REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

_____ _____
DATE SIGNATURE

CASE NO: 2018/85581

In the matter between:

SAMANCOR MANGANESE (PTY) LTD Applicant

and

AZAM FABRICATION CC Respondent

JUDGMENT

INTRODUCTION

[1] The Applicant, Samancor Manganese (Pty) Ltd t/a South 32 ('*Samancor*'), is the owner of the premises situated at remaining extent of portion 4 of the farm Kookfontein 545 IQ ('*the premises*'). The respondent,

Azam Fabrication CC ('*Azam*'), occupies a workshop situated on the premises ('*the workshop*').

[2] Azam came to occupy the workshop under an oral agreement ('*the lease agreement*') entered into between Samancor and Azam in terms of which Samancor would allow Azam to occupy the workshop for as long as Azam was contracted to provide engineering and fabrication services. Samancor would not charge Azam rental in respect of its occupation of the workshop and, in return, Azam would perform work for Samancor at discounted rates.[1]

[3] The engineering and fabrication work was formalised in a written Service Level Agreement ('*the SLA*') which commenced on 9 April 2018 and would terminate on 31 March 2019.

[4] During November 2018 Samancor formed the view that Azam was engaging in fronting practices and on 27 November 2018 Samancor caused a letter to be dispatched informing Azam that Samancor would be terminating the SLA. On 30 November 2018, Samancor's attorneys of record demanded that Azam vacate the workshop on or before 5 December 2018.

[5] Azam disputed that Samancor had terminated the SLA validly and refused to vacate the workshop. Azam issued an urgent application to this court seeking, amongst other things, an order interdicting and restraining Samancor from terminating Azam's right to the workshop.

[6] The matter was heard on 5 December 2018 and the following order ('*the Order*') was granted by agreement between the parties:

---

[1] There exists a dispute about the interplay between these two agreements but more about that later.

1. It is noted that:
   1.1. The Applicant alleges that a formal dispute has arisen regarding the termination of the service level agreement which dispute will be arbitrated, and all the parties' rights are reserved in relation to the existence and/or formulation of the said disputes;
   1.2. The parties abandon the informal dispute resolution process which exists in terms of clause 46.1 and 46.2 of the service level agreement;
   1.3. The parties refer the above dispute for arbitration in terms of Section 46.4 and will see to the appointment of an Arbitrator before the 15th of January 2019 by the exchanging of suitable names, and in the absence of an agreement pertaining to a particular Arbitrator, will approach the Pretoria Bar Counsel for the appointment of such.
   1.4. In the absence of an agreement for a specific Arbitrator, the appointment by the Pretoria Bar Counsel must be effected before the 20th of January 2019.

2. It is ordered as follows:
   2.1. To the extent that the Applicant or any of the Applicant's employees require access to any premises controlled by the Respondent in order to provide services to third parties, the Respondent shall grant such access subject to:
      2.1.1 The written receipt of the following from such third party:
         2.1.1.1 Names of the individuals who require access;
         2.1.1.2 A valid medical certificate for each individual, indicating that the individual is fit for duty;
         2.1.1.3 Details regarding the time period that access should be granted for in respect of each individual;
         2.1.1.4 Confirmation that the third party has inspected the Applicant's safety file, and is satisfied with the status thereof.
   2.2 The applicant will have access to the workshop that they are currently occupying on the Respondent's property up until 31 March 2019, subject to:
      2.2.1 The applicant at all times complying with the Respondent's occupational health and safety policies and procedures; and
      2.2.2 The applicant assuming all responsibility and liabilities in terms of section 37 of the Occupational Health and Safety Act.
   2.3 Any costs in relation to the Applicant's occupation will form part of the arbitration.
   2.4 The costs of the application is reserved and will form part of the costs of the Arbitration.

[7] On 3 April 2019 Samancor's attorneys of record wrote to Azam's attorneys of record to advise that despite the terms of the Order, their client had failed to vacate the workshop by 31 March 2019. No response to this letter was received.

[8] In this urgent application Samancor seeks orders declaring Azam to be in contempt of court, directing that it pay a fine to Samancor in the sum of R50 000, that it vacate the workshop and pay punitive costs.

[9] Azam opposes the application on various bases including: the lack of urgency, the existence of an arbitration clause and the existence of salvage and debtor/creditor liens. A *locus standi* point raised in the papers was abandoned during argument.

