

Neutral citation: *Samancor Chrome Limited v Bila Civil Contractors (Pty) Ltd and Others* (Case no 159/2021) [2022] ZASCA 154
(7 November 2022)

Coram: PETSE DP and ZONDI, HUGHES and
MABINDLA-BOQWANA JJA and DAFFUE AJA

Heard: 29 August 2022

Delivered: 7 November 2022

Summary: Contempt of court order – joinder of directors and contempt relief sought in the same application – directors aware of the relief sought against them – contempt of court established beyond a reasonable doubt.

ORDER

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

1 The appeal succeeds with costs.

2 Paragraph (b) of the high court order is set aside and replaced with the following:

‘(b) It is declared that the respondents are in contempt of the order granted by Neukircher J on 1 July 2019.

(i) The first respondent is to pay a fine of R100 000, while the second to fifth respondents are to pay a fine of R50 000 each, to the Registrar of this Court, within 30 days of this order.

(ii) The respondents shall notify the applicant in writing of their compliance with the order in subparagraph (i) above within 5 days of the payment of the amounts referred to in subparagraph (i) hereof after they have done so.

(iii) The respondents are to pay the costs in respect of the declaratory order in paragraph (b) above jointly and severally, the one paying the other to be absolved, such costs to include the costs occasioned by the employment of two counsel where applicable.’

JUDGMENT

Mabindla-Boqwana JA (Petse DP and Zondi and Hughes JJA and Daffue AJA concurring)

Introduction

[1] The appellant, Samancor Chrome Limited (Samancor), is the co-owner of the Remaining Extent of Portion 2 of the farm Elandskraal 469 JQ (RE Portion 2) and the owner of Portion 154 of the farm Elandskraal 469 JQ (Portion 154) (the properties) in the North West Province.

[2] It has the sole and exclusive right to mine¹ and recover chrome ore in the properties in terms of converted mining rights. In terms of these rights, it is obliged to take all such necessary steps to adequately safeguard and protect the environment and the mining area from any possible damage. It also has to safeguard any persons using or entitled to use the surface mining area, from injury associated with any activities on the mining area. Furthermore, it bears certain safety obligations imposed on it by the Mine Health and Safety Act 29 of 1996 (the MHSA).

[3] The first respondent, Bila Civil Contractors (Pty) Ltd (Bila), holds a prospecting² right over RE Portion 2. The prospecting right entitles Bila to

¹ 'mine' when used as a verb is defined in the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) 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

remove and dispose of chrome ore and other minerals found during the prospecting operations in terms of s 20 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). Section 20 stipulates:

‘(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 minerals found by such holder in the course of prospecting operations.’

[4] The planned prospecting activities required, in terms of s 20 of the MPRDA, consisted of three phases. Phase 1 would last for a period of six months from June 2018 to December 2018. It entailed activities that did not disturb the land such as collation of data and aeromagnetic surveys. Phase 2 would take place over 12 months from January 2019 to December 2019. It involved some sampling, trenching and limited drilling. In terms of this phase, Bila could drill up to six holes, which would be approximately 30 metres deep. It was obligatory that the pits be closed before the excavator moved to the next one.

[5] Phase 3 would be from January 2020 to 29 May 2023. This phase allowed for excavation, drilling, blasting and bulk sampling. It was anticipated that 50 000 m³ (100 000 ton) would be tested by making trenches

(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 economic value thereof; or
(c) in the sea or other water on land.’

at different locations over the whole prospecting area, where the possibility of ore was identified with test pits. The amount required to finance the three phases was said to be R1 248 122.

[6] On 12 June 2019, Samancor lodged an urgent application before the Gauteng Division of the High Court, Pretoria (high court), seeking an order interdicting Bila, its employees and contractors, from conducting unlawful mining operations on RE Portion 2 and Portion 154. Samancor alleged that in May 2019, its mineral resources manager, Mr Kabelo Dube, had observed extensive open cast mining operations, substantial blasting and other activities conducted by Bila, which were an indication that mining operations were taking place. Bila denied that it was mining, emphasising that although it had invested heavily in its operations, these were only for prospecting purposes. To this end, it alleged that it had employed 85 people and had invested in excess of R100 million in such prospecting activities.

