



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 810/21

In the matter between:

SAMANCOR **CHROME** **LIMITED**
APPELLANT

and

BILA **CIVIL** **CONTRACTORS** **(PTY)** **LTD**
RESPONDENT

Neutral citation: *Samancor Chrome Limited v Bila Civil Contractors (Pty) Ltd* (Case no 810/2021) [2022] ZASCA 163
(28 November 2022)

Coram: PETSE DP and ZONDI and MABINDLA-BOQWANA JJA
and DAFFUE and SALIE-HLOPHE AJJA

Heard: 30 August 2022

Delivered: 28 November 2022

Summary: Contempt of court – non-compliance with court orders to be established beyond reasonable doubt – elements of wilfulness and *mala fides* not established – appeal dismissed.



ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mabindla-Boqwana JA (Petse DP and Zondi JA and Daffue and Salie-Hlophe AJJA concurring)

[1] This appeal concerns the question whether the respondent, Bila Civil Contractors (Pty) Ltd (Bila), is in contempt of two court orders granted by the Gauteng Division of the High Court, Pretoria (high court), per Neukircher J on 1 July 2019 and Janse van Nieuwenhuizen J on 10 December 2019 respectively. The appellant, Samancor Chrome Limited (Samancor), which brought the contempt application before the high court, contended for that question to be answered affirmatively. The high court disagreed with Samancor in respect of both orders, albeit for different reasons, and dismissed the application. It also dismissed the application for leave to appeal. This appeal is therefore with the leave of this Court.

[2] Samancor is the co-owner and the holder of a converted mining right in respect of the Remaining Extent Portion 2 of the farm, Elandskraal 469 JQ (RE Portion 2). It has the sole and exclusive right to mine¹ and recover chrome in, on and under RE Portion 2, among other areas. It also has obligations to safeguard and protect the environment, the area and persons using it, from damage or injury. The Mine Health and Safety Act 29 of 1996 (the MHSA) also imposes safety obligations on Samancor.

[3] Bila has a prospecting² right for chrome ore over RE Portion 2. In terms of this right, it is entitled to remove and dispose, for its benefit, chrome ore and other minerals found during prospecting operations on RE Portion 2, as contemplated in s 20 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA).³ Bila is permitted to remove only authorised quantities of chrome ore as may be required in order to conduct tests on it or to identify or analyse it, as permitted in terms of s 20(2) of the MPRDA.

¹ In terms of s 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) the term 'mine' when used as verb is defined as 'any operation or activity incidental thereto, in, on or under the relevant mining area'.

² 'prospecting' – 'means intentionally searching for any mineral by means of any method –
 (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or
 (b) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economy value thereof; or
 (c) in the sea or other water on land.' (s 1 of the MPRDA)

³ Section 20 provides:

'(1) Subject to subsection (2), the holder of a prospecting right may only remove and dispose for his or her own account any mineral found by such holder in the course of prospecting operations conducted pursuant to such prospecting right in such quantities as may be required to conduct tests on it or to identify or analyse it.

(2) The holder of a prospecting right must obtain the Minister's written permission to remove and dispose for such holder's own account of diamonds and bulk samples of any other minerals found by such holder in the course of prospecting operations.'

[4] Bila's prospecting right is for five years commencing on 13 May 2018 and ending on 29 May 2023. All planned prospecting activities were to be conducted in three phases and within specific timeframes. Phase 1 would consist of non-invasive prospecting activities, which included collation of data and literature surveys. These activities would not disturb the land where prospecting would take place. This phase was to last for a period of six months, from June 2018 to December 2018.

[5] Phase 2 would last for a period of 12 months, from January 2019 to December 2019. The activities planned for this phase would be invasive and result in land disturbance, for example, sampling, drilling, trenching, and bulk sampling. The proposed drilling programme consisted of six holes, approximately 30m deep, depending on local depth to bedrock. The pits would be 3m x 3m x +/- 10m deep on a grid of 100 x 100 metres and 50 x 50 metres when necessary. These test pits had to be closed immediately before the excavator moved to the next. It was envisaged that at least 100 test pits would be excavated.