URGENCY

[10] In *Protea Holdings Limited v Wriwt* it was held that:

> "[a]s one of the objects of contempt proceedings is, by punishing the guilty party, to compel performance of the order, it seems to me that the element of urgency would be satisfied if in fact it was shown that respondents were continuing to disregard [an order]."[2]

[11] Any suggestion that Samancor should not be heard as it tarried too long in coming to Court is without merit. Azam's non-compliance began on 1 April 2019. Samancor sent a letter on 3 April 2019 demanding compliance. When same was not forthcoming, this application was issued on 17 April 2019.

[12] The matter warrants an urgent hearing, particularly in light of the fact that it is common cause that Azam has not complied with the Order and

[2] 1978 (3) SA 865 at 868.

continues not to do so. The urgent circumstances under which this application was heard, and under which a judgment and order is required to be delivered, compels a judgment that would have been more comprehensive had more time been available.

ARBITRATION CLAUSE

[13] The SLA contains an arbitration clause which reads:

> **46. Dispute resolution:**
>
> 46.1 Any dispute between the Parties in regard to:
>
> 46.1.1 the interpretation of;
>
> 46.1.2 the effect of;
>
> 46.1.3 the Parties' respective rights and obligations..
>
> 46.1.4 a breach of; and/or
>
> 46.1.5 any matter arising out of,
>
> this Contract, shall be referred to the Parties, who shall meet as soon as possible after referral of the dispute to them, and shall use their respective *bona fide* reasonable efforts to resolve the dispute.
>
> 46.2 …
>
> 46.3 In the event that the Special Committee shall have failed, for whatever reason, to resolve the dispute by not later than 14 (fourteen) Business Days after the dispute shall first have been referred to the Parties for resolution in terms of clause 46.1, the dispute shall be submitted to and decided by arbitration.
>
> 46.4 …
>
> 46.5 …
>
> 46.6 …
>
> 46.7 The Parties irrevocably agree that the decision in these arbitration proceedings shall be binding on them and may be made an order of any Court of competent jurisdiction.

[14] Mr Greyling representing Azam, argued that the aforegoing clause precluded this court from entertaining this matter. This, so the argument ran,

was because clause 46 includes any dispute between the parties. The parties have, as is recorded in the Order at paragraph 1, agreed on an arbitrator to decide the dispute regarding the termination of the SLA and accordingly, this dispute too, should be decided by the arbitrator.

[15] There are a number of difficulties with this reasoning. Azam contends that the lease agreement and the SLA are independent agreements with the lease agreement being self standing ie Azam is entitled to remain in the workshop rent free even if it does not provide any services to Samancor. The current dispute relates to Azam's occupation of the workshop, thus, to the subject matter of the lease agreement which, on Azam's construction of the facts, has nothing to do with the SLA. Azam cannot on the one hand argue that the agreements are not connected yet draw on the SLA provisions when convenient.

[16] Having regard to the nature and purpose of contempt proceedings, contempt proceedings are not arbitrable as their purpose, even where an individual seeks compliance with an order, is to vindicate judicial authority.[3]

SALVAGE LIEN

[17] There is certain equipment and machinery in the workshop listed in an inventory ('*the machinery'*). On 8 March 2019, Samancor laid claim to it. On 18 March 2019 Azam, through its attorneys of record, stated that the machinery belonged to it and called upon Samancor to provide proof that the machinery belonged to Samancor. Samancor did not respond to this request or the letter.

[18] It is trite that no *lien* can be claimed in respect of one's own property. Samancor accepted for purposes of this application, that the machinery is the

[3] See *Fakie NO v CCII Systems (Pty) Ltd,* 2006 (4) SA 326 (SCA) paras 38-40.

property of Azam.[4] There thus, exists no impediment to vacate the workshop with the machinery, the ownership of which, for present purposes, is accepted to be that of Azam.

THE DEBTOR/CREDITOR LIEN

[19] Azam contends that Samancor is indebted to it in an amount in excess of R1 million for work done in terms of the SLA. Because of this indebtedness, Azam contends, it is entiltled to remain in the workshop. Whether Azam would be entitled to exercise a *lien* at all under such factual scenario is doubtful but to put this to bed completely, clause 35.1 of the SLA provides:

> "[Azam] hereby waives all and any rights of lien, retention and possession for payment of monies in terms of the Contract or for compensation for improvements or for any other cause whatsoever which, but for this clause, the Contractor would have had".

DUTY TO OBEY COURT ORDERS

[20] As the Court held in *Bezuidenhout v Patensie Sitrus Beherend Bpk* [5]

> "A court order stands and must be strictly obeyed until set aside by a higher court, and the same court which granted the original order does not have the right to nullify its effect or interfere with that order except in very limited circumstances in the context of variation".[6]

The Court went on to hold as follows:

> "The issue in the present application is whether I have the competence to make an order that would nullify the effect of the earlier order made by another Judge of

---

[4] Quite rightly in my view. The ownership of the equipment does not fall for determination in these proceedings.

