IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 2005/7655

In the matter between:

THE MINISTER OF WATER AFFAIRS AND FORESTRY	Applicant
and	
STILFONTEIN GOLD MINING COMPANY LIMITED	First Respondent
KEBBLE, ROGER AINSLEY RALPH	Second Respondent
BUITENDAG, HENDRIK CHRISTOFFEL	Third Respondent
KEBBLE, ROGER BRETT	Fourth Respondent
MILLER, GORDON TREVLYN	Fifth Respondent
HARMONY GOLD MINING COMPANY LIMITED	Sixth Respondent
DRDGOLD LIMITED	Seventh Respondent
BUFFELSFONTEIN GOLD MINES LIMITED (In liquidation)	Eighth Respondent
ANGLOGOLD ASHANTI LIMITED	Ninth Respondent
HARTBEESFONTEIN GOLD MINING COMPANY LIMITED	Tenth Respondent
THE MINISTER OF MINERALS AND ENERGY	Eleventh Respondent
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	Twelfth Respondent

J U D G M E N T

HUSSAIN, J:

This is an urgent application wherein the applicant seeks an order declaring the first to the fifth respondents to be in contempt of an order of this court under case number 7655/2005 dated 18 May 2005. Pursuant to such a declaration the applicant required that the said respondent be punished for such contempt.

Introduction

The following is the factual background, an understanding of which brings the whole application into perspective.

[1] The applicant is the Minister of Water Affairs and Forestry. The first, sixth to tenth respondents are companies that operate or operated gold mines in the Klerksdorp, Orkney, Stilfontein and Hartebeesfontein area (known as the "*KOSH*"). The second to the fifth respondents were directors of the first respondent. At the date of hearing of this application the second to the fifth respondents had resigned as directors of the first respondent. The ninth to the twelfth respondents are joined in this application insofar as they have an interest in the proceedings and no relief is sought against them. The ninth respondent however was represented in court by senior counsel who was

instructed to support the applicant's application against the first to the fifth respondents.

[2] Mining activities of the first, sixth to tenth respondents in the KOSH area resulted in a situation where underground water will, if not raised to the surface and treated appropriately, become polluted and this will in turn result in the pollution of valuable water resources. Herein lies the principal interest of the applicant. The first respondent has under its control a shaft, known as the Margaret Shaft, which required the daily pumping of water from the shaft to the surface. Failure to manage this water will not only lead to pollution but will have disastrous effects on other mines in the KOSH area operated in particular by the ninth respondent. Failure to pump water from the Margaret Shaft will result in serious flooding of shafts operated by the ninth respondent with the consequential loss of property and potentially the lives of miners working in these mines.

[3] As a result of this situation representatives of the applicant and the respondents met in order to reach agreement on how the water could be managed in the interests of all the parties including public interest. The parties failed to reach agreement and as a result two things happened. Firstly, the ninth respondent on 11 April 2005 launched an application for an order directing the first, sixth and seventh respondents to continue with the pumping and extraction of water from various shafts operated and controlled by them. Secondly, the Regional Director: Free State of the applicant began preparing and issuing a directive to the mines in order to address the problem. The first

directive was issued on 13 April 2005. A supplementary directive was issued on 15 April 2005.

[4] The seventh and ninth respondents agreed to accept the measures contained in the directive dated 15 April 2005, subject to certain reservations. The sixth respondent decided to launch an application reviewing and setting aside the directives. This application was heard by Goldstein J under case number 8274/05. The sixth respondent was unsuccessful and on 22 April 2005 its application was dismissed. The sixth respondent successfully applied for leave to appeal and that appeal is pending.

[5] On 7 May 2005 further directives were issued by the Regional Director. The first respondent failed to comply with the directives by failing to provide the information which the applicant required to issue a final directive and also by failing to contribute towards the cost of pumping water from affected shafts.

[6] On 18 May 2005, as a consequence of the first respondent's failure to comply with the directives, the applicant obtained an order from Goldstein J under case number 7655/05 in terms of which, *inter alia*, the first respondent was ordered to comply with the provisions of the directives issued by the Director-General: Free State of the applicant. Notwithstanding the order granted by Goldstein J the first respondent failed to comply.

[7] The first respondent in the meantime brought an application for its winding-up. The application was opposed by a number of intervening parties and the application was dismissed. I in fact dismissed the application after noting that the first respondent failed to appear in court, nor did any of its erstwhile directors, the second to the fifth respondents, make an appearance. More will be said about this elsewhere in this judgment.

[8] Due to the first respondent's non-compliance, the applicant brought this application before me. I heard argument over a period of four days during the course of which I gave the parties an opportunity to reach some form of settlement. To this end the parties eventually agreed to a draft order and I postponed the case to 25 July 2005. On that day the matter was called before me and I was told that the first respondent had failed to comply with the draft order and still failed to comply with the directives. The applicant then proceeded to seek an order as prayed for in the Notice of Motion.