[7] The application served before Neukircher J who on 1 July 2019, having found in Samancor's favour, granted 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.

2. In respect of Portion 154 of the Farm Elandskraal 469 JQ North West Province:

- 2.1 [Bila], its employees and contractors are interdicted and restrained from conducting, facilitating or being involved in any manner whatsoever in mining operations, including blasting activities, or the removal of any material containing chrome or chrom[e] ore or other minerals from [Samancor's] mining area on this property;
- 2.2 [Bila] is ordered to vacate this property together with its employees, contractors, equipment and machinery within 5 days of the date on which this order is served [o]n it;
- 2.3 [Bila] is interdicted and restrained from entering onto this property;
- 2.4 [Bila] is directed to return to [Samancor], within 10 days of service of this order on it, any mineral and/or material containing chrome or chrome ore which it has removed from this property;
- 2.5 the second respondent [the Sheriff] is authorised and directed to give effect to the order set out in paragraph 2 by:
- i removing [Bila], its employees and contractors and any trucks, vehicles, mining equipment or any other equipment reasonably suspected of being used or intended to be used for conducting, facilitating or being involved in any man[n]er whatsoever in mining or blasting activities or the unlawful removal of any chrome or chrom[e] ore on this property;
 - ii preventing all trucks and other vehicles reasonably suspected of being used or intended to be used for conducting, facilitating or being involved in any manner whatsoever in the unlawful removal of any chrome or chrome ore from this property, from entering this property;
 - iii preventing [Bila] from conducting any mining operations including blasting activities on, or the removal of any material containing chrome or chrome ore or any other minerals from [Samancor's] mining areas situated on this property;
 - iv preventing [Bila] from entering this property.
3. [Bila] is ordered to pay the costs of this application.'

[8] Subsequent to this order, on 8 September 2019, Samancor launched an urgent application before the high court against Bila and its directors, ie the

second to fifth respondents, who were not parties before Neukircher J. It sought an order: (a) joining the second to fifth respondents as parties in the application; (b) declaring that the respondents were in contempt of the judgment and order granted by Neukircher J on 1 July 2019; (c) directing that each of the respondents pay a fine of R100 000, alternatively such other sum as the court considered appropriate and; (d) that in the event that any of the respondents failed to comply with the order sought or continued to act in breach of the order, that such respondent be committed to prison for a period of 90 days, alternatively such other period as the court deemed appropriate.

[9] A further order, which is not relevant to this appeal was also sought in terms of s 18(1) of the Superior Courts Act 10 of 2013 (Superior Courts Act), for the immediate enforcement and operation of the relevant parts of Neukircher J's order.

[10] In response to this application, a counter-application was filed together with an answering affidavit for an order interdicting Samancor from conducting any mining operations on RE Portion 2 pending the outcome of an appeal process that Samancor had lodged with the Department of Mineral Resources (the DMR) regarding its decision to grant a prospecting right to Bila.

[11] Both applications were argued before Van der Westhuizen J, who, on 30 September 2019, granted an order joining the second to fifth respondents as parties to the application but dismissed, with costs, the application for

contempt. He further struck the counter-application from the roll for want of urgency.

[12] In dismissing the contempt application, Van der Westhuizen J relied on the decision of *R v Keyser*³ endorsed in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd*.⁴ He held that the principles propounded in those judgments were not followed by Samancor and reasoned as follows:

‘The applicant seeks that the contempt order be granted immediately following on the order for joinder: *Non constat* that such consent to be joined and such joinder being granted, implies that a contempt order can be summarily granted against them. Such approach by the applicant ignores the basic right that a party has, namely that it is entitled to be heard before an order is granted against him or her or it. In my view it constitutes a summarily find[ing] of contempt without the respondents having the opportunity of being heard. The issue of urgency impacts upon the unfairness of the procedure followed. . . .’

[13] The passage in *Keyser* upon which Van der Westhuizen J relied, states as follows:

‘But counsel for the Crown fairly and properly admitted that in every case of contempt *ex facie curiae* dealt with by our courts without a criminal trial, the proceedings were commenced by an order, served upon the offender, containing particulars of the conduct alleged to constitute the contempt of court complained of, and calling upon the offender to appear before the court and show cause why he should not be punished summarily for the alleged contempt of court.’⁵

³ *R v Keyser* 1951 (1) SA 512 (A) at 518E-F (*Keyser*).