[6] Phase 3 would cover the remainder of the period from January 2020 to 29 May 2023. During this period, invasive prospecting activities such as sampling, excavation, drilling, blasting, and bulk sampling would take place. The prospecting area is described as 434 hectares, and it was anticipated that a total of 50 000m³ (100 000 ton) would be tested by making trenches on different locations over the whole prospecting area, where the possibility of ore was identified with the test pits. Bila would be able to process 960m³ a month and the processing of 50 000m³ would take about 42 months overall.

The total budget to complete the work for the duration of the prospecting right was stated as R1 248 122.

[7] On 12 June 2019, Samancor lodged an urgent application in the high court for an order interdicting Bila, its employees, and contractors from conducting unlawful mining operations on RE Portion 2 (and Portion 154, which is not relevant for this particular appeal). Samancor alleged that these unlawful activities infringed upon its rights as a co-owner and the holder of converted mining rights and posed health, safety, and environmental risks.

[8] In resisting Samancor's application, Bila denied that it was conducting unlawful mining activities. It alleged that it employed 85 people and had invested in excess of R100 million in its authorised prospecting operations and activities.

[9] The matter served before Neukircher J, who in her comprehensive judgment, found in favour of Samancor on 1 July 2019. She granted, *inter alia*, the following order:

'1. In respect of the remaining extent of Portion 2 of the farm Elandskraal 469 JQ North West Province:

1.1 [Bila], its employees and contractors are interdicted and restrained from conducting, facilitating or being involved in any manner whatsoever in mining operations on this property;

1.2 [Bila], its employees and contractors are interdicted and restrained from the removal of any material containing chrome or chrome ore or other minerals from this property outside of that allowed by its prospecting right.'

[10] Bila applied for leave to appeal against Neukircher J's order, which was dismissed on 12 August 2019. On 8 September 2019, Samancor lodged another application in the high court for an order joining Bila's directors as respondents, and for Bila and its directors to be held in contempt of the order granted by Neukircher J on 1 July 2019.

[11] In that application, Samancor alleged, inter alia, that various people from Samancor – including its service specialist, Mr Vusumzi Vilakazi, its mineral resources manager, Mr Kabelo Dube and an official from a security company it employs, Mr Dolf Labuschagne – observed Bila conducting mining activities on RE Portion 2 and Portion 154. Mr Vilakazi and Mr Dube conducted an analysis of the pits where the alleged activities had taken place and found that Bila had, by 22 August 2019, removed an estimated amount of 174 382.23 tons of chrome ore from MG4 Reef and 75 441.37 tons of chrome ore from MG4A on RE Portion 2. The dimensions of the pits excavated were in sizes that were more than those allowed in Bila's Prospecting Work Programme (PWP). Bila denied these allegations, while offering no evidence to refute them, allegedly because of the urgency with which the application had been brought.

[12] Samancor's second application was heard by Van der Westhuizen J, who dismissed it on 30 September 2019 on the basis that Samancor could not obtain an order for contempt 'summarily against the respondents [Bila's directors] without them being granted a need to be heard.'⁴ This Court

⁴ Relying on *R v Keyser* 1951 (1) SA 512 (A) at 518E-F endorsed in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2018 (1) SA 1 (CC) para 79.

granted Samancor leave to appeal Van der Westhuizen J's order after he had refused leave.

[13] On 7 October 2019, Bila applied for leave to appeal Neukircher J's order to this Court, which was dismissed on 30 November 2019. Nearly eight months later, on 22 July 2020, it applied for leave to appeal to the Constitutional Court, which was dismissed on 13 November 2020.

[14] The dismissal of the application for leave to appeal by this Court on 30 November 2019, made Neukircher J's order operative and enforceable until 22 July 2020, when an application for leave to appeal was lodged with the Constitutional Court.

[15] On 13 July 2020, Samancor lodged another application, which is the subject of this appeal, for an order holding Bila in contempt of the orders granted by Neukircher J on 1 July 2019 and Janse van Niewenhuizen J on 10 December 2019, as mentioned earlier. Fourie J heard that application. Counsel for Samancor submitted that the difference between the application that served before Van der Westhuizen J in respect of Neukircher J's order and the one heard by Fourie J was the applicable contempt period.

