, alienating, disposing of, mortgaging or in any way encumbering the property known as...the [Zwart Modder Mountain farm]...
6. The fifth respondent is ordered to register a caveat over the property in accordance with paragraph 5 above.
7. The third respondent is interdicted and restrained from taking transfer of any other property in respect of which the first or second respondent has been issued a reconnaissance, prospecting, mining right or permit in terms of the MRPDA.”

[12] The above orders were to operate as an interim order pending the outcome of part B of the main application. The order also directed Million Rise and the third respondent to disclose accounting information which had been previously demanded by the applicants.

[13] The next relevant order, dated 8 July 2020, was granted pursuant to an application brought by Million Rise, Sizisa and the third respondent, and its relevant terms were as follows:

- “1. Pending the determination of Part B of the main application, Million Rise, Sizisa and [the third respondent] will not ship, dispose of, sell, distribute or relinquish possession of any mining products from Million Rise and Sizisa’s mining operations, other than in the usual course of the business of Million Rise and Sizisa;
2. Pending the determination of Part B of the main application, Million Rise, Sizisa and [the third respondent] will not move, dispose of, sell, transfer or in any way relinquish possession and control to any third

party, of any of Million Rise and or Sizisa's other assets (including any mining equipment), other than for the purposes of:

2.1. maintenance or repair;

2.2. employing for service in either of Million Rise or Sizisa's operations;
or

2.3. the day to day requirements, or as may otherwise be necessary to advance the commercial interests, of Million Rise or Sizisa's businesses.

...

4. Million Rise, Sizisa and the third respondent shall provide to the applicants:

4.1 details of exports currently at the Cape Town harbour;

4.2 monthly management accounts in respect of Million Rise and Sizisa's businesses;

4.3 monthly bank statements in the respect of Million Rise and Sizisa;
and

4.4 monthly details of the stock of granite in production in respect of Million Rise and Sizisa.

5. [Million Rise, Sizisa and the third respondent] shall provide copies of the first set of the information listed in paragraphs 4.1, 4.3 and 4.4 (which information shall be retrospective from 5 June 2020) above by 17 July 2020, and in respect of paragraph 4.2 by 14 August 2020 and thereafter on

the 10th of every succeeding month pending the determination of Part B of the main proceedings, written agreement between them or variation of this order.

6. Million Rise, Sizisa and the third respondent undertake that, pending the determination of Part B of the main proceedings:

6.1 Million Rise and Sizisa will incur expenditure only in the ordinary course of business, which shall be reflected in the monthly management accounts referred to in paragraph 4.2 (it being recorded that such expenditure includes meeting Million Rise and Sizisa' commitments to their third-party lenders);

6.2 Neither Million Rise nor Sizisa will make repayment of capital or interest in respect of the third respondent's loan claims, nor will they declare dividends.

7. The applicants may appoint, at their cost, an independent forensic auditor agreed to by the parties, or in the absence of agreement by 13 July 2020, nominated by the chairman of SAICA on the written request of the Applicants, for the purposes of verification of the veracity of any information required to be provided by the Respondents to the Applicants in terms of this order, which auditor may take such steps or employ such means as may be reasonably necessary, for the purposes of such verification.

8. The terms of the order under the above case number dated 26 May 2020:

8.1 in paragraphs 1, 4, 5, 6 and 7 remain unchanged;

8.2 in paragraphs 2, 3, 9, 10 and 11 are replaced by this order."

[14] On 5 February 2021, the Xiamen Arbitration Commission issued an arbitration award which included the following relevant terms:

1. It was confirmed that the “*entrusted shareholding relationship*” between the second applicant and the third respondent regarding the 70% equity in Sizisa was terminated on 5 December 2019; and
2. The third respondent was directed to assist and cooperate with the second applicant, within 10 days from the date of service of the ruling, to register the change in the 70% equity and Sizisa into the second applicant’s name.

[15] As already indicated, on 21 November 2022, Maher AJ granted an order which made the arbitration award granted by the Xiamen Arbitration Commission an order of court in terms of subsection 16(3) of the International Arbitration Act 15 of 2017.

