



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

CASE NO: 401/2023

In the matter between:

FUNDISWA MATIWANE	1 st Applicant
SIKHOLO MBEDLE	2 nd Applicant
THOBILE MADIKANE	3 rd Applicant
ABONGILE MATIWANE	4 th Applicant
VUTHA MBEDLE	5 th Applicant
NTSINDISO MBATHU	6 th Applicant
ZETHU MADIKANE	7 th Applicant
ALICE MKHATSHANE	8 th Applicant
MAYIBUYE LILA	9 th Applicant
BULELANI MALIBA	10 th Applicant
and	
BISMARCK (PTY) LTD	1 st Respondent
RUMDEL CONSTRUCTION CAPE (PTY) LTD	2 nd Respondent

MINISTER OF MINERAL RESOURCES	3 rd Respondent
MINISTER OF LAND REFORM AND RURAL DEVELOPMENT	4 th Respondent
FIKENI TRADITIONAL COUNCIL	5 th Respondent
BONGOLAM NDAMASE	6 th Respondent
ANDILE MUSWANA	7 th Respondent
ROLF ZUNCKER	8 th Respondent
MINISTER OF POLICE	9 th Respondent
STATION COMMANDER:	
NTABANKULU POLICE STATION	10 th Respondent
STATION COMMANDER:	
EMAXESIBENI POLICE STATION	11 th Respondent

JUDGMENT

RUSI J

[1] The first respondent is a company with limited liability registered in terms of the company laws of the Republic of South Africa. Its business entails the mining of stone, aggregate and gravel. The sixth respondent is its sole director. In 2023 the first respondent had been conducting mining operations at Mjelweni Quarries situated in Mjelweni Locality in the District of Ntabankulu and on a piece of land situated in Luxwesa Locality in the District of Maxesibeni (formerly known as Mount Ayliff). At the time, the first respondent

had been the holder of a mining permit issued to it by the Department of Mineral Resources and Energy (DMRE) bearing reference number 27/2021.

[2] The first respondent's mining activities included rock blasting which the second respondent undertook. The seventh and eighth respondents are the employees of the first and/or second respondents.

[3] Aggrieved by the first respondent's mining activities, the applicants, who are members of the Mjelweni and Luxwesa communities, staged a protest action in a quest to put an end to the mining operations or to voice their disquiet thereat. The gist of their complaint was that an access road to the mining site was developed without consultation with the members of the community or the community leadership. The mining operations negatively impacted their lives, livelihood, well-being health and environment, and caused damage to their property.

[4] In an attempt to quell the protests, the respondents, on 03 October 2023, unsuccessfully applied for an interim interdict prohibiting the applicants from interfering with its mining operations. That interim relief was opposed by the applicants who contended that the first respondent's mining permit did not authorize it to conduct mining operations in Mjelweni and Luxwesa. Even though the respondents were unsuccessful in seeking the interim interdict, the determination of the final interdict remains pending in this Court.

[5] The applicants subsequently made a counter application which was heard on 29 August 2024, in which they sought and were granted by Brooks J, an interim interdict against the respondents halting the mining activities on their land without a permit, pending the determination of the main application (the order of Brooks J). It is this order that the only the first, second, sixth, seventh and eighth respondents are alleged to have disobeyed in circumstances that I will deal with shortly hereafter. In January 2025, the applicants brought an

application for an order holding the respondents in contempt of the order of Brooks J. They sought their committal for the alleged contempt, among other relief. For the sake of brevity, I shall henceforth in this judgment refer to the first, second, sixth, seventh and eighth respondents as “the respondents.” No substantive relief is sought against the rest of the respondents.

[6] The application is opposed by the respondents, and it served before me on 31 July 2025. On the date of the hearing of the application, Counsel for both parties readily acknowledged that the urgency with which the application had been launched in January 2025 had dissipated, hence, it was no longer an issue for my determination.

[7] In tandem with their opposition to the contempt application, the respondents made three interlocutory applications. Mr *Bodlani*, together with Mr *Bakker*, appeared for the respondents, while the applicants were represented by Mr *Pienaar*. More about the respondents’ interlocutory applications later on in this judgment.

The common cause background and litigation history

[8] The first respondent was issued with a mining permit, number 27/2021, by the Department of Mineral Resources and Energy to mine stone aggregate, aggregate and gravel on a part of farms Mnceba 23 and 52 in the District of Ntabankulu. Based on this license, the first respondent conducted its mining operations on land situated in Luxwesa Locality in the District of Maxesibeni and in the Mjelweni Quarries in Ntabankulu. The license was subject to annual renewal, and the last renewal was on 09 October 2025 for a year which will end on 10 October 2026.