⁴ *Matjhabeng Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 79 (*Matjhabeng*).

⁵ *Keyser* fn 3 above at 518E-G.

The issues

[14] The appeal by Samancor is against those portions of Van der Westhuizen J's order dismissing the contempt application and it is with the leave of this Court.

[15] The first issue is whether the high court was correct in holding that the contempt order could not be granted simultaneously with the joinder of the directors. If it was correct, that is the end of the matter. If not, the second question is whether this Court should determine the merits of the contempt application or send the matter back to the high court as submitted by counsel appearing for Bila. If this Court adopts the former, then it will determine whether Samancor is entitled to the contempt relief it sought before Van der Westhuizen J.

Joinder and summary process

[16] *Keyser* and *Matjhabeng* are in my view both distinguishable from the facts of this case. In *Keyser* the appellant was admonished and sentenced to a fine without knowing that he was an accused. As a result, he had no knowledge of the exact charges against him. He was not given an opportunity to consult counsel, prepare his defence nor was he advised of his right not to make a statement at all.⁶

[17] Similarly, in *Matjhabeng*, a *rule nisi* was granted *ex parte* calling upon the municipal manager to appear before court. He had neither been cited nor joined in his personal capacity as a party to the proceedings. He was cross-examined by the judge and Eskom's counsel with no evidence

⁶ *Keyser* fn 3 above at 518B-D.

being led and was not given an opportunity to comment on the allegations before being cross-examined. He was not legally represented or forewarned that committal to prison could be imposed. Had he known all of this, he might have asked for a postponement in order to consult with counsel and consider his position.⁷

[18] In the present matter, the directors were cited as respondents in the joinder and contempt application. They received the notice of motion, which clearly set out the relief sought against them. They had time to seek legal counsel, to consider the application and their position in regard thereto. They clearly knew what the case was against them. Specifically, they were aware that not only was joinder sought, but equally aware that the court was also asked to find them in contempt of court and impose a penalty, should it find them guilty of contempt. There was no suggestion either in the papers or in argument that the directors were not aware of the allegations against them and that they needed time to consult with counsel and prepare their case.

[19] The resolution authorising the second respondent to depose to an affidavit was signed by each of the directors, which is a clear indication that they knew about the application. They also each filed confirmatory affidavits to the answering affidavit deposed to by one of them.

[20] Furthermore, in the answering affidavit it was expressly stated:

‘7. While I dispute the liability of [Bila’s] directors for contempt of court, for the reasons dealt with in the rest of this affidavit, I am advised that the joinder of the directors as respondents will not be opposed.’

⁷ *Matjhabeng* fn 4 above para 80.

[21] Indeed, none of the respondents opposed the joinder. To the extent that it is suggested that the answering affidavit did not represent an answer for all the directors, then they would have elected not to oppose the application seeking their joinder and to hold them in contempt of which they were aware.

[22] Counsel for the respondents argued that a contempt order could not be summarily granted after the joinder because the directors could not provide answers to the founding affidavit as they were not yet parties to the application and therefore were not obliged to file a response. He submitted that the answering affidavit was only filed on behalf of Bila and deposed to by the second respondent as indicated in the answering affidavit.

[23] The answering affidavit, which is attributed solely to Bila, did not raise any issue with the contempt order being sought simultaneously with the joinder of the directors. It went ahead to address the merits of the contempt case. In several paragraphs of the answering affidavit, allegations, which referred to the respondents in plural, are made. The answering affidavit also ventured allegations and responses on behalf of all the respondents. In this regard, reasons were offered as to why the respondents could not be found guilty of contempt. The respondents did not distance themselves from these allegations. And no purpose would have been served in bringing a separate contempt application from the joinder in these circumstances.