[16] Since the third respondent has complied with the November 2022 order by effecting transfer of the membership interest in Sizisa, the thrust of the case concerns non-compliance with the May and July 2020 orders in three main respects:

- 16.1 In direct breach of paragraph 4 of the May 2020 order, he allowed Golden Tropic to apply for, and obtain, a mining right in respect of the Zwart Modder Farm.
- 16.2 In breach of paragraph 1 of the July 2020 order, he relinquished possession of the Sizisa’s mining products from its mining operations, other than in the usual course of Sizisa’s business.
- 16.3 The third respondent has failed to provide the applicants with documentation referred to in paragraph 4 of the July 2020 order.

D. THE LAW ON CONTEMPT

[17] It is a crime to unlawfully and intentionally disobey a court order.¹ The rule of law and the supremacy of the Constitution – both founding values of the Constitution – require that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.² Similarly, section 165(5) of the Constitution makes orders of court binding on ‘*all persons to whom and organs of state to which it applies*’.

[18] The Constitutional Court stated as follows in *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* ³:

‘Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. ... Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court’s honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.’

[19] An applicant who alleges contempt of court must establish that: (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order.

¹ See *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) para 6, quoting *S v Beyers* 1968 (3) SA 70 (A). See also *aMatjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017) para 50.

² *S v Mamabolo* 2001 (3) SA 409 (CC) para 14.

³ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015) para 28.

[20] Once the applicant has proved the order, service or notice, and non-compliance, wilfulness and *mala fides* are presumed, and the respondent bears an evidentiary burden to establish a reasonable doubt.⁴ Should the respondent fail to discharge this burden, contempt will have been established.⁵ All the requisites of an order, its service or notice, non-compliance, and wilfulness and *mala fides*, must all be proved beyond reasonable doubt.⁶

[21] As confirmed in *Fakie*⁷, the normal principles applicable to the adjudication of the motion proceedings find application. Conflicting affidavits are not a suitable means for determining disputes of fact. However, a respondent may not raise fictitious disputes of fact to delay the hearing of the matter or to deny the applicant its order. There must be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁸, the court extended the ambit of uncreditworthy denials to encompass not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[22] A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

E. GOLDEN TROPIC

[23] The applicants contend that the third respondent is in contempt of the May and July 2020 orders in that he allowed Golden Tropic to apply for, and obtain, a mining right in respect of the Zwart Modder Farm, and to conduct mining operations there.

⁴ *Fakie NO v CCII Systems (Pty) Ltd* para 42.4.

⁵ *Secretary Judicial Commission of Enquiry into Allegations of State Capture v Zuma and Others* 2021 ZACC 18 (2) 2021 (5) SA 327 (CC), para 37.

⁶ *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) at para 42.

⁷ Paragraph 55.

⁸ *Plascon Evans Paints. Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

They allege that Ms Van Wyk, the sole director of Golden Tropic is the third respondent's girlfriend, and that, in effect the third respondent is the controlling mind behind Golden Tropic.

[24] In sum, the applicants highlight the following: Golden Tropic applied for a mining right in respect of a property upon which the Sizisa had, until recently conducted its mining operations. The third respondent was aware of the November 2022 order which compelled him to transfer 70% of the members' interest in Sizisa to the second applicant. Golden Tropic applied for a mining right over Zwart Modder Farm, a property which is registered in the third respondent's name and over which he has control. It is inconceivable that he, as the owner of the property, would be unaware of a mining right application made, by Golden Tropic, in respect of this property and be unaware of mining operations being conducted upon his property.

[25] The third respondent denies that he controls Golden Tropic or that he caused it to apply for a mining right. He explains that, although he was previously its sole director, he resigned from that position in March 2020 and was replaced on 1 September 2020 by Ms Van Wyk, and points to a CIPC report attached to the applicants' papers which indicates that his resignation was with effect from that date. He has also attached to his papers a letter from the current director of Golden Tropic confirming that there is no affiliation between him and the company. As a result, he states that he is unable to produce Golden Tropic's share register to demonstrate that he is not a shareholder in Golden Tropic because its director takes the position that he is not entitled to request any information or documents relating to the company.

[26] The applicants' retort is that, whilst the third respondent may have resigned, the remaining sole director is the third respondent's girlfriend, which is disputed by the third respondent. They point to the fact that the registered business address of Golden Tropic indicated in its mining rights application remains the residential address of the third respondent. The third respondent is unable to explain why the registered address of Golden Tropic remains his residential address, stating that he

cannot account for the current management's conduct. The applicants state that, even if Golden Tropic is not controlled by the third respondent, which they dispute, then it is in any event a "*third party*" as contemplated by paragraph 4 of the May 2020 order. Therefore, on any construction, the third respondent is in contempt of paragraph 4 of the May 2020 order.