[9] The precise location of the mining site became highly contested between the parties. The applicants protested against the first respondent’s mining activities stating that its mining permit directs it to mine in Mnceba 23 and 52 in

Ntabankulu and not on their land situated in Luxwesa locality in MaXesibeni. The dispute culminated in a long history of litigation between the parties, which includes the application in which Brooks J made an order dated 29 August 2024. In that order ‘the applicants’ were the respondents in the present case. It was granted in the counter application brought by the present applicants, and its terms were, inter alia, that:

- (a) Pending the finalization of the main application, the applicants are interdicted and restrained from conducting and mining operations on the land situated at Luxwesa Locality in the District of EmaXesibeni (formerly known as Mout Ayliff) without a permit that has been issued to them by the relevant authorities in terms of the laws of the RSA.
- (b) Pending the finalization of the main application, the applicants are interdicted and restrained from conducting and mining operations on the land situated at Mjelweni Locality in the District of Ntabankulu without a permit that has been issued to them by the relevant authorities in terms of the laws of the RSA.
- (c) Pending the finalization of the main application, the applicants are directed to remove all and any machinery that has been brought to Luxwesa Locality in the District of EmaXesibeni and at Mjelweni Locality in the District of Ntabankulu for the purposes of conducting illegal mining operations.

[10] In his judgment on the counter application, Brooks J made an observation that as identified by the then respondents (the applicants herein), the mining permit that the applicants (the present respondents) relied on in asserting their mining rights did not pertain to the locality in which the Luxwesa and Mjeleweni communities’ land is situated. Resulting from this, the learned Judge expressed himself as follows:

‘In essence what is sought . . . is the halting of the mining activities pending a resolution of the main application determining whether or not indeed the applicants have the right to mine in the relevant area. . . Upon an analysis of the main application papers and without making a finding . . . [inaudible] it seems unlikely that the applicants would be successful, as the respondents have identified the permit that the applicants rely upon as not pertaining to the

locality in which the respondents' land is situated . . . It is also open to the applicants to remedy the situation either by embarking upon the necessary consultation in order to secure the issue of an appropriate permit relating to Mjelweni locality, or to cease the mining operations. It is also open to them to pursue the application they have brought to determine the final position relating to the right of the applicants to conduct such mining.'

[11] The first respondent subsequently produced GPS coordinates which depict the demarcation of the area on which it is authorized to mine. According to the GPS coordinates the mining permit area is 5 Hectares in extent and covers part of farm 23 Mnceba and part of farm 52 located in Mjelweni Village in Ward 12, Mvenyane Administrative Area, Ntabankulu, in Alfred Nzo District Municipality. The GPS coordinates are confirmed by expert land surveyors in a report dated 10 September 2024 to which is attached a plan which depicts both 'Mvenyane no. 89 (52) and Mnceba No. 23.' The plan further depicts Mnceba No. 23 as located in the Administrative District of Maxesibeni. The respondents also rely in this application on a letter from the DMRE dated 25 October 2025 with the following content:

'MINING PERMIT NUMBER 27/2021

1. I refer to the above-mentioned matter.
2. I hereby confirm that Bismark (Pty) Ltd was granted a permit under reference number 27/2021, to mine stone aggregate, aggregate and gravel on a part of the farm Mnceba 23 and farm 52. The coordinates of the mining permit area, as depicted in the plan contemplated regulation 2 (2) (sic) to the Mineral Resources and Development, 2002 (sic) (Act no.28 of 2002) (the MPRDA), which accompanied the mining permit application, falls under both the magisterial districts of Ntabankulu and Maxesibeni.
3. The mining permit was granted in terms of section 27 of MPRDA on 11 October 2021 and was renewed twice. The current renewal period, which is a second renewal period, will lapse after a period of 13 months (i.e. 10th October 2026).'

[12] After obtaining the GPS coordinates, the expert surveyor's report and the letter from the DMRE (collectively, the GPS coordinates), the first respondent resumed its mining activities at Mjelweni and Luxeswa. The resumption of the

mining activities was heralded in a letter written on behalf of the first respondent by its attorneys on 19 December 2024. Upon becoming aware of the resumption of mining activities on their land, the applicants served upon the respondents a warrant of ejectment, seeking to eject them from their land.

[13] In response, and on *ex parte* basis, the respondents sought and were granted an order by Majiki J, on 14 December 2024, staying the execution of the warrant of ejectment; interdicting their ejectment from the mining sites at Luxwesa and Mjelweni; interdicting the applicants as respondents in that matter, from removing the first and second respondents security personnel and other human resources personnel from the mining area; and granting the first and second respondents the right to obtain, retain and remain in possession of the mining area. This order was set aside by Majiki J on 03 January 2025 upon a reconsideration application that was brought by the applicants, with the result that the position according to the order of Brooks J prevailed.