[9] It is worth pointing out at this stage that during all of the proceedings before me the first respondent was not represented. Counsel appeared on behalf of the directors of the first respondent only namely the second to the fifth respondents. The applicant accordingly pointed out that it was entitled to an order against the first respondent. However, the second to the fifth respondents argued, *inter alia*, that the applicant had failed to make out a case against the first respondent and therefore were not entitled to any relief against them.

[10] The second to the fifth respondents relied on the following defences:

(a) The matter was not urgent and ought to be struck off the roll.

(b) The respondents did not receive notice of Goldstein J's order.

(c) The nature of Goldstein J's order was such that contempt proceedings were inappropriate.

(d) The directive was, in material parts, unintelligible and therefore not capable of being complied with.

(e) The first respondent was, due to its financial status, unable to comply with the directives.

(f) The second to the fifth respondents had resigned as directors of the first respondent.

Based on these defences, the second to fifth respondents allege that neither they nor the first respondent was in wilful contempt of the order granted by Goldstein J.

I will deal with each of these defences.

Urgency

[11]

11.1 The applicant relies mainly on two grounds of urgency:

(a) That pumping operations must continue at the affected shaft in the KOSH area failing which serious and potentially catastrophic consequences may follow and

(b) That unless the first respondent furnishes the information sought in the directives, as they were ordered to do by Goldstein J, the applicant will not be in a position to issue a further or final directive when the interim payment provisions of the directives expire on 30 June 2005.

The above grounds of urgency were also relied upon by the applicant when the matter came before Goldstein J, nor was it disputed before me that on the facts presented by the applicant, these grounds of urgency indeed exist.

11.2 The first to fifth respondents principal attack on urgency is that the grounds of urgency relied upon by the applicant have no bearing on the relief sought in the Notice of Motion. The first to the fifth respondents' submission is that the finding of contempt and the imposition of a fine will not secure uninterrupted pumping operations nor will it expedite the provision of information sought in the directives. Thus the respondents argue that the application is defective for want of compliance with Rule 6(12) of the Uniform Rules and ought to be dismissed.

11.3 Rule 6(12)(b) provides that:

> "*In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course.*"

The degree of relaxation of the stipulated time periods should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down. In terms of Rules 27 and 6(12), the applicant has to show good cause why the time should be abridged and why it could not be afforded substantial redress at a hearing in due course.

See: *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another* 1977 (4) SA 135 (W) at 137F

I L N B Marcow Caterers (Pty) Ltd v F Greatermans SA Ltd and Another; *Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 110F-111A.

In assessing whether the requirements of this rule have been complied with, "*the substance of the affidavit, and not its form, will weigh with a court; if an affidavit sets out facts upon which a court can decide that an applicant is entitled to relief in terms of the subrule, the court will entertain the application*".

See: *Sikwe v S A Mutual Fire and General Insurance Co Ltd* 1977 (3) SA 438 (W) at 440H
Cekeshe and Others v Premier, Eastern Cape and Others 1998 (4) SA 935 (Tk) at 948A-E.

11.4 Although there appears to be some logic in the first to fifth respondents' submissions, one must consider the application within the context of all the surrounding facts and circumstances. The applicant does not bring this application merely to punish the first to the fifth respondents, the applicant brings this application in order to ensure compliance with an order of court which it legitimately obtained as a matter of urgency. The applicant enjoys a legitimate expectation that an order of court will be complied with.

11.5 In fact there is a practice in our courts whereby litigants bring contempt proceedings as a means of ensuring or compelling compliance with an order of court. Indeed that is what happened in this case. During argument the parties attempted

to settle the matter and even agreed to a draft order to be made an order of court. It is the respondents' continued non-compliance that resulted in the applicant seeking punitive measures.

11.6 The first respondent was not represented in court. However, the first respondent can only function through its board of directors. Therefore it was necessary, in the circumstances, for the applicant to proceed against the second to the fifth respondents and to proceed against them in these proceedings as a matter of urgency.

Accordingly, the respondents' defence based on lack of urgency must fail.

Notice of the order of court

[12]

12.1 The first to fifth respondents state that at no time, prior to this hearing, was the court order served on any of them. The first to fifth respondents merely make the point that if there was service then there would have been an earlier response from them detailing their inability to comply with the order of court. On the respondents' own version service would not have resulted in compliance in any event.

12.2 It is not disputed that first respondent's counsel, attorney and legal advisors were present in court when Goldstein J handed down the order compelling first respondent to comply with the directives. The second to fifth respondents do not state any where that they were entirely unaware of the court order. The second respondent merely states that he had "*seen*" the order when the papers in this application were served on him.

12.3 In my view it is inconceivable that the first respondent's legal representatives, who were in court, failed to immediately inform the Board of Directors that an order had been made.