[27] In terms of paragraph 4 of the May 2020 order the third respondent was interdicted and restrained from applying for or attempting to procure, or causing any third party to apply for or attempt to procure a prospecting right, mining right or mining permit from the Minister of Mineral Resources and Energy in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 in relation to any minerals in any of the properties whereupon Million Rise and Sizisa mining operations are situated.

[28] It is common cause that Golden Tropic is conducting mining operations on the Zwart Modder Farm, and that the application for that mining right was made in June 2021 whilst Sizisa was operating its mining operations there. But, by June 2021 when the mining application was made, the third respondent had resigned from Golden Tropic, and the applicants are not in a position to dispute that. The applicants point out that the circumstances of the third respondent's resignation are curious in the fact that, according to a letter penned by the current director of Golden Tropic, Golden Tropic's board of directors considered him incapable of fulfilling his position as a director and "*revoked*" his position as director in August 2020. This means that at the time of third respondent's supposed resignation (or revocation, as the case may be) he was the sole director of Golden Tropic. Therefore, if the current director of Golden Tropic is to be believed, the third respondent convened a meeting of Golden Tropic's board of directors (which consisted of him alone) and "*revoked*" himself on the basis that he considered himself incapable of fulfilling his position as a director. Regardless, the fact of his resignation is indisputable and must be decided in his favour in terms of *Plascon Evans*.

[29] The same applies in respect of the allegation that Ms Van Wyk is the girlfriend of the third respondent – an averment which is aimed at bolstering the allegation that the third respondent continues to wield significant influence and control over Golden Tropic. That too has not been established by the applicants, beyond the mere say-so on the affidavit of the second applicant who is resident in China.

[30] As for the fact that the third respondent's residential address was the registered address reflected on Golden Tropic's documents when it sought a mining right, that may be explained by the fact that he was previously its sole director and that the address was not changed. Given the fact that he was previously the sole director, I am not convinced that the only reasonable inference that may be drawn is that the third respondent remained the controlling mind of Golden Tropic. In any event, this is an issue that should rightly have been explained by Golden Tropic, and it does not appear that any explanation was sought from them by the applicants. This is in contrast to the third respondent who did approach Golden Tropic but received the seemingly disinterested response already adverted to earlier. In that context, the third respondent's response that he is not able to explain why Golden Tropic failed to change the address, is not unreasonable.

[31] Stripped of the issues discussed above, what is left factually-speaking, is that the third respondent was a director of Sizisa which was conducting mining operations at Zwart Modder Farm as at June 2021 when the mining right application was made by Golden Tropic. The question is whether this establishes beyond reasonable doubt that the third respondent applied for, or attempted to procure, or caused a third party to apply for or to attempt to procure a prospecting right, mining right or mining permit. This is a difficult hurdle for the applicants to mount.

[32] The argument on behalf of the applicants resolved itself into stating that the third respondent, as the owner of the farm, was aware of Golden Tropic's application for mining rights, as well as their commencement and mining operation on the farm. Although the argument is based on circumstantial evidence or inferences to be drawn,

its true force lies in the requirements set out by the MPRDA, in terms of which the application was made. Section 22 of the MPRDA sets out the provisions applicable when applying for a mining right as follows:

- '(1) Any person who wishes to apply to the Minister for a mining right must simultaneously apply for an environmental authorisation and must lodge the application-
 - (a) at the office of the Regional Manager in whose region the land is situated;
 - (b) in the prescribed manner; and
 - (c) together with the prescribed non-refundable application fee.
- (2) The Regional Manager must, within 14 days of receipt of the application, accept an application for a mining right if-
 - (a) the requirements contemplated in subsection (1) are met;
 - (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and
 - (c) no prior application for a prospecting right, mining right or mining permit or retention permit, has been accepted for the same mineral and land and which remains to be granted or refused.
- (3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing within 14 days of the receipt of the application.

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

(a) to submit the relevant environmental reports, as required in terms of Chapter 5 of the National Environmental Management Act, 1998, within 180 days from the date of the notice; and

(b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports.