[24] In challenging the question of urgency, it was alleged in the answering affidavit that the matter should have been brought by way of a *rule nisi*. Apart from stating that an order should have been sought on terms akin to *rule nisi* proceedings, it is not clear how that is related to the directors' joinder and summary contempt process. The summary process defence, as already stated, was not pertinently raised as an issue in the papers. Van der Westhuizen J erred in dismissing the contempt of court application on this basis. He should instead have proceeded to consider the merits in this matter.

Further conduct of the matter

[25] Counsel for the respondents submitted that, should this Court find that the high court erred in dismissing the contempt relief, then it should remit the matter to the high court for the determination of the merits.

[26] The difficulty is that while Van der Westhuizen J did not delve into the merits of the contempt matter, he nevertheless expressed himself thus:

'In my view, the applicant [Samancor] has further shown that:

- (a) the first respondent's conduct complained of constitutes mining operations, despite the first respondent's protestations in that regard;
- (b) the first respondent holds the information to gainsay any allegation by the applicant in that regard, but has decidedly chosen not to inform the court in that instance;
- (c) accordingly, the only inference to be drawn in that respect is that the first respondent is in fact conducting mining operations over the said property as shown by the applicant's uncontroverted evidence;
- (d) the evidence placed before the court by the applicant at least *prima facie* shows the first respondent's conduct complained of requires an answer that is not met by the first respondent, its protestations to the contrary nevertheless. The respondents hold the required information as demonstrated by the applicant;

(e) the applicant would suffer irreparable harm should the order of Neukircher J, not be made operational and enforceable pending any possible application for leave to appeal and any appeal following thereon.’

[27] Van der Westhuizen J went on to state that Bila was less than candid with the court by choosing to raise a technical point and deliberately deciding ‘to ignore the pertinent facts raised in the founding affidavit, where it [was] in a position to gainsay such allegations, [whilst in possession of] all the relevant detail of its conduct complained of.’

[28] Although these findings were made in the context of the determination of the application in terms of s 18(1) of the Superior Courts Act, which formed part of the relief sought, the facts relied upon by Samancor in respect of that relief were the same as those for the contempt application. It seems to me the horse has left the barn and the high court appears to be *functus* insofar as at least one aspect of the contempt enquiry is concerned. Accordingly, it is proper for this Court to decide whether the requirements to hold the respondents in contempt have been met.

Contempt application

[29] The requisites to be fulfilled to hold a party in contempt of a court order are: (a) the existence of the order; (b) service or notice of that order to the respondent; (c) non-compliance with the order by the respondent; and (d) wilfulness and *mala fides*. The onus is on the applicant to prove all these requirements beyond a reasonable doubt. However, once the applicant has established the existence of the order, service or notice and non-compliance, the respondent bears the evidential burden in relation to wilfulness and *mala*

fides. If the respondent fails to provide evidence that will establish reasonable doubt as to whether non-compliance was wilful and mala fide, contempt of the court order will have been established beyond a reasonable doubt.⁸

Existence of the order and service or notice

[30] In the answering affidavit it is conceded that Neukircher J's order 'exists and it was served upon the respondents subsequent to its issue on 23 August 2019 and hence the respondents are aware of the order. The first two legal requirements have accordingly been met'. The next step of the enquiry is whether the respondents breached that order.

Non-compliance with Neukircher J's order

[31] The facts relied upon by Samancor are as follows. On 2 July 2019, Bila applied for leave to appeal Neukircher J's order. That application was dismissed on 12 August 2019. This meant that the order was no longer suspended and had to be obeyed. On 19 August 2019, Bila's attorneys informed Samancor's attorneys that they had been instructed to petition this Court for leave to appeal.

[32] On 23 August 2019, Samancor's attorneys served a copy of the order by Neukircher J dismissing the application for leave to appeal, on Bila's attorneys, even though Bila would have been aware of that order by then, since they were represented in court when it was issued. It is common cause that at the time of the hearing of the application, which is the subject of this

⁸ *Fakie N O v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42.

appeal, this Court was yet to be petitioned. Accordingly, from 12 August 2019 Neukircher J's order remained operational and unsuspending.