The submission that the order was not served does not advance the first to fifth respondents' defence, this on their own version.

The directives

[13]

13.1 Following the principle that one cannot be in contempt of an order of court that is unclear, ambiguous or incomplete, the second to fifth respondents attack the order of court on the basis that the directives, which form part of the order, are unintelligible.

13.2 The applicant issued the directives in terms of section 19 of the National Water Act No. 36 of 1998. The applicant was concerned that mining activities in the KOSH area may cause pollution to valuable water resources. The directives were aimed at ensuring that the risk of water pollution as a result of mining activities did not materialise. It was not disputed that all of the mines in the KOSH area accepted that their activities could potentially cause pollution to water resources and that management of underground water was essential to continued safe mining operations. To this end the KOSH Intermine Water Forum was formed. Represented in this Forum were all the mines, including the first respondent, as well as the relevant government departments, including the Regional Director of the applicant. The Forum was established in April 2000. The object of the Forum was to determine how the mines could share the responsibility, amongst themselves, for the management of underground water and in particular how this was to be funded. The Forum met but, it is common cause, were unable to reach agreement. This necessitated the issuing of the directives by the Regional Director of the applicant.

13.3 The first of these directives is dated 13 April 2005. Part I of the directive gives the reasons for the issue of directives. The reasons are, as I have already stated, related to the proper management of underground water in the KOSH area. Part II of

the directive directs the relevant mines, including the first respondent, to collect, remove, contain and discharge water in an approved manner. The mines are also directed to ensure the continued maintenance of infrastructure associated with the management of the water. Paragraph 3 of Part II reads as follows:

> "*3. To, before 1 May 2005, provide the Regional Director with the outcome of a determination of your responsibilities with regard to the continued collection, removal, containment, treatment, use and disposal of the water found underground in this area, based on the following:*
>
> *a. Stilfontein Gold Mining Co historic contribution to carrying responsibilities relating to cost for the collection, removal, containment, treatment use, and disposal of such water;*
>
> *b. the underground area exposed by your operations;*
>
> *c. the surface area covered by your operations;*
>
> *d. your collective earnings to date resulting from your mining activities in the area;*
>
> *e. potential future earnings by your company resulting from mining in the area from the date of this directive to end of extraction operations under current economic conditions; and*
>
> *f. the quantum of your financial provision made under section 41 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), relating to water management, infrastructure maintenance, and monitoring;*

which determination must be submitted together with audited statements and documentation by suitably qualified persons regarding these aspects.

This particular paragraph seeks information and was criticised for lack of clarity. The respondents pointed out that the paragraph does not stipulate how much water the first respondent was responsible for pumping. The paragraph itself is certainly not a model of clarity and the applicant responded by issuing two further supplementary directives. The directive of 13 April 2005, it is not disputed, was not complied with by the first to the fifth respondents.

13.4 On 15 April 2005 the first supplementary directive was issued. Paragraphs 1 and 2 of Part II of the directive is relevant and read as follows:

"*1. For the interim period, from the date of this directive until 7 May 2005, Stilfontein Gold Mining Company must –*

(a) ensure the management of any water found underground that may affect its operations, which management encompasses, but is not limited to, the collection, removal, treatment to general effluent standards specified in GN. R. 991 (GG9225 of 18 May 1984), and either re-used in a legal and approved manner, or discharged into the environment in a legal and approved manner in terms of Chapter 4 of the NWA;

(b) ensure the continued operation and maintenance of all infrastructure associated with any aspect of the management of the water found underground.

> *2. This supplementary directive is not in substitution of any of the clauses of the directive issued on 13 April 2005.*"

There was no compliance with this directive.

13.5 On 7 May 2005 a further directive was issued. Paragraph 10 of Part I reads as follows:

> "*10. As an interim measure, and in order to address this lack of information, while considering options regarding this non-compliance, it is deemed necessary to issue a second supplementary directive in amplication of clause 1 of the directive issued on 13 April 2005, since the conditions of the first supplementary directive dated 15 April 2005 expires on 7 May 2005.*"

The directives are found in Part II of paragraphs 2 to 5 which read as follows:

> "*2. For the interim period, starting from the date of this directive until 30 June 2005, ensure that water found underground is managed as follows:*
>
> *a. 1 ML/day of water found underground at Buffelsfontein Pioneer Shaft, 2.5 ML/day of water found underground at Hartebeesfontein #7 Shaft, 5,7 ML/day of water found underground at Hartebeesfontein #2 Shaft, and 31 ML/day of water found underground at Margaret Shaft, are to be collected and removed to surface, treated to comply with general effluent standards specified in GN. R. 991 (GG9225 of 18 May 1984), and either re-used in a legal and approved manner, or discharged into the environment in a legal and approved manner in terms of Chapter 4 of the NWA.*