(5) The Regional Manager must, within 14 days of receipt of the environmental reports and results of the consultation contemplated in subsection (4) and section 40, forward the application to the Minister for consideration.'

[33] Section 22(2)(b) makes it clear that one of the grounds on which a mining application may be refused is if another person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land. Further, in terms of Regulation 3 of the Mineral and Petroleum Resources Development Regulations published in terms of the MPRDA under GN R527 in GG 26275 of 23 April 2004 ('the MPRDA Regulations') there must be meaningful consultation with interested and affected persons, which includes public notification regarding a mining application and invitation for written comments from the public. There is no indication of whether the applicants in this case became timeously aware of any such notices, and whether they submitted any comments in response thereto.

[34] Further, in terms of section 22(4)(b) of the MPRDA, if a mining application is accepted, the applicant must be directed to '*consult in the prescribed manner with the*

landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports’. The prescribed manner of that consultation is set out in Regulation 39(1) of the Environmental Impact Assessment Regulations (promulgated in 2014, and published under GN R982 in GG 38282 of 4 December 2014), read with Regulation 3A of the MPRDA Regulations, and provides that *‘if the proponent is not the owner or person in control of the land on which the activity is to be undertaken, the proponent must, before applying for an environmental authorisation in respect of such activity, obtain the written consent of the landowner or person in control of the land to undertake such activity on that land’.* This requirement is the closest indication that the third respondent in this case must have been consulted and provided his consent to Golden Tropic’s application to undertake its mining activities on the farm.

[35] However, despite the fact that the applicants have attached a portion of Golden Tropic’s application for a mining right, there are no details in the record regarding the process in terms of which the mining right was granted to Golden Tropic, and specifically whether and how any of the highlighted provisions above were met. But, it is common cause that Golden Tropic did resume mining operations on the farm, although it is not clear when. It is also common cause that the farm remains under the control and ownership (though disputed) of the third respondent. It must accordingly be accepted that the third respondent was indeed consulted regarding Golden Tropic’s mining application, in terms of the provisions highlighted above. The conclusion that the third respondent must be aware of the circumstances pertaining at the farm since Golden Tropic resumed operations is supported by his repeated firm denials of the applicants’ allegations that Golden Tropic is currently using the mining equipment of Sizisa at the farm. Far from claiming to have no knowledge, his denial in that regard is firm, which suggests that he is aware of the circumstances.

[36] Still, none of the above conclusions meet the standard set by the clear terms of paragraph 4 of the May 2020 court order. What it interdicted the third respondent from doing is causing any third party to apply for, or attempt to procure, a mining right or

permit in relation to any minerals on the property. The fact that he may have been consulted in terms of the provisions highlighted above, and even the fact that he may have agreed when approached, does not mean that he *caused* the application. More is required by way of evidence to reach that conclusion. And I have already rejected the unsupported averments to the effect that the third respondent is the controlling mind of Golden Tropic. I am accordingly not able to conclude that there has been non-compliance with the provisions of the May 2020 court order in the circumstances discussed above.

F. RELINQUISHING POSSESSION OF MINING PRODUCTS

[37] The next argument relates to paragraph 1 of the July 2020 order, in terms of which the third respondent was ordered not to relinquish possession of any of Sizisa's mining products from its mining operations, other than in the usual course of Sizisa's business. According to the applicants, the fact that Golden Tropic is conducting mining operations upon the farm where Sizisa's mining operation was situated and where its mining products were mined, must, by implication, mean that it is also selling the products mined by it on the farm in breach of paragraphs 3 and 4 of the May 2020 order. Sizisa would not in the ordinary course of its business relinquish possession of its mining products and/or its mine. These mining products were Sizisa's sole source of income. Furthermore, Golden Tropic must also be using Sizisa's mining equipment, which was situated at the Zwart Modder Farm whilst Sizisa was mining there.

[38] The applicants complain that the third respondent is silent regarding the whereabouts of the equipment, despite having being in sole and exclusive, control of Million Rise and Sizisa. As I have already indicated, the third respondent denies that Golden Tropic is using Sizisa's (or Million Rise's) mining equipment, stating as follows: *'...neither Sizisa nor [Million Rise] have provided mining equipment to Golden Tropic for use on the farms. I do not know what equipment Golden Tropic is using to mine, but it is not Sizisa's or Million Rise's equipment'*.