[33] As to allegations of contempt, Samancor alleges that on 19 August 2019, an employee of its security company, Mr Dolf Labuschagne, observed continued mining operations taking place on RE Portion 2. He took aerial photographs of the pit being mined by Bila. A mine wall as depicted in the photographs was an indication that substantial blasting had taken place. There were, among others, vehicles loaded with material mined from Bila's mining area, large crushing plants, numerous loading trucks and material, which had been crushed and stockpiled on Bila's mining site.

[34] Mr Dube, who is a qualified mine surveyor, studied the photographs and confirmed that they indicated full-scale mining operations being conducted by Bila as opposed to prospecting operations. Samancor's survey specialist, Mr Vusumzi Vilakazi, and Mr Dube conducted an analysis of the pit where unlawful mining activities were allegedly being conducted, using the industry-standard digital terrain modelling and surveying software known as 'model-maker'.

[35] They calculated that by 22 August 2019, Bila had mined and removed an estimated 174 382.23 tons of chrome ore from MG4 reef and 75 441.37 tons from the MG4A reef from the pit on RE Portion 2. They also measured the dimensions of the pits that had been excavated and found them to be larger than what was anticipated by Bila in the prospecting work programme

(PWP). Bila had also not closed or rehabilitated any of the mine excavations conducted in an old pit on RE Portion 2.

[36] Bila was only permitted to remove 80 000 tons of ore over a period of 42 months for purposes of conducting tests and analysis in terms of the prospecting right and PWP. It had as at 21 August 2019 removed a total amount of 642 607.04 tons of chrome ore from the MG4 reef and 278 005.09 tons of chrome ore from the MG4A reef on RE Portion 2 and Portion 154.

[37] On 4 September 2019, Mr Labuschagne observed that Bila was continuing its mining operations on RE Portion 2 and it had escalated its operations since he had last observed on 19 August 2019. He took video footage of these activities. Mr Dube reviewed the video and confirmed that full-scale mining operations were taking place. Also, on 4 September 2019, Samancor's safety, health, environment and quality specialist for explosives, Mr Tshepo Mogoai received a telephone call from one Mr Kenny Whal from Bila, who informed him that Bila would be conducting blasting on 4 and 5 September 2019 consisting of 110 (explosive filled) holes – a 'big blast'.

[38] Prior to the hearing of the matter before Neukircher J, Bila had been issued with a notice in terms of s 54 of the MHS Act (s 54 notice)⁹ by the

⁹ Section 54(1) of the Mine Health and Safety Act provides as follows:

'54. Inspector's power to deal with dangerous conditions. — (1) If an *inspector* has reason to believe that any occurrence, practice or condition at a *mine* endangers or may endanger the *health* or *safety* of any person at the *mine*, the *inspector* may give any instruction necessary to protect the *health* or *safety* of persons at the *mine*, including but not limited to an instruction that—

(a) operations at the *mine* or a part of the *mine* be halted;

(b) the performance of any act or practice at the *mine* or a part of the *mine* be suspended or halted, and may place conditions on the performance of that act or practice;

DMR highlighting safety transgressions that had been found, including Bila 'blasting at a place that is above another underground mine without any risk assessment and exemption in place'. In terms of this notice, Bila was, among others, required to provide a risk assessment prepared jointly with Samancor. The notice was, however, uplifted notwithstanding the safety concerns still outstanding. The mine surveyors of the two parties, nevertheless met and Bila's mine surveyor agreed with Samancor's mine surveyor, Mr Johnny Maleka, that the parties were mining in the same area.

[39] In that meeting, Samancor advised Bila of the mine health and safety concerns, which included loss of ventilation in Samancor's shafts, possible influx of material flooding and blasting that would affect the integrity of Samancor's underground workings and causing the surface of the land to cave and the pillars underground to collapse. The joint risk assessment was completed. However, Bila did not take steps to mitigate the risks identified in this assessment.

[40] Continued mining operations by Bila in RE Portion 2 would sterilise the MG2 reef, which would shorten the life of the mine causing financial harm to Samancor. It was also causing an unacceptable degradation to the environment, which exposed Samancor to liability in terms of the National Environmental Management Act 107 of 1998. In addition, removal of tons of chrome, which was done between the period of 24 May 2019 and 22 August 2019, would result in the depletion of chrome resources. In that

(c) the *employer* must take the steps set out in the instruction, within the specified period, to rectify the occurrence, practice or condition; or

(d) all affected persons, other than those who are required to assist in taking steps referred to in paragraph (c), be moved to *safety*.'

period, Bila had removed 249 823.60 tons of chrome from RE Portion 2. If it continued that would mean approximately 83 274.53 tons of chrome resource will be removed per month.