3. *For the interim period, starting from the date of this directive until 30 June 2005, ensure that the cost for taking the measures under clause 2(b), including the cost for ensuring the continued operation and maintenance of all infrastructure associated with any aspect of the management of this water found underground, is shared equally between AngloGold Ashanti Limited, Harmony Gold Mining Company, Stilfontein Gold Mining Company and DRD Gold Limited.*

4. *For the interim period, starting from the date of this directive until 30 June 2005, when the implementation of a detailed Monitoring Programme, to be submitted to the Regional Director by 1 June 2005 in compliance with clause 8 of the directive issued on 13 April 2005, can be effected, provide the Regional Director with a weekly report to be submitted every Friday, starting 13 May 2005, regarding the following:*

    a. *volume of water removed from the underground at each location of removal;*

    b. *qualify of water removed from the underground at each location of removal;*

    c. *status of management measures used for the collection, removal, storage, treatment and disposal of water so removed;*

    d. *volume and quality of water prior to and after any use and treatment thereof;*

    e. *location(s) of final disposal of water removed from the underground;*

    f. *volume and quality of water prior to such final disposal; and*

    g. *quality of the receiving water resource to which water is so disposed, both upstream and downstream from the location of final disposal.*

5. *This supplementary directive is not in substitution of any of the clauses of the directive issued on 13 April 2005.*"

It is not disputed that the first to fifth respondents failed to comply with this directive.

13.6 If one reads the contents of all three directives together then the meaning and objectives of the directives become plain. I cannot find that the directives are unintelligible or in any way unclear, ambiguous or incapable of being understood. The directives call for two things namely information which the applicant needs and an interim contribution towards the funding of necessary pumping operations at affected shafts. All the other mines in the KOSH area to whom the same directives were issued had no difficulty understanding the directives and in fact complied with it. Only the first to the fifth respondents had difficulty understanding the directives.

13.7 It is significant that when the matter came before Goldstein J, the first respondent, who was represented, did not argue that the directives were incomprehensible. I read Goldstein J's judgment and no mention of this is made. Nor can I find, in these papers, any evidence of the first to fifth respondents seeking clarity from the applicant or the State attorney regarding these directives. A simple enquiry would suffice if indeed they were unable to understand the directives. In fact if the second to fifth respondents had any difficulty in interpreting or understanding the directives they should have asked for clarification in this

respect and they could have approached the High Court for a declarator in this regard (*Batiss and Another v Elcentre Group Holding Ltd and Others* 1993 (4) SA 69 (WLD)).

I accordingly find that this defence has no merit.

The nature of the court order

[14]

14.1 The order of court made by Goldstein J requires the first respondent to comply with the three directives issued on behalf of the applicant. The second to fifth respondents argue that to the extent that clause 3 of 7 May 2005 directives imposes an obligation upon first respondent to pay a contribution, the order enforcing payment is *ad pecuniam solvendam* and thus contempt proceedings are inappropriate. The applicant and the ninth respondent disagreed and argued that the whole of the order of Goldstein J was by its nature an order *ad factum praestandum* and that the only remedy was to approach the court for an order declaring the first to the fifth respondents to be in contempt of court.

14.2 As I have previously stated, the directives call for two things namely payment of a contribution towards pumping costs and the provision of information. The order calling upon the first

respondent to provide information presents no problems. Both the applicant and the respondents agree that it constitutes an order *ad factum praestandum*. No more needs to be said about this. It is the first part which orders payment of a contribution towards pumping costs that is contentious.

14.3 Orders of court are broadly divided into two categories namely:

(a) orders *ad pecuniam solvendam* that is orders to pay a sum of money and

(b) orders *ad factum praestandum* that is orders to do, or abstain from doing, a particular act or to deliver a thing. The approach of our courts has been that civil contempt can be committed only in the case of orders *ad factum praestandum*.

See: *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 (T)

East London Local Transitional Council v MEC for Health, Eastern Cape and Others 2001 (3) SA 1133 (CK)

Hofmeyr v Fourie; *B J B S Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (E)

Gawiya v MEC for Welfare, Eastern Cape and Another 2004 (2) SA 611 (SCA)

Kate v MEC for Welfare, Eastern Cape and Another 2005 (1) SA 141 (E)

Heg Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others 2000 (1) SA 507 (C).

As far as orders *ad pecuniam solvendam* are concerned these may be enforced by the issue of a writ of execution.

14.4 For an order to be *ad pecuniam solvendam*, it must relate to a judgment sounding in money for a judgment debt of a commercial character.

See: *Hofmeyr v Fourie (supra)*

Heg Consulting v Siegwart (supra)

For there to be a judgment debt there has to be a judgment creditor. No such creditor is identified in Goldstein J's order. The amount payable in terms of the directive is clearly not a judgment debt but an amount, unspecified, payable in terms of a directive authorised by legislation. The directives certainly do not call for payment of a judgment debt of a commercial character.