[14] Undeterred by the applicants' opposition of its mining activities, the respondents approached this Court in an application which served before Mhambi AJ. In that application, they sought an order declaring permit 27/2021 issued by DMRE valid; and prohibiting the applicants qua respondents from unlawfully interfering the first respondent's mining operations. Attempts by the applicants to enforce the order of Brooks J included the service on the respondents, of the orders of Majiki J in which she set aside the stay of execution of the warrant of ejectment, and the order of Mhambi AJ.

[15] On 08 or 09 January 2025 the first respondent carried out rock blasting at the mining site in Luxwesa. This impelled the present application. Its essence is that since the first respondent's mining permit does not direct the respondents to conduct mining operations at Mjelweni and Luxwesa, by continuing with the mining activities at these places they acted in contempt of the order of Brooks J

‘as read with the order of Majiki J dated 03 January 2025 (the reconsideration order), and the judgment and order of Mhambi AJ’.

[16] It also became common cause between the parties that the orders of Brooks J, the reconsideration order and the judgment and order of Mhambi AJ, were served on the respondents and therefore the respondents had full knowledge of them when they continued with the mining activities on 08 January 2025. It is convenient at this point that I interpose to deal with the interlocutory applications first.

The interlocutory applications

[17] In the first application, the respondents sought the striking out of several averments made by the applicants in their replying affidavit. The second application, which was contingent upon the dismissal of the application to strike out, was for leave to file a further answering affidavit in response to the allegations made in the replying affidavit to which the strike out relates. The last application was for the leave of this Court for the admission of a further affidavit in which new evidence was adduced. That new evidence was a letter from the Regional Manager of the Eastern Cape’s DMRE dated 09 October 2025 confirming a subsequent renewal of the aforementioned permit 27/2021 until 10 October 2026. This latter application was granted, unopposed by the applicants.

[18] The impugned paragraphs of the replying affidavit are 11.2; 11.4; 11.7; 141 and 142; 15 to 18; 36, 37 and 38; 55; 65 and 67; and the 3rd paragraph of the “conclusion”. The basis of the application to strike out was two pronged. In respect of paragraphs 11.2; 11.4; 11.7; 141 and 142; 15 to 18; 36, 37 and 38; 55, the respondents stated that the allegations contained therein are material and were made for the first time in the replying affidavit and thus prejudicial to the respondents to the extent that they were not afforded an opportunity to respond

them. As regards paragraphs 65 and 67; and the 3rd paragraph of the “conclusion”, the respondents contend that they are vexatious, intended to embarrass and harass them and are irrelevant.

[19] In paragraphs 11.2; 11.4; 11.7; 141 and 142, the applicants alleged that after they were served with the order of Brooks J, the respondents undertook to leave their land within a week of service of the said order and later requested an extension of this period. In paragraphs 15 to 18, the applicants alleged that due to the intervention of the SAPS, the respondents ceased their operations, and if not, they continued with them clandestinely. Their quest to obtain interdictory relief against the SAPS on 12 November 2024 was influenced by the fact that they never ceased their mining operations.

[20] The complaint pertaining to paragraphs 36, 37 and 38 of the replying affidavit is that in these paragraphs, new matter is pleaded regarding the damage caused by fly rocks to the home of one Sithembele Mbedle and that the respondents admitted liability and apologized for the damage caused. In this regard, the respondents stated that there is no reason why the applicants did not raise this further damage and the alleged admission of liability in the founding affidavit where they had pleaded the matter pertaining to the damage to Mbedle’s property.

[21] Regarding paragraphs 55 of the replying affidavit, the applicants alleged for the first time, that the local Chiefs made affidavits regarding their failure to consult the community, and that community consultation were done after the order of Brooks J. The respondents contend that this is prejudicial to them. They contend that these allegations ought to have been made in the founding affidavit where the applicants dealt with the alleged failure of the respondents to consult the community. The respondents further state that the prejudice emanates the fact that the said Chiefs’ affidavits have not been attached to the papers.

[22] In paragraphs 65 and 67; and the 3rd paragraph of the “conclusion”, the applicants alleged that Majiki J, in her reconsideration order of 03 January 2025; and later, Mhambi AJ, in the proceedings before him on 12 November 2024, rejected the evidence of the GPS coordinates and the surveyor’s report and that this evidence was sought to be “sneaked in” by the respondents as they avoided ventilation the issues in the main application.

Counsel’s submissions on the application to strike out

[23] Mr *Bakker* submitted that emphasized the fact that the new matter pleaded entails substantial issues and respondents have been prejudiced in that they were not afforded an opportunity to respond to it and that the applicants acted against the established rule that all allegations relied on by the applicant must be made in the founding affidavit.

[24] Mr *Pienaar*’s principal submission was that the answering affidavit was voluminous and elicited the matter sought to be struck out. In this regard, he submitted that the impugned averments were in response to the background of this application as it appears both from the founding and answering affidavits. As regards paragraphs 11.2; 11.4; 11.7; 141 and 142, it was submitted in the applicants’ supplementary heads of argument dealing with the application to strike out that the allegations were made in the founding affidavit regarding the respondents’ request for a week to vacate the mining sites.