[41] Bila denied that it was conducting mining operations. It claimed that it was merely conducting prospecting operations in terms of its prospecting licence, the purpose of which was to establish whether there were sufficient viable minerals over RE Portion 2 for Bila to undertake a full-scale mining operation. It did not dispute that there could be sterilisation of MG2 reef.

[42] Bila, however, did not deal with the evidence of Mr Dube and Mr Vilakazi, which indicated that Bila's operations were at the scale beyond what was allowed by the prospecting right and as indicated in its PWP. While it denied the calculations made by the former, dismissing them as being guesstimates, it did not disclose the actual quantities that it removed during the period in issue.

[43] It may be so that the physical operation equipment required for prospecting and mining is identical, the volumes of chrome ore allowed by the prospecting right and the mining right are not the same. Mr Dube's and Mr Vilakazi's analysis brought this evidence into focus but Bila did not directly engage with it.

[44] Bila simply noted allegations regarding a call from its Mr Whal, who had advised Mr Mogoai that Bila would be conducting a 'big blast' on 4 and 5 September 2019. It denied that its mine surveyor had admitted that the

parties were mining in the same area but attached no confirmatory affidavit to that effect. According to Bila, the uplifting of the s 54 notice was an indication that it had remedied the issues identified by the DMR in the s 54 notice.

[45] The uncontroverted evidence brought by Samancor showed that full scale blasting took place at the level beyond that which was allowed for phase 2. Bila did not suggest that it only drilled six holes as permitted in phase 2. It seemed to suggest that the level of operation it undertook (which it did not reveal) was necessary to fulfil its prospecting objectives. The allegation made by Samancor as to the scale at which the operation was conducted did not seem to be challenged by Bila but somewhat was justified.

[46] Bila, did not produce evidence to challenge allegations regarding, *inter alia*, the size of the pits, how much blasting it had done, the calculations regarding the amount of chrome ore that was removed and where the material was taken and stockpiled. This information was necessary to bring the level of operations within the ambit of the prospecting licence. Importantly, there was no evidence as to how Bila had changed its operations after Neukircher J's order in order to counter the allegations that nothing had changed; instead, mining operations allegedly escalated.

[47] The submission that Bila could not produce the necessary evidence because of the urgency of the matter, does not come to its assistance. It could have produced information that it was expected to readily have in its

possession in terms of its prospecting right. It could also have gathered and brought evidence from those who were involved in these operations. No attempt was made, at the very least, to present any information that it had or could be obtained within the limited time available before delivering its answering affidavit. The second respondent ventured into giving opinions on matters he had no expertise on, such as deducing why the expansive operation was observed by the Samancor personnel, without any substantiation.

[48] In addition, clause 13.1 of its prospecting right obliged Bila to maintain all such books, plans and reports regarding prospecting operations in terms of clause 13.2. It was further obliged to furnish the Regional Manager¹⁰ with progress reports. Furthermore, in terms of clause 13.3, it was required to inform the Regional Manager of any new developments and of any future prospecting activities, and was required to keep records of prospecting operations, results, and expenditure connected therewith.

[49] Bila did not seriously and explicitly engage with the extensive facts and evidence presented by Samancor in its founding affidavit. Information as to what it was allowed to do in terms of the prospecting right and what it did, was within its knowledge and ought to have been presented.¹¹ As Wallis JA noted in *Strydom v Engen Petroleum Ltd*:

‘Where matters are within the exclusive knowledge of one party less evidence is required to be adduced by the other party to discharge the onus of proof on a point. And

¹⁰ Section 1 of the MPRDA defines ‘Regional Manager’ as ‘the officer designated by the Director-General in terms of section 8 as regional manager for a specific region.’