[16] He contended that the application before Van der Westhuizen J dealt with the contempt period between 12 August 2019, which is when Neukircher J dismissed the application for leave to appeal, and 8 September 2019, when the application before Van der Westhuizen J was brought. In contrast, the matter heard by Fourie J, dealt with the period between the

dismissal of the petition by this Court on 30 November 2019 and the lodgement of the application for leave to appeal to the Constitutional Court on 22 July 2020.

[17] As regards the facts relating to Janse van Nieuwenhuizen J's order, Samancor alleged that on 3 October 2019, it had lodged an internal appeal with the Department of Environment, Forestry and Fisheries (the Department)⁵ in terms of the National Environmental Management Act 107 of 1998 (NEMA) against the decision to grant Bila an environmental authorisation, in respect of a prospecting right that had been granted to it over RE Portion 2.

[18] In terms of s 43(7) of NEMA, an appeal suspends an environmental authorisation, exemption, directive, or any other decision made in terms of that Act or any other specific environmental management Act or any provision or condition attached thereto. Samancor's internal appeal accordingly suspended any activities by Bila on RE Portion 2.

[19] According to Samancor, Bila continued to conduct mining and prospecting activities on RE Portion 2 despite the lodgement of the internal appeal. Because of this conduct, Samancor lodged an urgent application in the high court seeking an order interdicting Bila from conducting any activities on RE Portion 2 until the internal appeal had been determined. On 10 December 2019, Janse van Nieuwenhuizen J granted an order interdicting Bila from being involved in any manner whatsoever, in any activities,

⁵ Currently known as Department of Forestry, Fisheries and the Environment.

including prospecting operations on RE Portion 2, pending the outcome of the appeal.

[20] On 13 December 2019, Bila applied for leave to appeal against Janse van Niewenhuizen J's order. This prompted Samancor's attorneys to write a letter to Bila's attorneys on 19 December 2019 advising them that Janse van Niewenhuizen J's order was interlocutory and consequently did not have the effect of a final judgment. Unfazed, Bila did not withdraw its application for leave to appeal Janse van Niewenhuizen J's order. It, however, never prosecuted that application.

[21] In advancing a case of non-compliance with the Neukircher J and Janse van Niewenhuizen J's orders, Samancor alleged that on 10 June 2020, one Mr Riaan Greeff, of a security company it employed, reported that he had noticed Bila's trucks operating on Bila's prospecting area and RE Portion 2. On 11 June 2020, with a view to ascertaining the nature and extent of these activities, Samancor's finance and administration security specialist, Mr Nel, took aerial photographs, from a drone, of the prospecting area and RE Portion 2.

[22] This was followed by a letter sent to Bila by Samancor's attorneys on 15 June 2020, advising that Bila had again commenced with illegal mining and prospecting operations in contempt of Janse van Niewenhuizen J and Neukircher J's orders. The letter demanded an immediate cessation of the alleged illegal mining and prospecting operations failing which Samancor would apply to court to hold Bila in contempt of the orders.

[23] On 25 and 26 June 2020, Mr Nel took aerial videos of the activities on RE Portion 2. The video footage and photographs taken by Mr Nel were studied by Mr Dube, Samancor's mineral resources manager and qualified mine surveyor. Mr Dube confirmed that the photographs and footage depicted mining and/or prospecting operations.

[24] On 3 July 2020, Samancor employed the services of Directional Survey and Mapping (DSM) to conduct a drone survey on RE Portion 2. DSM processed the data and provided it to Samancor. Mr William Jele, Samancor's survey practitioner, analysed this data by using industry-standard digital terrain modelling in surveying software, 'model-maker'.

[25] As pointed out in the founding affidavit:

'Mr Jele calculated that *by 3 July 2020*, [Bila] has mined additional volumes of chrome ore of 258, 117 cubic metres from the MG4 Reef and 114, 211 cubic metres from MG4A Reef on RE Portion 2. [Samancor's chief surveyor, Mr Eddie Maleka] converted these volumes to tons by multiplying the amount of the volumes with the density of the ore (being 4.04 tons per cubic metre for the MG4 Reef and 3.95 tons per cubic metre for the MG4A Reef). *This resulted in an additional 1,493,926 tons of chrome ore removed by [BILA] from the MG4 Reef and MG4A Reef on RE Portion 2 i.e. in excess of the 920,611 tons of chrome mined in 2019.*' (My emphasis.)