[25] After hearing counsel, I upheld the application to strike out, with costs, and indicated that my reasons would follow. What follows immediately below are those succinct reasons.

Reasons for the strike out order

[26] Rule 6(15) provides that the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and

client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted. Among the matter that is susceptible to be struck out is new matter that is raised in a replying affidavit.

[27] It is trite that the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances.¹ In exercising this discretion, the court will consider factors such as whether all the facts necessary to determine the new matter in the replying affidavit were placed before court; whether the determination of the new matter will cause prejudice to the respondents which a postponement and cost order would not ameliorate; whether the new matter was known to the applicant when the application was launched; and whether to disallow the new matter will result in unnecessary waste of costs.²

[28] It is so, as adumbrated above, that there is a long history of litigation involving the parties in this application. Central to the dispute between the parties is the first respondent's entitlement to conduct mining activities at Mjelweni and Luxwesa. Even though the applicants alleged in the founding affidavit that the respondents requested a period of a week to remove their machinery, a fact which the respondents deny, that they requested a further two weeks to make arrangements to leave ought to have been alleged in the founding affidavit. Curiously, the applicants make this latter allegation after the respondents stated in response, that the allegation is untrue as it could not have been practical to remove its machinery from the site within a week.

¹ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* (363/2011) [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (30 March 2012).

² *Ibid*, para 26; see also *Minister of Police v Kati* (CA 15/2024) [2024] ZAECMHC 30 (15 May 2024), para 13; Erasmus Superior Court Practice, Volume 2 [Service 15, 2020] at D1 – 66.

[29] In any event, it is not available to the applicants to state that paragraphs 15 to 18 entail historical background to the application. This background was sufficiently set out in the founding affidavit. It is difficult to fathom why the applicants saw a need to rehash it in the replying affidavit. Furthermore, and significantly, the facts necessary to determine the issues germane to the contempt application were sufficiently placed before court in the founding affidavit. Issues such as the respondents' admission of liability for the damage caused to the property of the members of the community are irrelevant for the present purposes.

[30] Rather strangely, it was submitted in the applicants' supplementary heads of argument that the matter that the applicants raised in their replying affidavit which the respondents complain of is not essential to the determination of the main issues but arose from the founding affidavit. This begs the question why those allegations had to be made in the replying affidavit. This is the kind of abuse of the process of court that Harms ADP spoke about when he once said:

‘A reply in this form is an abuse of the court process and instead of wasting judicial time in analysing it sentence by sentence and paragraph by paragraphs such affidavits should not only give rise to adverse cost orders but should be struck out as a whole. . . *mero motu* . . .’³

[31] The averments in paragraphs 65, 67 and paragraph 3 of the “conclusion” are intended to cast aspersions on the respondents and therefore vexatious. For all these reasons, I came to the conclusion that the impugned averments were prejudicial to the respondents. The granting of the strike out disposed of the second application. I have already indicated that the third application was granted, unopposed.

[32] It bears remarking that the applicants' replying affidavit was more than 61 pages, almost double the length of the founding affidavit, and in some respects extensively repetitive – undoubtedly unnecessarily prolix. I can do no better

³ *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at 370G-H.

than quote Schutz JA in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd*,⁴ when he said:

‘[80] There is one other matter that I am compelled to mention – replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. . . The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.’

[33] With this said, I turn to deal with the parties’ respective cases in the contempt application.

The case for the applicants

[34] The applicants contend, chiefly, that the first respondent’s mining activities continued on 08 January 2025 despite the order of Brooks J ‘read with the reconsideration order and the judgment and order of Mhambi AJ’. They further state that this conduct caused damage to the property of 3 community members including the fifth applicant, and the blasted rocks flew onto their premises. It is their contention further, that, the permit that the first respondent relied on in continuing with its mining activities was not issued in terms of legislation as it had no coordinates and diagram signed by a surveyor and the Regional director of the province in whose jurisdiction the mine falls, and there was no consultation with the Luxwesa and Mjelweni Communities.

[35] According to the applicants the order of Brooks J constituted an absolute bar on the first respondent’s mining activities at Mjelweni and Luxwesa pending the determination of the main application. They further rely on a dictum that

⁴ *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (32/2003, 40/2003) [2003] ZASCA 46; [2003] 2 All SA 616 (SCA); 2003 (6) SA 407 (SCA) (16 May 2003); 2003 (6) SA 407 (SCA) at 438G-H.

appears in the judgment of Mhambi AJ when he said, at paragraph 40 of the judgment:

‘It is apparent from the litigation between the parties that the main application instituted by the applicants has the same issue for determination in this application, the validity or otherwise of the mining permit of the applicants when the counter application was heard by my brother Justice Brooks J, he reserved the issue for the determination of the validity of the permit of the applicants to the court to hear the main application.’