¹¹ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 13.

sometimes the silence of the witness on a vital point within that person's knowledge is as telling as anything that may be said from the other side.'¹²

[50] From these facts, Samancor, in my view, has established non-compliance with Neukircher J's order. As a result, Bila bears the evidential burden of rebuttal to produce evidence that gives rise to a reasonable doubt that such non-compliance was wilful and *mala fide*.

Wilfulness and *mala fides*

[51] The defence given by the respondents for non-compliance with the order (in the event that disobedience was proven) is that the order was not even capable of being breached since it was automatically suspended, according to the legal advice which the second respondent received and the correctness of which he had no reason to doubt.

[52] Further, that the respondents, relying on the legal advice they had obtained from their attorneys, which was confirmed by the current senior and junior counsel, acted *bona fide*. It was further alleged in the answering affidavit that the advice was obtained verbally but that it could 'be gleaned from the version of the respondents, which ha[d] been consistently articulated in writing in all the papers pertaining to this matter. If necessary, it will be re-articulated by counsel during the hearing.'

[53] The respondents were obliged to state the full details of the alleged advice, because they had raised it as a defence. In the ordinary course, the

¹² *Strydom v Engen Petroleum Ltd* [2012] ZASCA 187; 2013 (2) SA 187 (SCA); [2013] 1 All SA 563 (SCA) para 19.

facts to be detailed would include the nature of the advice, when and by whom it was given. In *S v Abrahams*, this Court said:

‘[I]f 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 the 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.’¹³

[54] I am willing to assume in the respondents’ favour that the advice they allegedly received was given by its current attorneys of record and counsel who had represented Bila in the urgent application before Neukircher J and who remained on record in the subsequent proceedings relating to this matter, even though no confirmatory affidavits have been filed. There is, however, lack of detail, even at the bare minimum, of the alleged advice so as to assess whether it was given on full and true statement of facts as postulated in *Abrahams*. Moreover, Samancor was entitled to know what the defence proffered as a rebuttal for non-compliance was, so as to properly deal with it in reply.

[55] The respondents submitted that the advice should be gleaned from the correspondence substantiating their version, and yet they did not point to a particular document where the alleged advice was contained in their answering affidavit.

¹³ *S v Abrahams* 1983 (1) SA 137 (A) 146F-H.

[56] We were referred by counsel for the respondents to the paragraphs of the answering affidavit, which deal with the point *in limine* of prematurity, in which the following is stated:

‘16. . . . It is either the applicant’s case that:

. . .

16.2 the notification of the *respondents’ intention* to institute section 17(2)(b) proceedings for an application for leave to appeal to the Supreme Court of Appeal (by way of a so-called petition) is sufficient to overcome the jurisdictional challenge, *and the first respondent must be deemed to have initiated leave to appeal proceedings*, in which case the contempt of court proceedings must fail, because the order is thereby automatically suspended until otherwise determined by the court upon the granting of the relief sought in prayer 6 of the present application.

17. I am advised that it will be argued that the better view is the one articulated in paragraph 16.2 above.’ (My emphasis.)

[57] Counsel further directed us to a letter dated 11 September 2019, sent by Bila’s attorneys of record to Samancor’s attorneys. This letter records that Samancor’s application for contempt of court was premature because the deadline to petition this Court for leave to appeal was 29 September 2019. This, the respondents asserted, was further exacerbated by Samancor’s failure to obtain an order in terms of s 18(1) of the Superior Courts Act.

[58] The intimation in the letter is that Neukircher J’s order was suspended until 29 September 2019, which was the final date of the period within which an application for leave to appeal to this Court could still be made. However, this letter is not by any stretch of the imagination legal advice to the respondents as it was addressed to Samancor’s attorneys.

[59] Even if I were to assume on behalf of the respondents (and not be seen to be pedantically putting form over substance) that the content of the letter amounts to legal advice, the nature of it does not assist the respondents. Section 18(5) of the Superior Courts Act is clear and categorical that:

‘[f]or the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or notice of appeal *is lodged* with the registrar in terms of the rules’. (My emphasis.)

It is not clear whether the advice was based on the full statement of facts as suggested in *Abrahams* as the answering affidavit is bereft of details.