[26] Samancor submitted that Bila's unlawful operations adversely affected Samancor's obligations imposed on it by the MHSA. Bila's actions, it was contended, also posed environmental, health and safety risks and placed the integrity of the underground mined out area at risk.

[27] In its defence, Bila contended that the orders were not capable of being breached, as they were not operational. Neukircher J's order, so it contended, was automatically suspended by virtue of the provisions of s 18(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) as the papers seeking leave to appeal to the Constitutional Court had then been filed. In respect of Janse van Nieuwenhuizen J's order, Bila alleged that, although the order was of an interim nature, it was final in effect and therefore its operation was suspended upon the lodging of the application for leave to appeal against it.

[28] Consequently, Fourie J was required to determine whether contempt had been established on the papers. He found that Samancor's application was based on Bila's conduct, which occurred after 10 June 2020. He held that '[t]he relevant period applicable for the order granted by Neukircher J [was] therefore between 10 June 2020 (the effective date) and 22 July 2020 when the application for leave to appeal to the Constitutional Court was filed.' The effective date was based on Samancor's allegation that Mr Greeff had noticed Bila's trucks operating on the prospecting area on RE Portion 2 on 10 June 2020. He made the following key findings:

'[40] Taking into account the period during which the order granted by Neukircher J is operative for purposes of this application (between 10 June, the effective date, and 21 July 2020), the question to be considered is whether the respondent, by conducting these activities, was conducting mining operations as opposed to prospecting activities, by removing material or other minerals from this property "*outside of that allowed by its prospecting rights*".'

[41] The founding affidavit still refers to "*unlawful mining and/or prospecting activities*", even after Jele's calculations. The explanation given in the founding affidavit "*that by 3*

July 2020 the respondent has mined additional volumes of chrome ore” in the quantities as mentioned, also does not take the matter any further as it is not explained during what period these quantities of material had been mined and/or removed outside of that allowed in terms of the prospecting rights. Put differently, had it been illegally mined or was the respondent conducting prospecting activities? Furthermore, had the material been removed between 10 June (the effective date) and 3 July 2020 (when the calculation was apparently made) or had the activities and removal already started prior to 10 June 2020? If the activities had already started *prior* to 10 June 2020, what is the amount of material that was removed *after* the effective date?’ (Emphasis in the original text.)

[29] Fourie J further noted the concession made in the replying affidavit that Samancor became aware of these activities on 10 June 2020. For completeness, the replying affidavit records that ‘[t]he difference between this contempt application and the one before Van der Westhuizen J is that this application is based on the [Bila’s] conduct after 10 June 2020, whereas the application before Van der Westhuizen J was based on conduct up to 8 September 2019.’

[30] Fourie J accordingly found that ‘there [was] no sufficient evidence to indicate, beyond reasonable doubt (or even on a balance of probabilities), that [Bila] has disobeyed the order granted by Neukircher J by conducting mining operations, as opposed to prospecting activities, and by removing material outside of that allowed by its prospecting right during the period referred to above.’

[31] As to the order granted by Janse van Niewenhuizen J, Fourie J found that, that order which prohibited all activities, including prospecting operations, was operational from when it was granted on 10 December 2019

and was not suspended by the application for leave to appeal. It was an interlocutory order not having the effect of a final judgment, as contemplated in s 18(2) of the Superior Courts Act. It was therefore effective and enforceable also from 10 June 2020.

[32] He further found that, Bila had admitted that it was carrying out prospecting activities even during the relevant period. The uncertainty about the removal of the material outside of that allowed by the prospecting right during the relevant period, while relevant, was of less importance when regard is had to the terms of Janse van Niewenhuizen J's order. He therefore concluded that Bila had failed to comply with the order granted by Janse van Niewenhuizen J.