[36] On this score, the applicants contend that Mhambi AJ barred the reliance on the GPS coordinates and directed that the only recourse for the respondents was to ventilate the issue pertaining to the GPS coordinates in the main application. According to the applicants, the respondents continued to ‘second-guess’ the order of Brooks J by seeking the aforementioned relief before Majiki J and Mhambi AJ.

[37] According to the applicants, the respondents’ conduct of continuing with the mining activities, and in the case of the sixth, seventh and eighth respondents, failing to ensure that the order of Brooks J was obeyed, amounted contempt of court. The applicants further state that the respondents’ conduct is mala fide and contumacious, in that, after they were served with the order of Brooks J together with the orders of Majiki J and judgment and order of Mhambi AJ, they undertook to vacate the mining sites but never did so.

[38] An overarching allegation which the applicants make is that even though as at 08 January 2025 the first respondent had secured and produced further evidence of the GPS coordinates, which further explain the demarcation of the contested mining area, that evidence did not give them the right to continue with their mining operations at Mjelweni and Luxwesa. They base this contention on the afore quoted dicta of Brooks J and Mhambi AJ in their respective judgments in the already mentioned applications that involved the parties.

[39] The applicants further state that the correct interpretation of the orders of Brooks J, the reconsideration order and the judgment and order of Mhambi AJ, cumulatively, is that the respondents have no right to rely on the further evidence of the GPS coordinates and expert reports elsewhere other than in the main application.

The respondents' case

[40] The respondents rely on the mining permit with the attached diagram, issued by DMRE and the GPS coordinates. They contend that they continued with the mining operations at Luxwesa and Mjelweni on the strength of the permit and the GPS coordinates. According to the respondents, even those these documents were not before Brooks J on 29 August 2024, they are known to the applicants since November 2024.

[41] According to the respondents, the order of Brooks J was not an absolute bar to their mining activities. It only prohibits illegal mining or mining on the applicants' land 'without a permit'. As a result, reference to the reconsideration order to buttress the contempt contention is misplaced as Majiki J did not consider the validity of the permit. The same is the case with Brooks J. As regards the judgment and order of Mhambi AJ, the respondents state that it also is no bar to the first respondent's mining operations and has no effect on the present application. It is the respondents' contention further, that by securing the evidence of the GPS coordinates, the expert surveyor's report and the letter signed by the Regional Manager of the DMRE, they did what the court directed in its judgment in the matter that appeared before Brooks J on 29 August 2024. It is instructive to repeat the relevant portion of the dictum of Brooks J, where he said:

‘ . . . Upon an analysis of the main application papers and without making a finding . . . [inaudible] it seems unlikely that the applicants would be successful, as the respondents have identified the permit that the applicants rely upon as not pertaining to the locality in which the

respondents' land is situated . . . It is also open to the applicants to remedy the situation either by embarking upon the necessary consultation in order to secure the issue of an appropriate permit relating to Mjelweni locality, or to cease the mining operations. It is also open to them to pursue the application they have brought to determine the final position relating to the right of the applicants to conduct such mining.'

[42] Dealing with the complainant that the permit was issued without consultation, the respondents state that the permit was issued after various stringent processes were followed including the consultation of the affected communities of Mjelweni and Luxwesa. The respondents further state that the purpose of the application is to harass and annoy them – it is a vexatious application. For if the applicants wish to assail the validity of the permit they ought to do so in the appropriate review proceedings. Further according to the respondents, not even the pending main application entails the issue of the validity of the permit, but rather whether or not the first respondent is entitled to mine at Mjelweni and Luxwesa.

The replying affidavit

[43] Apart from repeating the history of litigation regarding the disputed mining area, the material allegations made in the replying affidavit, barring those that have been struck out, are that the respondents are not entitled to rely on the GPS coordinates in continuing with mining activities. Thus, they are in contempt of the order of Brooks J. In this regard, the applicants contend that Brooks J and Mhambi AJ “*both re-iterated that the matter must be ventilated in the main application*”.

[44] The applicants also persist with the contention that the area mined at is not what is demarcated in the permit. They confirm that coordinates were produced after the order of Brooks J but state that this was in order to “cure the defect in the respondents' case in the main application. In persisting with their interpretation of the judgment and order of Brooks J, the reconsideration order

and the judgment and order of Mhambi AJ, the applicants say that since all these orders were an absolute bar to the continuation of the first respondent's mining activities in Mjelweni and Luxwesa, the respondents had to show, in the main application, that their permit meets the requirements of the law.

[45] The applicants contend that the permit relied on is not the kind of permit that Brooks J envisaged in that it was not granted in terms of the laws of Republic of South Africa. This, despite the fact that in the same replying affidavit, they encapsulate the context of the order and judgment of Brooks J as being that 'the court understood that the respondents had a permit, however, such permit does not direct them to mine where they are mining.' In similar vein, they state that the fate of the permit will be determined in the main application.