[60] Be that as it may, for the respondents to labour under the impression that only the intention of a party, which is effectively the mental state of a party, without any action, could automatically suspend an order is not only untenable but is far-fetched. Taken to its logical conclusion, it is no different to a contention that an intention to institute summons without actually doing so interrupts prescription.

[61] This statement, must be viewed against the backdrop that the respondents deliberately and intentionally caused Bila to continue acting against Neukircher J’s order, whilst contending that it was not mining but prospecting. In addition, the respondents’ failure to disclose what the true nature and scale of the operations undertaken were, impels me to find that the defence of legal advice is contrived and therefore does not give rise to a reasonable doubt so as to rebut the inference of wilfulness and *mala fides*.

[62] As regards removal of material at Portion 154, the defence advanced by the respondents, is that it was impossible to comply with this part of the order because Bila 'did not remove any materials from Portion 154 immediately prior to or subsequent to the granting of the court order. Such materials as have been previously removed have long been sold'. In the same breath, the second respondent denies, in the answering affidavit, that Bila removed any minerals and/or chrome materials. The question then is: what material was long sold?

[63] Details once again are not provided as to when and why Bila sold any minerals from Portion 154, when it was not permitted to do so. It is not stated whether the material was sold under the mistaken belief that Bila was entitled to sell it or not. The timeline should have been provided. It is not sufficient to state the impossibility to comply with the order owing to the sale of the material without providing information including documentation in that regard.

[64] In the context of the facts of this case, it is improbable that Neukircher J would make such an order with the knowledge that the material removed by Bila could not be returned because it had long been sold. In my view, the respondents have not advanced credible evidence in rebuttal to give rise to a reasonable doubt in this regard too. Therefore, non-compliance on this aspect must also be found to have been wilful and *mala fide*.

[65] The second respondent submitted that the contempt order sought against all the directors is an intimidation tactic. He alleged that he was the

responsible director who had been given authority to make decisions. He therefore did not consult other directors on every single operational matter, and it therefore could not be said that the other directors had also caused Bila to be in contempt of Neukircher J's order.

[66] This claim cannot shield the third to fifth respondents from responsibility. Even if they had given the second respondent powers to make decisions in operational matters, a court order is a serious matter requiring the board's attention. The third to fifth respondents had a duty to ensure that once they received the court order stating that Bila had acted unlawfully, that court order was obeyed. They could not simply wash their hands and walk away from accountability. Moreover, they have not explained what steps they had taken to ensure that the court order was complied with. Consequently, all the directors must be held responsible jointly with Bila.

[67] In these circumstances, Samancor has, in my view, established that the respondents were in contempt of Neukircher J's order beyond a reasonable doubt. It is accordingly entitled to the relief it sought before Van der Westhuizen J.

[68] The next issue to determine is the penalty to be imposed against the respondents. Samancor sought an order directing each of the respondents to pay a fine of R100 000 or any other sum the Court would deem appropriate. Further, counsel for Samancor submitted that, in the event that any of the respondents failed to pay the fine or continued to breach Neukircher J's order, they be committed to imprisonment.

[69] However, when pressed, counsel conceded that an order for committal would be inappropriate at this stage. The imposition of a fine in respect of each of the respondents is, thus, the most appropriate penalty in the circumstances. I am further of the view that the directors should be ordered to each pay half of the fine that would be paid by Bila. Costs should follow the result.

[70] In the circumstances, the following order is made:

- 1 The appeal succeeds with costs.
- 2 Paragraph (b) of the high court order is set aside and replaced with the following:

‘(b) It is declared that the respondents are in contempt of the order granted by Neukircher J on 1 July 2019.

(i) The first respondent is to pay a fine of R100 000, while the second to fifth respondents are to pay a fine of R50 000 each, to the Registrar of this Court, within 30 days of this order.

(ii) The respondents shall notify the applicant in writing of their compliance with the order in subparagraph (i) above within 5 days of the payment of the amounts referred to in subparagraph (i) hereof after they have done so.

(iii) The respondents are to pay the costs in respect of the declaratory order in paragraph (b) above jointly and severally, the one paying the other to be absolved, such costs to include the costs occasioned by the employment of two counsel where applicable.’

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

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Instructed by:

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Claude Reid Attorneys, Bloemfontein.

For respondents:

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