14.5 The judgment of Goldstein J cannot be characterised as an ordinary commercial judgment or a judgment sounding in money. The directives were issued in terms of section 19 of the National Water Act No. 36 of 1998, the object of which is to prevent and remedy the effects of pollution on the country's water resources. Section 19(1) requires an owner, person in control of or a person who occupies or uses land on which an activity which has caused or is likely to cause pollution of a water resource to take all reasonable measures to prevent such pollution from occurring, continuing or recurring. Section 19(3) provides that any person who fails to take the measures required in section 19(1) may be directed to commence taking specific measures before a given date, to continue with those measures and to complete them before a given date. Such measures were clearly contemplated in the directives which required the underground water at the Margaret Shaft to be collected and removed to the surface and treated appropriately. The directives also called for the costs of pumping operations to be shared equally between the mines operating in the KOSH area.

14.6 The amount payable in terms of the directives is clearly not a judgment debt in a specified amount but an amount payable in terms of a directive authorised by the National Water Act. The directive to pay is the result of the exercise of an administrative

function or power for which there are statutory sanctions for non-compliance. Moreover the directive relates to a contribution (in an unspecified amount) towards the cost of necessary pumping operations not to the party issuing the directive but towards the shared costs as specified in the directive. This is certainly not "*a debt of a commercial character*" nor can one enforce it by a writ of execution.

14.7 The primary obligation created by the 7 May 2005 directive was for the collection and removal of underground water *inter alia* at the Margaret Shaft which is owned by first respondent. The second to fifth respondents' argument is that paragraphs 2 and 3 of the directives are entirely separate justifying the court regarding paragraph 3 as a separate and discreet order which is one for the payment of money. I disagree with this argument. Paragraph 3 of the directive is simply a consequence of the order found in paragraph 2(a) of the directive namely for the collection and extraction of underground water. It is a fundamental feature of almost all mandatory relief that there may be cost implications attached to such relief. The fact that a party ordered to perform in terms of a mandatory order may incur costs to carry this out does not convert the order into one *ad pecuniam solvendam*. The order granted by Goldstein J was in the nature of an interim *mandamus*. The directives constitute a statutory injunction and the order by Goldstein J orders first

respondent to comply with the statutory injunction. There is no debtor/creditor relationship and there is no "*debt*" being due by first respondent to either the applicant or anyone else in terms of the statutory injunction and the subsequent court order.

I accordingly find that the second to fifth respondents' attempt to characterise part of the directives as an order *ad pecuniam solvendam* is incorrect and falls to be rejected.

First respondent's financial status

[15]

15.1 It must be said at the outset that when Goldstein J made his order it could only be in the understanding that the first respondent was capable of carrying it out. It appears from the judgment of Goldstein J that at a very late stage of the proceedings an affidavit was handed to him in which the first respondent stated that its financial status was such that it was incapable of complying with the directives. The first respondent simply stated that it did not have the money to comply. Goldstein J found the affidavit to be vague and stated as follows:

> "*The affidavit states that Stilfontein is unable to comply with any of the directives which have been made by the applicant. The affidavit does not reveal what the assets and liabilities of Stilfontein are, and in my view nothing said in this affidavit constitutes a defence to the claims made in prayers 4, 5 and 6.*"

What the second to fifth respondents have now done, on the papers before me, is to set out further facts which justify the conclusion that the first respondent does not have the funds to comply with the order. Applicant and ninth respondent disagree with this contention and pointed out that on the second to the fifth respondents' own version the first respondent was able to comply with what was only an interim payment plan to keep pumping operations going. The second to fifth respondents also argued that there was a material dispute of facts in relation to the first respondent's financial position.

15.2 The second to fifth respondents rely on the contention that failure to pay in circumstances where a party cannot pay does not amount to a wilful and *mala fide* refusal to comply. At the outset it is crucial to bear in mind the terms of the directives and in turn the implications of the order of court obtained by the applicant. It is noteworthy that the order obliging the first respondent to contribute its share of the pumping costs is an interim one effective from 7 May 2005 to 30 June 2005. It is not an order that the first respondent pay towards pumping costs indefinitely.

15.3 The first respondent, before Goldstein J, made no attempt to place any credible evidence before the court relating to first respondent's inability to comply. A belated attempt was made in

an affidavit which was rejected by Goldstein J as being vague and not constituting a defence. The second to fifth respondents had an opportunity, at the appropriate time before Goldstein J when an order was being sought, to place the relevant evidence before the court and to make the submission that first respondent was unable to financially meet the directives. This they failed to do.