The parties' submissions

[46] Mr *Pienaar* took the view that because the evidence of the GPS coordinates was obtained after the order of Brooks J, it has no bearing on these proceedings. He persisted with the contention that by continuing with their mining operations even with the GPS coordinates, the respondents acted in contempt of the order of Brooks J. In his words' "*the court orders are stronger than the evidence of the GPS coordinates*". Thus, it was submitted on behalf of the applicants that 'the evidence of GPS coordinates is not good enough' - it is no justification for their failure to obey the court order. Mr *Pienaar* further submitted that the proper avenue to ventilate the evidence of the GPS coordinates is the main application. I was referred to *Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others*⁵ which was an appeal against the decision of the High Court in staying the application for contempt of court pending the intended application for review.

⁵ *Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others* (657/08) [2009] ZASCA 49; 2010 (2) SA 289 (SCA); [2009] 3 All SA 491 (SCA); 2009 BIP 251 (SCA) (25 May 2009). (*Clipsal*)

[47] In *Clipsal*, an order was granted interdicting Gap Distributors and Trust Electrical Wholesalers from infringing registered design A96/0687 by making, importing, using or disposing of certain Lear G-2000 series single and double electrical sockets ('Gap sockets'). Subsequent to the court order Botbol, who is the sole shareholder and the managing director of Gap, caused Lear, which was a close corporation at the time, to be converted into a company of which he is the sole shareholder and director. Thereafter Lear applied to the High Court, Pretoria ('the Lear application') for an order – (i) (a) declaring that the word 'original' in s 14(1)(a)(ii) of the Designs Act 195 of 1993 has a different meaning to the one ascribed to it by this court in the first *Clipsal* application; alternatively (b) declaring that s 14(1)(a) alternatively s 20(1) of the Designs Act is inconsistent with the constitution; and (ii) revoking Design A96/0697. Prior to this court's order against Gap Distributors and Trust Electrical Wholesalers, Lear was not in the business of importing and selling electrical sockets in South Africa but subsequent to the order it started selling such sockets ('Lear sockets'). This gave rise to the contempt application. The appellants contended that the Lear sockets differ only in immaterial respects from the Gap sockets and the sockets that are the subject of the registered design; that Gap and Lear are but Botbol in different guises and that the corporate veil between them should be pierced. The respondents opposed the application and lodged a counterclaim for the same relief as had been claimed in the Lear application.⁶

[48] In overturning the decision of the court a quo, the SCA held as follows:

'However, the outcome of the review application is irrelevant to the question whether the respondents were acting in contempt of court. In terms of the court order Gap Distributors and Trust Electrical Wholesalers are interdicted from infringing registered design A96/0687. That court order is a final order and has to be obeyed even if it is wrong as is alleged by the respondents. Should the review application be successful and the registration of the design be

⁶ This summary appears from paragraphs 2 to 4 of the *Clipsal* judgment.

set aside, the interdict would come to an end as there would no longer be a registered design, but until that happens the interdict stands and has to be obeyed. As was said by Herbst J in *Kotze v Kotze* 1953 (2) SA 184 (C) at 187F-G: ‘The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.’⁷

[49] In response, Mr *Bodlani* made these principal submissions: the determination of the issue before court ought to commence with the interpretation of the order of Brooks J in accordance with the established principles of the law. The order in question does not constitute an absolute bar to the first respondent’s mining activities – it is mining without a permit that the order prohibited.

[50] As regards the removal of the machinery from the mining sites, Mr *Bodlani* further submitted that the order makes it plain that the proscription applies where the machinery is brought to the sites ‘for the purposes of conducting illegal mining activities.’ An interpretation, such as that adopted by the applicants, which suggests that the order prohibited mining operations pending the main application, brings about unbusinesslike results and is insensible. This is so, he said, because the respondents produced GPS coordinates as well as the expert surveyor’s reports and the letter of the Regional Manager, which all clarify the boundaries of the mining area.

[51] It was Mr *Bodlani*’s submission further, that, in the event of this Court finding that the respondents did not comply with the order of Brooks J, a finding must be made that such non-compliance was not wilful and mala fide. In this regard, he submitted that the respondents have discharged the evidential burden of creating reasonable doubt in the applicants’ case. In developing this argument, he submitted that since the applicants did not gainsay the evidence of the GPS coordinates which they knew of long before the application was

⁷ *Clipsal*, para 21.

launched, and since the respondents conducted the mining operations in accordance with the boundaries delineated by the GPS coordinates, it cannot be said that the respondents willfully and mala fide disobeyed the order of Brooks J.