[33] As to wilfulness and *mala fides* in respect of this order, Fourie J accepted the explanation given by Bila that it had received legal advice to the effect that the order was suspended and it could therefore continue with its prospecting activities, which it *bona fide* accepted. In this regard, he was satisfied that Bila had 'advanced sufficient evidence to establish a reasonable doubt (even on a balance of probabilities) as to whether the non-compliance was wilful and *mala fide*, notwithstanding the fact that [Bila] was later found to be wrong about the supposed suspension.' He accordingly dismissed the application with no order as to costs.

[34] Before us, counsel for Samancor submitted that Fourie J erred by conceiving 10 June 2020 as the effective date on which the contempt commenced. That date, counsel emphasised, was simply the date on which

Samancor became aware of Bila's continued unlawful activities and not the date from when non-compliance with the orders began. According to Samancor's counsel, Samancor had expressly stated in its replying affidavit that the conduct for which it sought to hold Bila in contempt began from 30 November 2019 to 22 July 2020.

[35] Counsel expressed regret that Samancor had also stated in the replying affidavit that the application was based on Bila's conduct after 10 June 2020. He emphasised that, despite that assertion, Samancor's case, clearly showed that Bila's unlawful conduct, apparent from a holistic reading of its affidavits, at the earliest, commenced from when this Court refused Bila's application for leave to appeal to when the application for leave to appeal was filed in the Constitutional Court. That meant that Neukircher J's order remained operative until Bila's belated filing of its application for leave to appeal to the Constitutional Court.

[36] He further argued that Fourie J erred in finding that Samancor did not present sufficient evidence to establish contravention of Neukircher J's order and further contended that the high court failed to analyse the evidence that was presented before it.

[37] As to the finding that non-compliance with Janse van Nieuwenhuizen J's order was not proved to be wilful and *mala fide*, counsel for Samancor submitted that Bila had been informed by Samancor's attorneys on 19 December 2019 that the order was operative, and it had to adhere to it despite its application for leave to appeal. Relying on *S v Abrahams*,⁶

⁶ *S v Abrahams* 1983 (1) SA 137 (A) at 146F-H.

Samancor contended that Bila had failed to provide, in its answering affidavit, any details of the advice it had allegedly received, including what the advice entailed, when and by whom it was given.

[38] Bila readily conceded in its answering affidavit that both the Neukircher J and Janse van Niewenhuizen J orders existed and were served upon it. Consequently, the first two requirements to establish contempt were met.

[39] The main defence in respect of these two orders was that they were not breached because they were not operative. In my view, Fourie J was correct in dismissing this defence because Janse van Niewenhuizen J's order was interlocutory in nature and therefore not suspended as s 18(2) of the Superior Courts Act explicitly provides. Neukircher J's order remained operative during the period of 30 November 2019 and 22 July 2020, as already stated. It was similarly not suspended during the period in which Samancor claims the unlawful activities were taking place.

[40] I do not need to delve into the non-compliance with Janse van Niewenhuizen J's order as Bila admitted conducting prospecting operations, which the order had interdicted. Fourie J was correct on this score, and Bila mounted no challenge on appeal. In respect of that order, the issue that remains to be determined is whether Bila advanced evidence that established a reasonable doubt as to whether the breach was wilful and *mala fide*.

[41] I deal next with Neukircher J's order. The first question is whether Samancor established breach of that order beyond reasonable doubt.⁷ I am willing to accept the argument made on Samancor's behalf that on a proper reading of the papers, 10 June 2020 was the date its 'officials' observed the operations and the contempt complained of started on 30 November 2019 to 22 July 2020, despite the assertion made in its replying affidavit suggesting otherwise.

[42] Therefore, the period that should be assessed as to whether Bila was conducting mining operations in contempt of Neukircher J's order is 30 November 2019 to 22 July 2020. It is important to carefully examine the allegations relating to that period. This is so because a lot of background precedes it and touches on the application brought for contempt of Neukircher J's order in relation to conduct from 12 August 2019 to 8 September 2019.