[39] Although the applicants are skeptical of this response, they are not in a position to dispute it, especially given that it is common cause that the third respondent is in control of the property, and they are not. Furthermore, the conclusion that Golden Tropic must be using Sizisa's equipment is not the only inference that may be drawn from the agreed facts. It is also possible that the equipment is elsewhere, or that some other corporate body is using it, which may also constitute transgression of the court order, although not on the case made out by the applicants.

[40] In any event, the applicants' allegations in this regard are speculative and are set out as follows: *'The fact that Golden Tropic is conducting mining operations upon the farms must, by implication, mean that it is also selling the products mined by it upon the farm... Moreover, it is probable that Golden Tropic is using Sizisa and/or Million Rise's equipment to conduct mining operations upon the farms...As far as I know, Sizisa is mining, and related equipment was being used to conduct mining operations at the farm at the time of granting of the May 2020 order'*. Even after the applicants conducted investigations into Sizisa's trading activities in preparation for this application via a Mr Yongjian Yu, these averments remained speculative and were put no higher than the assumptions set out in the above-quoted portion. The averments are speculative and are denied by the third respondent.

[41] The applicants complain that the third respondent is silent about the whereabouts of the equipment, which is the subject of the anti-dissipation paragraphs of the July 2020 order. But the third respondent was not required to state the whereabouts of the equipment in these proceedings. It is rather the applicants who bear the onus to establish the non-compliance, and to do so beyond reasonable doubt. I am not satisfied that the applicants have discharged that evidential burden.

[42] For all these reasons, it has not been established beyond reasonable doubt that the third respondent caused Golden Tropic to apply for the mining right over the Zwart Modder Farms, or that he relinquished possession of Sizisa or Million Rise by

permitting Golden Tropic to use the mining equipment of Sizisa or of Million Rise. I am therefore unable to conclude that the facts surrounding Golden Tropic discussed in this judgment constitute non-compliance with the May 2020 and July 2020 court orders.

G. DELIVERY OF DOCUMENTS

[43] In terms of paragraph 4.1 of the July 2020 order, the third respondent was ordered to provide details of exports currently at the Cape Town harbour in respect of both Million Rise and Sizisa. According to a letter from the third respondent's legal representatives dated 18 May 2021, those documents were provided soon after the taking of the July 2020 order.

[44] As for the documents that the third respondent was ordered to provide in terms of paragraph 4.2 of the July 2020 order, namely the monthly management accounts in respect of Million Rise and Sizisa's businesses, he failed to provide all of the monthly management accounts in respect of Million Rise, specifically for the months of July 2022 to February 2024, but did so after receipt of the replying affidavit in these proceedings.

[45] Similarly, although the third respondent was ordered to provide monthly details of the stock of granite in production in respect of Million Rise and Sizisa in terms of paragraph 4.4 of the July 2020 order, he only provided them after receipt of the replying affidavit in these proceedings, together with an explanation that there were no mining operations conducted by Million Rise over the period July 2022 to February 2024.

[46] In answer to the charge of breach of the court orders until the institution of these proceedings, the third respondent states that he complied with these orders to the best of his ability by providing the documents required from time to time. To the extent that he did not provide documents, he states that this was not deliberate or

intentional, but was '*often the result of not yet having finalised versions of the documents, or thinking that [he] had already provided the documents*'. Moreover, he points to the fact that the second applicant did not 'chase him' for production of the outstanding documents.

[47] Furthermore, he states that prayer 5 of the July 2020 order is somewhat ambiguous in that it seems to provide that it is only item 4.2 (monthly management accounts) that should have been provided on a monthly basis. If so, he states that he is not in breach of the order as he has provided the documents.

[48] He states that since the institution of these proceedings, he has done the following: (a) he has tendered itemised documents listed in two Rule 34 tenders (with the second tender including a tender to provide documents required in terms of the July 2020 order that the applicants identify as not having yet been provided); (b) he has delivered copies of the documents listed in paragraphs 1.1 to 1.5 of the second tender.