[52] Dealing with the contention that the respondents are not entitled to rely on the evidence of the GPS coordinates in this application, Mr *Bodlani* submitted that this contention cannot be sustained since it amounts to the applicants prescribing to the respondents what evidence to present in defence. This, he said, is all the more so that none of the court orders referred to by the applicants, properly construed, prohibit the reliance of the GPS coordinates in these proceedings.

The legal principles

[53] In order for the applicants to succeed in seeking the contempt order, they must prove beyond reasonable doubt:

- (a) the existence of the court order;
- (b) the service of the order or knowledge thereof;
- (c) Non-compliance with the court order; and
- (d) The non-compliance must have been wilful and mala fide.⁸

[54] Proof of knowledge of the court order and non-compliance places an evidential burden on the contemnor to create reasonable doubt as to wilfulness and mala fides.⁹

[55] As held in *Fakie*, the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’. A deliberate disregard is not enough,

⁸ *Pheko & others v Ekurhuleni Metropolitan Municipality & another* 2015 (5) SA 600 (CC) at para 32; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 9 and 16. (*Fakie*)

⁹ *Fakie*, supra, para 42.

since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide though unreasonableness could evidence lack of good faith.¹⁰

[56] In the discussion that follows, I consider whether a case has been made for the contempt order sought.

Discussion

[57] The existence of the above-mentioned court orders and the continuation of the mining operations after they were granted are common cause facts between the parties. This Court's enquiry turns on whether in continuing with the mining operations, the respondents willfully and mala fide refused to obey the order of Brooks J. The question to be answered is whether while they knew and understood the terms of the order Brooks J and what is required to be done to comply with it, the respondents deliberately did not comply with it without any justification.

[58] What clearly emerges from the dispute at hand is that a proper determination of the issues requires an interpretation of the order of Brooks J. As regards the interpretation of court orders, the Supreme Court of Appeal, in *Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV 'Unity'*,¹¹ put the legal position this way:

'The principles which apply to the interpretation of court orders are well established. Trollip JA observed in *Firestone South Africa (Pty) Ltd v Gentiruco AG* that the same principles apply as apply to construing documents. Thus, '...(T)he court's intention is to be ascertained from the language of the judgment or order as construed according to the usual, well-known

¹⁰ Ibid, paras 9 and 16.

¹¹ *Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV 'Unity'* (1341/18) [2020] ZASCA 120 (2 October 2020).

rules... Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention.'¹²

The court went further and said:

'The starting point, it was held in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited* and others, is to determine the manifest purpose of the order. This was endorsed by the Constitutional Court in *Eke v Parsons*. This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, described the process of interpretation as involving a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the face of ambiguity, a sensible is to be preferred to one which undermines the purpose of the document or order.'¹³ (footnotes omitted)

[59] It is discernible from the judgment handed down by Brooks J, with respect, that he deliberately refrained from making any pronouncement on the extent of the area where the first respondent was authorized to conduct mining operations in Luxwesa and Mjelweni. Not only this, but mindful of the fact that the point of dispute was whether the permit held by the first respondent entitled it to conduct mining operations at Luxwesa and Mjelweni, and not the validity of the permit, the Honourable Judge remarked as follows:

'In essence what is sought . . . is the halting of the mining activities pending a resolution of the main application determining whether or not indeed the applicants have the right to mine in the relevant area. . .'

[60] On the interpretation of the order of Brooks J, it was submitted on behalf of the applicants that to contend that Brooks J prohibited the mining only where it was without a permit would "result in absurdity" and would be too simplistic. I disagree. Below I state why.

[61] I readily accept that the issue of the boundaries of the mining area is at the heart of the main application. But sight must not be lost, I think, of the fact that the respondents were the initiators of that application. They availed

¹² Id, para 2.

¹³ Id, para 3.

themselves of further documentary evidence that would clarify the issue of the contested mining boundaries. It is inconceivable in my view, and it indeed makes no business nor judicial sense, that the respondents would be forced to wait until the determination of the final interdict in which they are *dominis litis*, when there was available to them an avenue to remedy the cause of the applicants' complaint. Brooks J must have been mindful of this too, when he made the remarks that I have quoted earlier on in this judgment.

[62] The case of *Clipsal* that I was referred to is distinguishable from the present case on the facts. In the present case, Brooks J granted interim relief pending the final determination of the main application. Not only that, but, as already mentioned, the order of Brooks J, properly interpreted in the context of the court's reasoning was that it was available to the applicants to remedy the cause of the complaint or persist with the main application, inter alia. To my mind, the order of Brooks J, properly construed against the text of the judgment, could not have been an absolute bar to the mining activities continuing where, as it has happened here, the respondents were able to subsequently remedy the situation that obtained when the matter served before the Honourable Judge.