[43] In my assessment, there are two main paragraphs of the founding affidavit that pointed to whether Samancor showed that Bila conducted mining activities. Mr Greeff noticed Bila's trucks operating on the site and reported them. Mr Nel followed that up by taking photographs and making a video of their activities. So far, the two witnesses' observations on their own were not vouching for whether mining or prospecting was taking place. The person who could do that and indeed who studied the photos and the video was Mr Dube, who was an expert in this regard. On scrutiny, the allegation relating to what Mr Dube studied is not helpful either. It is, at best for

⁷ *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 42.

Samancor, ambivalent. It is stated, he confirmed that ‘they show mining *and/or* prospecting operations.’ (My emphasis.)

[44] The key allegation that remains is that which states that as at 3 July 2020 there was ‘. . . an additional 1,493,926 tons of chrome ore removed by [Bila] from the MG4 Reef and the MG4A Reef on RE Portion 2 i.e. in excess of the 920, 611 tons of chrome ore that it had already mined in 2019.’

[45] The question is whether the allegation quoted in the preceding paragraph is sufficient to hold Bila in breach of the order beyond reasonable doubt. The difficulty I have with this allegation is its lack of particularity. First, it must be accepted that by this stage, Bila was in phase 3 of the prospecting activities in terms of the PWP. It is not alleged by how much it exceeded its allowable extraction for this period.

[46] No allegations are made as to whether it had exceeded the permissible amount of chrome ore. It is left to the court to make its own deductions that the additional tons of chrome referred to in the quoted part of the relevant paragraph meant that Bila had exceeded what it was allowed to extract.

[47] If regard is had to the slides provided in support of the measurements for 2019 and 2020, it appears that the measurements for 2019 were done on 24 May 2019, which leaves the possibility that the measurements done on 3 July 2020 included the six months period from May 2019 to November 2019 (which is a period not forming part of the complaint).

[48] It is neither conclusive nor clear whether any extractions took place after November 2019 to 3 July 2020. This is because calculations presented for 2019 stopped on 24 May 2019, which could mean calculations for 2020 included those from 25 May 2019. It may be surmised, according to Samancor's counsel, that part of the volumes removed should be between 30 November 2019 and 3 July 2020. This, however, may be lending us into the realm of supposition.

[49] The difficulty is that the allegations made by Samancor are too wide and difficult to devise into the particular period. This may be because of the manner in which the allegations are made, which leaves gaps and requires the court to put pieces together for it to understand how the infringement could be attributed to that period.

[50] While it may be easy to say numbers speak for themselves, one must be careful that such numbers indicate a breach during the period concerned. I am not sure that it is fair to have to undertake the analysis of assembling pieces together, that counsel sought to make in argument. This is so because the party having to respond to the allegations must be clear as to the exact infringement and not have to wait for the hearing to take place in order to understand what the actual breach is, ie the analysis of the quantities and comparisons is, as shown in the slides.

[51] In my view, the hurdle that Samancor has to overcome is to show non-compliance beyond a reasonable doubt, and that requires a clearly pleaded case. Lack of clarity regarding the breach of Neukircher J's order could have

been brought about by the clumping together of allegations dealing with the orders of Janse van Nieuwenhuizen J and Neukircher J.

[52] The problem with that approach is that all that was required to be shown in respect of Janse van Nieuwenhuizen J's order was that Bila had conducted prospecting operations after the granting of the order. In contrast, insofar as Neukircher J's order is concerned, Samancor had to show that Bila was mining after 30 November 2019 to 22 July 2020.

[53] The theme of mixing allegations in respect of the two orders unfortunately showed equivocation, even if not intended, that permeated the entire founding affidavit. For example, another averment is made in the founding affidavit that Bila was continuing to conduct unlawful mining and/or prospecting activities and operations on RE Portion 2.

[54] In the circumstances, it is difficult to find that non-compliance with Neukircher J's order was distinctly and clearly decipherable from allegations dealing with the breach of Janse van Nieuwenhuizen J's order, without having to apply a strained analysis to the facts. Contempt of a court is a serious matter, with grave consequences; hence, the standard that must be met whenever a criminal sanction is sought is proof beyond reasonable doubt.

[55] While there may be a general sense that even during the period alleged, Bila may have been conducting mining operations, clear and unequivocal allegations ought to have been made. The facts, such as they

are, are insufficient to sustain an inference of non-compliance during the alleged period.