[49] It is common cause that not all the documents in question were provided within the timeframes provided in the July 2020 court order. In terms thereof, the information listed in paragraphs 4.1, 4.3 and 4.4 of that order was to be provided by 17 July 2020, and in respect of paragraph 4.2 by 14 August 2020 and thereafter on the 10th of every succeeding month. The first to third respondents failed to comply with those timeframes in respect of the items in paragraphs 4.2 and 4.4. There is no evidence that the third respondent ever indicated any confusion or lack of clarity regarding what he was supposed to provide. Besides, the July 2020 order was taken by agreement between the parties, after the third respondent launched those proceedings. The third respondent has throughout been legally represented, and would have received guidance if there was any lack of clarity or supposed ambiguity.

[50] The same goes for his explanation that he often thought that *he had already provided the documents*. He was legally represented, and one assumes that that

assistance would have included ensuring that he complied where he had fallen short. If he had problems in finalizing the documents, whatever this means, one would have expected him and his legal representatives to act with the requisite haste and diligence required of an individual who had deadlines set in terms of a court order. It is clear from his explanations discussed earlier that, unless these proceedings were instituted, the third respondent would have continued to disregard the court orders, of which he has throughout been aware.

[51] However, what cannot be ignored is a letter dated 18 May 2021, which emanated from the third respondents' attorneys. According to the evidence, this is the last correspondence between the parties regarding non-compliance with the requirements to provide the documents mentioned in the July 2020 order, before the launch of these proceedings. That letter indicates that, soon after the July 2020 was taken, there was a considerable amount of engagement between the parties and a certain auditor regarding the documents to be provided, and that most of the documents had been provided to the applicants by that date. In the letter, the third respondents' attorneys also undertook to deliver further itemised documents, and to liaise with the auditor regarding the exchange of further information and documents.

[52] Apart from this correspondence, there is no other evidence of the applicants demanding the documents before the launching of these proceedings. As a result, although the third respondent failed to comply with the court order by providing all the documents timeously, it has not been established that the non-compliance was wilful or *mala fide*. The letter indicates the opposite. It must be remembered that, in order to establish contempt, it is not enough to show that the contemnor merely disregarded a court order. It must be shown to have been wilful and/or *mala fide*.

[53] Furthermore, as the third respondent states, the non-compliance is no longer continuing because, by the time matter was heard he had complied with all the requirements to provide documents in terms of the court orders. He also points to the fact that the transfer of the members' interest to the second applicant has now taken

place or is imminent, stating that the applicants will have access to all the documents concerning Sizisa, including historical information and business records.

[54] The result is that the third respondent has discharged the imputation of wilfulness and *mala fides*. Contempt of the July 2020 court order has accordingly not been established.

H. COSTS

[55] Although the applicants have failed to establish contempt, it is common cause that much of the compliance that was sought occurred once these proceedings were launched. That includes the transfer of the 70% membership interest in Sizisa, which was the subject of the November 2022 court order. And as I have already indicated, the grounds for non-compliance with, firstly, the requirement to deliver documents in terms of the July 2020 order, and secondly, the delivery of the answering affidavit in these proceedings, leave much to be desired.

[56] There is also to consider the third respondent's disclosure of the Rule 34 tenders, contrary to the express provisions of the Uniform Rules which provide as follows:

'No offer or tender made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.'⁹

"Any party who, contrary to this rule, personally or through any person representing him, discloses such an offer or tender to the

⁹ Uniform Rule 34(10).

judge or the court shall be liable to have costs given against him even if he is successful in the action.¹⁰

[57] It was conceded by the third respondent's counsel that Rule 34 tenders are inappropriate in the context of contempt applications which concern compliance with court orders, and that the third respondent's tenders should probably not have been disclosed to the Court. However, it was argued that their disclosure was aimed at showing that there has been some compliance with the court orders and to refute any conclusions of wilfulness or *mala fide* motive on his part. There is no such exception provided by the Rules, and I was not referred to any case law for such a deviation. If such an approach were followed, every litigant would follow similar conduct on the basis of some or other justification.

[58] It is also not disputed that it is the conduct of the third respondent, not also of Sizisa and Million Rise, that is the cause of this application. I am therefore of the view that the third respondent should bear the costs of these proceedings on an attorney and client scale.

I. ORDER

[59] In the circumstances, the following order is granted:

1. The applicants' application is dismissed.
2. The third respondent is to pay the costs of this application, on an attorney and client scale.

N. MANGCU-LOCKWOOD

¹⁰ Uniform Rule 34(13).

APPEARANCES

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