15.4 The second to fifth respondents, in an answering affidavit set out the historical facts relating to first respondent's mining operations. The first respondent's mining operations ended and according to the second respondent the first respondent has been in a "*final winding down mode*". The financial picture painted in the answering affidavit is one of the first respondent, a public company, being factually insolvent, or at the very least will be pushed into insolvency if it complied with the directives. Notwithstanding this state of affairs the first respondent continued to comply with its statutory obligations to publish its annual financial statements. The first respondent's annual report for 2004 was made available to me. In a statement dated 22 October 2004 and against the signatures of the second and third respondents the following is stated:

> "*The directors have no reason to believe that the company will not be a going concern in the foreseeable future based on the forecasts and available cash resources. The company will continue to manage the*

> *pumping of water on behalf of Hartebeesfontein Gold Mining Co Ltd through the Margaret Shaft and sell surplus equipment.*"

The income statement reveals that for the year ended 30 June 2004 the first respondent's revenue amounted to R15 680 000,00 and its operating expenses amounted to R15 500 000,00. The profit before taxation is recorded as R290 000,00. The report also reflects total cash and cash equivalent in the amount of R5 639 000,00. This is hardly the picture of a company in "*wide down mode*" – whatever that might mean.

15.5 I am not satisfied that second to fifth respondents have placed enough credible evidence before me to make a finding that the first respondent was financially incapable of complying with the court order. In fact, on the second to fifth respondents' own version, the opposite is true. The second respondent in the answering affidavit states as follows:

> "*SGM could comply with the court order and pay its share of the pumping costs. It will in any event only be able to do so for three to four months at most, at which point all funds will have dissipated.*"

Bearing in mind that the directive was only an interim measure, the first respondent was perfectly able, financially, to comply.

The 2004 report shows cash and cash equivalent in the amount of R5 639 000,00. In the failed winding-up application of the first respondent it was stated that this cash had "*now been utilised*". No explanation was forthcoming as to how this had occurred, nor was this dealt with in the answering affidavit filed by the second to fifth respondents in this application.

I am accordingly not persuaded that the first respondent's financial status prevented it from complying with the order of court.

Resignation of the directors

[16]

16.1 I must be said that what the second to fifth respondents did in resigning as directors is a most unusual occurrence. I have not come across a case, in the corporate history of this country, where all the directors of a listed company resigned at once. Not surprising then that I could find no case law in this country that dealt with this situation nor was I able to find such a state of affairs in the English case law. This is probably because this is simply not done within the corporate world.

16.2 After Goldstein J made the order the second to fifth respondents decided that the first respondent was incapable, financially, to comply with the directives and to remain viable. They therefore decided to launch an application for the winding-up of the first respondent. This application was opposed by certain intervening parties and was ultimately dismissed in court. Here again the second to fifth respondents, in my view, must be subject to adverse criticism. After opposition to the application for the first respondent's winding-up was made the second to fifth respondents simply abandoned the application. They filed no papers resisting the opposition and even failed to appear in court. When the application came to court there was no one present to represent the first to fifth respondents. The application was dismissed unopposed. If the second to fifth respondents genuinely believed that it was in the best interests of the company and its members to liquidate the company then they should have acted accordingly. In my view the second to fifth respondents knew that the application for winding-up was ill-conceived and merely abandoned it in the face of opposition.

16.3 Having abandoned the winding-up application, the second to fifth respondents resigned as directors on 17 June 2005. According to the directors they resigned after seeking independent legal advice. They were advised that if, in the circumstances, they continued in office they ran the risk of being

party to reckless trading or they would be forced to manage the first respondent on the basis that it did not comply with court orders. These fears, in my view, are both unfounded and not supported by any facts before me. If the second to fifth respondents applied their minds to the directives they would have realised that first respondent was indeed capable of compliance. The information sought in the directives was available to the first to the fifth respondents and on the respondents' own versions the first respondent was in possession of sufficient funds to comply with the interim payment sought in the directives. There was no risk that the second to fifth respondents would be subject to accusations of reckless trading simply because they complied with an order of court. Indeed, if there was any recklessness it was in the second to fifth respondent's mass resignation thereby leaving the first respondent, a listed company, completely rudderless.

16.4 The manner and timing of the resignations must equally be criticised. The second to fifth respondents made a decision to resign and they merely did. The timing of the resignations was rushed in order to meet the hearing date of this application. One does not expect, within the corporate environment, that the entire board of a public company suddenly resigns. There should, at the very least, be some form of notification. At the very least the second to the fifth respondents ought to have

called a special general meeting of the company to inform the members of their decision to resign. At least then the members in a meeting could be given an opportunity to decide the future fate of the company. Investors and shareholders do not expect or foresee that all of the directors of a public company will suddenly resign with no notice. This must have a negative impact on the stock exchange.