[63] Moreover, the timing of the alleged date of resumption of the mining operations, viz, after 19 December 2024, is not without significance. At the time the respondents resumed the mining operations, they had obtained the GPS coordinates, the expert surveyors report and the letter written by the Regional Manager of DMRE. Put simply, the respondents were the holders of a permit in relation to Luxwesa and Mjelweni as defined in the already mentioned documents. In *Clipsal*, a final interdict had been granted prohibiting the development of a certain design. However, under the guise of a different entity, the respondent in that case, committed the very act that had been prohibited in terms of the final court order. This is not what took place in the present matter.

[64] The applicants are of the view that despite being *dominis litis* in the pending application, the respondents are forced to follow through with it. I must not be construed to be saying that to the extent that the applicants made a counter application it must be abandoned if the respondents are no longer desirous to persist in the interdict. I need only state that a counter application has a life of its own. There would be no bar in the applicants continuing with it if so advised. For the present purposes, I am called upon to determine whether an act of contempt of court has taken place.

[65] It is indeed unfortunate that upon being provided with the evidence of the GPS coordinates after the order of Brooks J, the applicants sought to straitjacket the course of the dispute by persisting that the respondents must proceed to ventilate the issue in the main application. Needless to say that the remarks of Brooks J point to the fact that he did not envisage that where the situation that obtained before him had been remedied, the parties were obliged to continue with the main application.

[66] I may add that if, as it appears to be the position that the applicants took, the GPS coordinates are “*a scary breed of its own kind that has not been granted in terms of the laws of South Africa as the order directs*” to quote them verbatim, the proper course for them to follow would be to challenge the decision to issue that permit in review proceedings. In the context of the present application, a bald assertion as to the authenticity or validity of the permit cannot suffice. This, all the more so, that the applicants produced no countervailing evidence to establish that the permit relied upon is a sham for lack of a better word. It seems to me that after all, when the applicants were provided with these documents, that was the point where they had to decide on the appropriate legal course that would expeditiously deal with the dispute.

[67] It would be remiss of me not to acknowledge the fact that the mining operations are not just about the sites where they are undertaken. They have

adverse effects on the communities where they are undertaken. People's lives, health, and environmental resources are invariably adversely affected. The operations come with high levels of inconvenience and tend to disrupt the lives of the communities. They strike at the heart of the fundamental rights of the communities. It is unsurprising that the law sets out stringent requirements to be fulfilled for the granting of mining permits or licences. However, in the context of the present matter, where the applicants hold a view that the respondents' mining permit was not validly issued, contempt of court proceedings are no panacea for the inconvenience as may be suffered by the communities of Luxwesa and Mjelweni.

[68] The standard of proof in contempt proceedings is that of proof of all the elements of contempt beyond reasonable doubt. The applicants have failed to discharge this onus. The application must accordingly fail.

Costs

[69] Mr *Pienaar* submitted that in the event that the application fails, the applicants should be granted the benefit of the *Biowatch*¹⁴ protection and be exempted from paying the respondents' costs. I invited him to address the question whether the *Biowatch* protection extends to private litigants who are litigating on equal footing on matters having nothing to do with a constitutional challenge to the law or state conduct. He conceded that it does not. For the sake of completeness, the essence of the *Biowatch* protection is that in litigation against the state where there is a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, an unsuccessful non-state litigant should be shielded from the costs consequences of failure.¹⁵ The fact that none of the respondents against whom the contempt order is sought in the present

¹⁴ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009) ("*Biowatch*").

¹⁵ *Id.*, para 23.

case are organs of state excludes the application of *Biowatch*. Mr *Pienaar*'s concession was well made.

[70] On behalf of the respondents, Mr *Bodlani* submitted that costs be payable on Scale B referred to in Uniform Rule 67A. It has been held that the default position set under the Rule 67A is that counsel's costs will be recovered on scale A, unless there is justification for the application of a higher scale.¹⁶ I have had regard to the web of complex factual issues that arose in this matter which emanate from a long history of litigation between the parties, as well as the fact those issues required the interpretation of court orders granted in previous litigation between the parties. These are the features that mark this case out as an unusually complex contempt of court case. For this reason, costs on scale B are warranted.

Order

[71] In the result, the following order shall issue:

1. Paragraphs 11.2; 11.4; 11.7; 141 and 142; 15 to 18; 36, 37 and 38; 55; 65 and 67; and the 3rd paragraph of the "conclusion" of the applicants' replying affidavit are struck out. The applicants shall pay the costs of the strike out application.
2. The contempt application is dismissed, with costs. Such costs shall include costs of two Counsel on scale B referred to in Uniform Rule 67A.

L. RUSI

¹⁶ *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387; 2025 (1) SA 466 (GJ) (22 April 2024), para 16.

JUDGE OF THE HIGH COURT

Appearances:

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Instructed by : Ximbi Ncolo Inc., Mthatha

Counsel for the respondents : *Adv. Bodlani SC*

Adv. J Bakker

Instructed by : Cox Yeats Attorneys,
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Mthatha

Heard on : 31 July 2025

Date delivered : 20 January 2026