[56] For those reasons, I am constrained to find that Samancor has not clearly established the breach of Neukircher J's order beyond a reasonable doubt.

[57] As regards Janse van Nieuwenhuizen J's order, the issue is whether wilfulness and *mala fides* have been established. Bila alleged that it relied on legal advice that the order, although interlocutory, was final in effect. In this regard, a notice of application for leave to appeal was lodged, even though the application was never pursued.

[58] As indicated earlier, counsel for Samancor argued that Bila failed to provide any detail pertaining to the advice, including what the advice was and by whom it was given, as contemplated in *Abrahams*.⁸ Whether sufficient detail has been provided in support of a defence of legal advice, is a question of fact. In *Abrahams*, the appellant had been convicted of contravening the Rent Control Act 80 of 1986, in that he demanded from tenants rental in excess of what was determined by the Rent Board while he had received a letter from the Rent Board stating what the controlled rent was. He then consulted an attorney who advised him that he was entitled to increase the rent as he had done. In this regard, the Court held:

'At the time he sought the attorney's advice he knew or at least suspected that the premises were rent-controlled and in addition he had a letter from the Rent Board confirming that fact. In such circumstances it was not sufficient for one burdened by the

⁸ *S v Abrahams* 1983 (1) SA 137 (A) at 146F-H.

onus under s 18 (4) (a) to seek to discharge the *onus* by stating *in court* that his attorney told him that his action in requiring the payment of an increased rent was in order. In the case of *R v Meischke's (supra)* the accused advanced in mitigation of his sentence the fact that his attorney had advised him that he need not obtain permission of the Rent Board to increase rentals controlled by a determination. In dealing with this plea TINDALL ACJ stated in the course of his judgment in that case at 711 that if an accused wished the Court to have regard to this advice as a mitigating factor, then it could be expected of him to produce the advice if it was in writing. In addition the Court would require to be satisfied that the advice was given on a full and true statement of facts. In the absence of such safeguards the fact of the advice having been given was held to be of no avail as a mitigating factor. These remarks are pertinent to the present enquiry, more particularly as the attorney on whose advice the appellant claimed to have relied was not called to testify in regard to all the circumstances relevant to the giving of such advice.⁹ (My emphasis.)

[59] In *R v Meischke's*¹⁰ the Court had said the following:

'This, however, must be emphasised, that if the accused wishes to rely on the receipt of such advice as a mitigating factor, he ought to give evidence in mitigation so that the court may be in a position to investigate whether in truth he did get such advice, and on what statement of facts by the accused the advice was given. If, as in the present case, the accused merely states in his evidence given before conviction that he took legal advice, he is not likely to be exposed to full interrogation on the matter. But if he gives such evidence after conviction and then pleads in mitigation that he acted on legal advice, he will be asked to produce the advice, if it was in writing, and whether it was written or oral, and the court will require to be satisfied that the advice was given on a full and true statement of facts. In the absence of these safeguards the plea of having acted on legal advice would be liable to abuse. In the present case, owing to the fact that Amoils did not tender evidence in mitigation, these safeguards were absent; the magistrate had no opportunity of verifying whether the accused did get the legal advice in question and, if

⁹ *Abrahams* fn 8 above at 146 D-H.

¹⁰ *R v Meischke's (Pty) Ltd and Another* 1948 (3) SA 704 (A) at 711.

he did, on what facts such advice was given. In the circumstances the statement made by Amoils under cross examination that his legal adviser had advised him that the permission of the control board was not necessary, is of no value in the assessment of the punishment and can be disregarded.' (My emphasis.)