16.5 In terms of section 208 of the Companies Act 61 of 1973 –

> "*(1) Every public company shall have at least two directors and every private company shall have at least one director.*
>
> *(2) Until directors are appointed, every subscriber to the memorandum of the company shall be deemed for all purposes to be a director of the company.*"

In terms of article 65 contained in Table A to the Companies Act (articles for a public company having a share capital) –

> "*65.*
>
> *The office of directors shall be vacated if the directors –*
>
> *…*
>
> *(c) resigns his office by notice in writing to the company and the registrar, …*"

There is nothing either in the Act or the article which sets out the consequences of all directors resigning simultaneously or which will prevent them from doing so, even if the effect thereof is to

bring about a state of affairs in terms of which the provisions of section 208 are not complied with.

I do not believe it was ever conceived that such a set of circumstances will materialise. A listed company can only function through its board of directors. The directors of the company are those who in terms of its articles are empowered to exercise all its powers other than those which in terms of the Companies Act or the articles are to be exercised by the company in general meeting. A company being an artificial legal entity can function only through human agencies. At any point in time that human agency is ultimately the board of the company's directors.

See: Henochsberg on *The Companies Act* – Meskin Volume 1 page 392

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 216

Lipschitz v Landmark Consolidated (Pty) Ltd 1979 (2) SA 482

The human agency has been described as the company's "*directing mind and will*".

See: *Levy v Central Mining and Investment Corporation Ltd* 1955 (1) SA 141 (A)

As Viscount Haldane stated in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL):

> "*In the case of a fictitious person like a company one must endeavour as best one can to ascertain who is or are its directing mind or minds*."

It is not in dispute that at all material times the second to fifth respondents were "*the directing minds*" of the first respondent.

16.6 At all material times the second to fifth respondents were under a duty to act *bona fide* in the interests of the first respondent. This is the fundamental duty which qualifies the exercise of any powers which the directors in fact have. The "*interests*" in this context, are only those of the company itself as a corporate entity and those of its members as a body.

See: *S A Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A)
Henochsberg (*supra*) page 467

I am not persuaded that the second to fifth respondents acted in good faith upon reasonable grounds for their decision to resign. All that the second to fifth respondents achieved was merely to incapacitate themselves from discharging their duties towards

first respondent and the first respondent's members. This is unacceptable and the second to fifth respondents cannot be allowed to merely walk away because it is convenient for themselves to do so. They accepted appointment as directors of a listed company and they thereby accepted the duties and obligations that go with it.

Section 182 of the Companies Act provides for the convening of general meetings by the Registrar of Companies in circumstances where all the directors of a company cease to be directors. This section possibly caters for the eventuality where all the directors had resigned. However, this section cannot assist the first respondent in these circumstances. The second to fifth respondents suddenly resigned all at once, an eventuality that was not anticipated nor can it be said that it was in the best interests of the first respondent.

16.7 Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country's economy especially in attracting new investments. To this end the corporate community within South Africa has widely and almost uniformally accepted the findings and recommendations of the King Committee on Corporate Governance – see King Report on Corporate Governance for South Africa – March 2002.

Regarding the Board of directors the King Report states the following:

> "*The Board is the focal point of the corporate governance system. It is ultimately accountable and responsible for the performance and affairs of the company. Delegating authority to board committees or management does not in any way mitigate or dissipate the discharge by the board and its directors of their duties and responsibility.*"

See King Report page 22 paragraph 2.1.1.

The conduct of the second to fifth respondents fly in the face of everything recommended in the code of corporate practices and conduct recommended by the King Committee. In my view the second to fifth respondents acted irresponsibly in merely abandoning the first respondent, a listed company of which they were the directors.

16.8 A director of a company who, with knowledge of an order of court against the company, causes the company to disobey the order is himself guilty of contempt of court. By his act or omission such a director aids and abets the company to be in breach of the order of court against the company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* againt a company is enforced by a punitive order.

See: *20th Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another* 1978 (3) SA 202 (W) at 203C-D

Melitka Trading Ltd and Others v Commissioner, SARS 2005 (3) SA 1 (SCA) at [51] page 19

The second to fifth respondents argued that the applicant failed to show that the directors did anything to "*cause the company to disobey the order*". I disagree with this. The second to fifth respondents, by resigning as they did certainly caused or were the principal cause of the first respondent's failure to comply. For this they must be held responsible.

16.9 The King Committee, correctly in my view, stressed that one of the characteristics of good corporate governance is social responsibility. The Committee stated as follows:

> "*A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration.*"

See King Report March 2002 page 12 paragraph 18.7.

The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations an impression will be created that mining companies are free to exploit the mineral resources of the country for profit over the lifetime of the mine, thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation.

For this reason too the second to fifth respondents cannot be permitted to merely walk away from the company conveniently turning their backs on their duties and obligations as directors.

I am persuaded that the second to fifth respondents, notwithstanding their sudden resignation, must be held responsible for the first respondent's failure to comply with an order of court.