[5] 2001 (2) SA 224 (E)

[6] 2001 (2) SA 224 (E) at 229

> the High Court in respect of the same issue, between the same parties. I thought it obvious that I do not possess that competence.
>
> An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 (W) at 494A - C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714). In *Kotze v Kotze* 1953 (2) SA 184 (C) Herbstein J provided the rationale at 187F:
> '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.' "

[21] The Supreme Court of Appeal has stressed that it is furthermore the duty of our courts to enforce parties' obligations to make "*serious good faith endeavours to comply*" with orders of court.[7] The importance of ensuring compliance with court orders was emphasised by Froneman J in *Magidimisi v Premier of the Eastern Cape and Others*:

> "in a constitutional democracy based on the rule of law final and definitive court orders must be complied with by private citizen and the state alike. Without that fundamental commitment constitutional democracy and the rule of law cannot survive in the long run. The reality is as stark as that."[8]

[22] The compulsion contained in section 165(5) of the Constitution that court orders are binding lies at the heart of the judicial authority of the Republic and hence at the effectiveness of the Constitution to perform its function. The

---

[7] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* [2015] 1 All SA 299 (SCA), paras 7 to 8. See too S v Mxhosa, 1986 (1) SA 346 (C) at 353F

[8] 2006 JDR 0346 (B), para 1.

State and the Courts bear a constitutional duty to ensure that court orders are adhered to and enforced.

[23] The duty to obey court orders is important not only because it vindicates the rule of law and the legal rights of the parties, but also because it fortifies and protects the dignity of the Courts in furtherance of the public interest:

> "it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system … That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

[24] The Courts are mere instruments of enforcement of the Constitution. If Court orders are not complied with the Constitution is not complied with and hence the reference to a Constitutional crisis is not an exaggeration. It is thus not merely a matter of the Court's honour. It is the functionality of our society as one governed by the rule of law. If a party truly experiences difficulty in complying with an order (for example, because its wording is vague), then it is incumbent upon that party immediately to pursue the appropriate legal avenues to seek a variation of the order. It is not appropriate for such a party to adopt a supine attitude amounting to disdain for the order.

[25] Azam has not varied the order nor did it apply to do so. In any event, this does not excuse non-compliance with court orders in the interim. All orders

must be obeyed fully until set aside, on pain of contempt,[9] for the good reasons adverted to above.

[26] The Constitutional Court, in the majority judgment of the Honourable Khampepe J in *Department of Transport v Tasima (Pty) Ltd* pronounced definitively on the import of court orders, which warrants full citation (emphases added, footnotes omitted):[10]

> "The general rule is that orders that do not concern constitutional invalidity do have force from the moment they are issued. And in light of section 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside.
>
> The common law has long recognised this position. In *Honeyborne*, De Villiers CJ found that if an agent—
>
> "were to be allowed to defy the authority of the court on the ground of an error of judgment on the part of the court, the question would in every case be whether the magistrate is right in his reading of the law or whether the agent is correct in his, but there would be no tribunal on the spot to decide between them. Undoubtedly it is the duty of the agent to bow to the decision of the court and to seek his remedy elsewhere; and it is equally the duty of the court to uphold its own dignity and see that its authority is respected by the practitioners before the court."
>
> This reading of section 165(5) accepts the Judiciary's fallibilities. As explained in the context of administrative decisions, "administrators may err, and even . . . err grossly." Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.

---

[9] *Clipsal Australia (Pty) Ltd & others v GAP Distributors (Pty) Ltd & others* 2010 (2) SA 289 (SCA) para [22]

[10] 2017 (2) SA 622 (CC), paras [180] - [188].

…

> The obligation to obey court orders "has at its heart the very effectiveness and legitimacy of the judicial system". Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.
>
> This is because the legal consequence that flows from non-compliance with a court order is contempt. The "essence" of contempt "lies in violating the dignity, repute or authority of the court." By disobeying multiple orders issued by the High Court, the Department and the Corporation repeatedly violated that Court's dignity, repute and authority and the dignity, repute and authority of the Judiciary in general. That the underlying order may have been invalid does not erase the injury. Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.

[27] The above pronouncement underscores the constitutional basis for the requirement to obey court orders and judicial authority. The fact that a party may consider the legal position or requirements to be different to what they have been held by a Court to be, or if they are actually different, is irrelevant to the efficacy and enforceability of the court order. As such, once granted, the order is enforceable against the world, even if it is wrong or contrary to other law.