[60] As appears from the cases in the preceding two paragraphs, evidence in support of the plea of legal advice is required to prevent abuse. In both *Abrahams* and *Meischke*'s, the accused simply mentioned in court that they had relied on legal advice without providing evidence in support of such claims. Consequently, it was held that the respective courts could not verify whether the alleged legal advice was given and, if so, on what facts. There are additional factors though, that distinguish those cases from the present one. In *Meischke*'s the accused appears to have relied on legal advice during cross-examination. In *Abrahams* the accused 'was well aware of the fact that he was acting in conflict with the requirements of the Act.'¹¹

[61] In the present case, throughout the answering affidavit, the theme that carried through Bila's defence was that the two court orders were automatically suspended, and in particular that of Janse van Nieuwenhuizen J, due to the lodgement of the application for leave to appeal. For present purposes, the focus is not on the correctness of that defence, but on whether legal advice to that effect was given, by whom, its nature and whether it was *bona fide* received by Bila.

[62] It is so, that in dealing with the elements of wilfulness and *mala fides* all that is recorded is that Bila 'acted *bona fide* and on the basis of legal

¹¹ *Abrahams* fn 8 above at 147G.

advice to the effect that the two court orders remain suspended, inoperational and non-executable *for all the reasons already canvassed above.*' (My emphasis.)

[63] As is apparent from the answering affidavit, on 10 December 2019 (which is the same day that Janse van Nieuwenhuizen J's order was issued), Bila's attorneys addressed a letter to Samancor which, inter alia, stated as follows:

'3. Our client has instructed us:

3.1 to file an application for leave to appeal in respect of the judgment of the Honourable Judge Janse Van Nieuwenhuizen... .' (My emphasis.)

[64] On 17 December 2019, Bila indeed lodged that application. As proof of the lodgement, it annexed a notice of application for leave to appeal. In the notice, it is stated that the application for leave to appeal did not fall to be determined in terms of s 18(2) of the Superior Courts Act as the judgment was final in effect.

[65] In addition, still on 17 December 2019, Bila addressed a letter to the Department requesting it to urgently constitute an independent panel to hear the NEMA administrative appeal including Bila's objection.

[66] Elsewhere in the answering affidavit, Bila stated that the question of whether Janse van Nieuwenhuizen J's order is automatically suspended 'is totally dependent on the finding in respect of the legal question whether the decision was final in effect.' The deponent went on to allege that he had

‘received legal advice that in view of the foregoing, the relevant decisions [could] not be breached.’

[67] Samancor dealt with these allegations in the replying affidavit. Consequently, it could not be argued that it was ambushed during oral argument. Although, the notice of application for leave to appeal was not dealt with under the heading of wilfulness and *mala fides*, it clearly asserted the automatic suspension of the orders. While the notice does not clearly set out the reasons why Janse van Nieuwenhuizen J’s order is final in effect, in circumstances like these, it is hard to conclude that Bila as a lay litigant did not genuinely accept the advice given by its legal representatives, albeit uncritically so, that the interim order could be appealed against.

[68] I am therefore of the view that, from the reading of the papers and the context of this case, the legal advice given was clear. The court cannot ignore it. For the purposes of contempt, the question is whether there is sufficient explanation given for the breach, which raises reasonable doubt as to whether the order was disobeyed wilfully and *mala fide*.

[69] In my view, as Fourie J found, the alleged legal advice was in respect of an issue that was legal in nature. It depended on the interpretation of the order, its context and particular circumstances. Although the legal advice was later found to have been incorrect, this does not detract from the fact that it was given and Bila accepted it in good faith.

[70] Even if Bila's acceptance of the advice could be said to be unreasonable, if it is accepted that it was received *bona fide*, it would not amount to contempt.¹² In the result, Fourie J's conclusion that sufficient evidence had been provided by Bila, creating reasonable doubt that its non-compliance with Janse van Niewenhuizen J's order was not wilful and *mala fide*, cannot be faulted. Accordingly, for all the foregoing reasons the appeal must fail.

[71] It remains to address the issue of costs. Bila asked for costs of two counsel. This matter was not complex to warrant such a costs order. I would therefore not allow costs of two counsel.

[72] In the result, the appeal is dismissed with costs.

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

APPEARANCES

¹² *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) paras 9 and 10.

For appellant:

G D Wickins SC

Instructed by:

Malan Scholes Inc, Johannesburg

Claude Reid Attorneys, Bloemfontein

For respondent:

D C Mpofu SC (with M ka-Siboto)

Instructed by:

Mabuza Attorneys, Johannesburg

Matsepes Inc, Bloemfontein