[17]

17.1 The mandatory orders granted by Goldstein J simply re-enforce the directive which in turn was issued pursuant to section 19(3) read with section 19(1) of the National Water Act. This section in itself contains mandatory injunctions to the parties mentioned in the preliminary portion of section 19(1). It has never been disputed by first respondent that it is such a person as referred to in section 19(1), and it does not appear to be contended by the second to fifth respondents that the first respondent is not a person against whom such a directive could validly be issued.

17.2 Mandatory orders have been granted to public authorities to prevent a breach of statutes or bye-laws, and also to force private persons to rectify their failure to abide by legislation or lawful decree.

See Baxter – *Administrative Law* page 697.

The Constitutional Court has considered the competence of courts to enforce judgments through process-in-aid, regarding this as an incident of a superior court's ordinary jurisdiction. It has been held that contempt of court proceedings are a recognised method of putting pressure on a defaulter to comply with an obligation.

See *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) para [20]

17.3 The *Bannatyne* judgment is important in the present context in that it sanctioned the use of contempt proceedings for the enforcement of children's maintenance being a fundamental right contained in section 28 of the Constitution. The obligation to ensure that children are properly cared for was held to be an obligation which created an obligation on the State to create the necessary environment for parents to fulfil this obligation. In my view the same approach should be taken with regard to the environmental imperatives contained in section 24 of the Constitution as supplemented by section 39(2) which enjoins a court interpreting any law to have due regard to the spirit, purport and objects of the Bill of Rights Chapter. It is essential for our courts to ensure that adequate and effective mechanisms are provided to the State for the proper enforcement of environmental obligations imposed by statutes such as the National Water Act.

[18] On a charge of contempt of court the interest to be served is not the private interest of the member or members of the court. Also, it is not sought to protect the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court. The interest served and protected is the moral authority of the judicial process as such. The sole aim of a prosecution for contempt of court is to preserve the capacity of the

Judiciary to fulfil its constitutional role. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice.

See: *S v Bresler and Another* 2002 (4) SA 524 (C) 525B-D

[19] Once it has established that the respondents, with knowledge of the court order, acted in conflict with its terms, the applicant is *prima facie* entitled to a committal order.

See: *Noel Lancaster Fans (Edms) Bpk v Theron en Andere* 1974 (3) SA 688 (TPD)

In order to resist the relief sought the respondents have to prove, and the *onus* rests on them in this regard, that they did not intentionally defy the order or did not act *mala fide* in doing so. Once a failure to comply with the court order that was within the knowledge of a respondent has been established, the wilfulness and *mala fide* character of the conduct of the respondent will be inferred and the *onus* will then rest on the respondent to rebut the inference of wilfulness on a balance of probability. This may be done by evidence establishing that the court's order was not intentionally disobeyed.

See: *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (AD) at 836E

Du Plessis v Du Plessis 1972 (4) SA 216 (O) at 220

In my view, and for reasons set out in this judgment, the first to fifth respondents failed to discharge this *onus*.

[20] It is trite that civil contempt of court is the wilful and *mala fide* refusal to comply with that order issued by the court. In all the circumstances I make the following finding:

20.1 The order of court granted by Goldstein J against the first respondent is an order *ad factum praestandum*;

20.2 The said order of court was properly served on the first respondent and came to the personal notice of each of the second to fifth respondents; and

20.2 That the first to fifth respondents are guilty of a wilful and *mala fide* refusal or failure to comply with such order.

Costs

[21]

21.1 Having considered the history of this matter beginning with the application brought before Goldstein J, I am satisfied that the sole cause of this litigation was the cavalier and off-handed approach of the first to fifth respondents towards the directives

lawfully issued by the applicant. For this the first to fifth respondents must bear the costs on a punitive scale.

21.2 I find that the ninth respondent had a real and substantial interest in this matter and was perfectly justified in coming to court to support the applicant's relief. I find that it was necessary for the ninth respondent to be represented in these proceedings and they were indeed of assistance to me. I find that the first to fifth respondents must be liable for the ninth respondent's costs.

The order

[22] In the result I make the following order:

(a) The first to fifth respondents are declared to be in contempt of the order of this Court under case number 2005/7655 dated 18 May 2005.

(b) The first respondent is sentenced to a fine of R15 000,00.

(c) The second to fifth respondents are each sentenced to a fine of R15 000,00 failing payment of which they are each to be committed to prison for a period of 6 months.

(d) The second to fifth respondents are to pay, jointly and severally, the one paying the other to be absolved, the applicant's costs, including the costs reserved in the urgent application, on a scale as between attorney and client. Such costs to include the cost of two counsel.

(e) The second to fifth respondents are to pay, jointly and severally, the one paying the other to be absolved, the ninth respondent's costs, including the costs reserved in the urgent application, on a scale as between attorney and client. Such costs to include the cost of two counsel.

_____

I HUSSAIN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	25 JULY 2005
DATE OF JUDGMENT	15 MAY 2006