[28] I find that there can be no legal impediment to the enforcement of the Order.

CONTEMPT OF COURT

[29] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie.*[11] In *Fakie*, the Supreme Court of Appeal held that whenever committal to prison for civil contempt is sought, the criminal standard of proof applies.[12] A declaration of contempt (other than the prayers relating to imprisonment) and any mandatory or interdictory order can, however, be made on the civil standard.[13]

[30] For the purposes of a finding of contempt, an applicant must establish the order, service or notice of the order, non-compliance with the terms of the order; and wilfulness and *mala fides* in the non-compliance. However, once the applicant has proved the order, service thereof and non-compliance therewith, wilfulness and *mala fides* are presumed. The respondent then bears the evidentiary burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether its non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt.[14]

[31] Azam's defence as to why it did not comply with the order, in addition to the already stated defences, was that it had agreed to the order on an incorrect application of the two contracts that govern the relationship between it and Samancor. It assumed, erroneously, that when the SLA terminated (which was 31 March 2019) then too, the lease agreement would terminate.

---

[11] Footnote 3 hereof

[12] *Ibid*, para [19].

[13] *Ibid*, para [42]*; see also Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2017 (11) BCLR 1408 (CC) at paras [50] to [55].

[14] *Ibid*, paras [19], [22] – [24].

[32] This, as already dealt with, is no defence at all as court orders must be complied with until set aside.[15] This aside, Azam's interpretation of the lease agreement and the SLA in any event leads to an un-business like result as it would entitle Azam to occupy the premises for no rental at all.

[33] It is trite law that court orders must be adhered to in their terms, and that it is a serious matter of foundational constitutional import if court orders are ignored or breached. The very effectiveness of the rule of law is undermined.[16]

[34] Although a punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of the court and coerce litigants into complying with court orders. Elaborating upon this, Plasket AJ pointed out in *Victoria Park Ratepayers v Greyvenouw CC*[17] that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in every contempt committal:

> "it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system… That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

---

[15] Para [26] hereof

[16] *Tasima* (supra), para [183].

[17] [2004] 3 All SA 623 (SE) para 23.

[35] The basis for my not declaring Azam to be in wilful contempt, even though it has breached the Order, is to be found, primarily, in the following three reasons:

35.1. The interpretation Azam attached to the interplay between the lease agreement and the SLA is incorrect and unsustainable. Even if Azam were entitled to stay in the workshop rent free, on its own version, the lease agreement could be terminated on reasonable notice. That has, from all the facts, clearly now occurred. Insofar as there was uncertainty about any or all of these facts, it has now been clarified and Azam will be given the benefit of the alleged doubt up to this point.

35.2. Azam similarly erroneously contended that because Samancor laid claim to the machinery, the only way it could assert its rights was to claim a lien over the machinery. That too has now been shown to be wrong and has been clarified.

35.3. Azam confusedly and erroneously relied on an arbitration clause.

[36] To issue the same orders repeatedly is obviously pointless. What I have found, however, is that the reasons advanced for non-compliance, whilst being sufficient to have averted the finding of wilfulness and mala fides (by not a large margin), are not sufficient for non-compliance and in the light of this judgment such excuses have been deprived of all further usefulness.

[37] Azam has breached an order of this court and as a mark of my displeasure for it having done so, I intend ordering it to pay the costs of this application as between attorney and client.

[38] Mr Greyling submitted for Azam that if I were to enforce the Order, I should amend the period for compliance to be 30 June 2019. Mr Mckenzie, acting for Samancor, argued that Azam has had more than sufficient time and that 7 days would suffice. In my view and having regard to all the circumstances of this case, compliance by 31 May 2019 would afford Azam ample opportunity to vacate the workshop. This is particularly so as Azam has already entered into a new lease agreement with Tegmul Properties (Pty) Ltd on 1 February 2019 for a period of 5 years and is paying rental.

[39] I accordingly make the following order:

39.1. This application is enrolled as an urgent application.

39.2. The Respondent is declared to be in breach of the order handed down on 5 December 2018 ('*the Order*').

39.3. The Respondent is ordered to cease acting in contravention of the Order and to vacate the workshop premises situated at 1 Kookfontein, Lion Avenue, Samancor, on or before 30 May 2019.

39.4. The Respondent is to pay the applicant's costs as between attorney and client.

_____

Ingrid Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 7 May 2019

Judgment delivered: 10 May 2019

Appearances:

For Applicant: Adv AC McKenzie

Instructed by: Hogan Lovells (South-Africa) Inc

For Respondent: Adv PJ Greyling

Instructed by: Deysel Attorneys