THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

# JUDGMENT

**CASE NO:530*/06***

***Not reportable***

In the matter between

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| **ROGER AINSLEY RALPH KEBBLE** | **1ST APPELLANT** |
| **HENDRIK CHRISTOFFEL BUITENDAG** | **2ND APPELLANT** |
| **GORDON TREVLYN MILLER** | **3RD APPELLANT** |
| and | |
| **THE MINISTER OF WATER AFFAIRS AND FORESTRY** | **RESPONDENT** |

**CORAM: HARMS ADP, LEWIS, VAN HEERDEN, JAFTA JJA, KGOMO AJA**

**HEARD: 23 AUGUST 2007**

**DELIVERED**: **21 SEPTEMBER 2007**

***SUMMARY:*** An order that a person is in contempt of court, which carries with it criminal sanctions, should be made only where the court order allegedly flouted is clear and capable of enforcement. Appeal upheld against an order that former directors of a company that did not comply with a court order were in contempt of court.

***Neutral Citation: This judgment may be referred to as Kebble v Minister of Water Affairs*** **[2007] SCA 111 (RSA).**

**LEWIS JA**

[1] The appellants, to whom I shall refer as 'the directors', were until 17 June 2005, the directors of Stilfontein Gold Mining Company Limited ('SGM'). This is an appeal against an order that the directors were in contempt of court for failing to ensure compliance with an order of the Johannesburg High Court.

[2] The Regional Director of the Department of Water Affairs and Forestry, Free State ('the Department'), over a period from April 2005, issued directives to a number of mining companies in the Klerksdorp, Orkney, Stilfontein and Hartebeesfontein area (the KOSH area), including SGM, about the pumping of water from mine shafts. When SGM failed to comply with the directives, the Department applied to the Johannesburg High Court, on an urgent basis, for an order compelling SGM to comply with the Department's directives. Goldstein J issued an order on the terms requested on 18 May 2005.

[3] SGM, through its attorneys, indicated in a letter to the Department dated 9 June 2005, that it could not comply with that order. The Department nonetheless brought another urgent application, on 14 June 2005, this time for an order that SGM and its directors be held in contempt of court. Prior to the hearing of that application the directors all resigned as such. Hussain J, in the Johannesburg High Court, on 15 May 2006, convicted SGM and the directors, and sentenced SGM to pay a fine of R15 000 and the directors to pay fines of R15 000 each, and failing payment to six months' imprisonment each. It is against the order that they were in contempt of court, and the sentences imposed, that the directors[1] appeal to this court, leave having been given by Schwartzman J in the Johannesburg High Court.

[4] The directors raise some 11 grounds of appeal against the judgment of Hussain J. I shall not deal with them all in view of the finding which I make that

[1] One of the directors, Mr Brett Kebble, died after having been found guilty of contempt of court but before the appeal was noted.

the order of Goldstein J, requiring SGM to comply with the directives, was incapable of implementation. However, a very brief history of the matter is necessary.[2]

[5] The respondent mining companies in the first application owned land in the KOSH area in the North West Province. SGM is on a higher level (upstream) than are the other mines in the area. In a letter written by the department to SGM on 13 April 2005, and in which the first directive is contained, the position is explained as follows (in summary). In order to prevent pollution of ground and surface water in the KOSH area, and to continue the safe operations of the mines, underground water needs to be removed, collected and treated to an acceptable level for use, or discharged in an environmentally acceptable fashion. This must be done at the most beneficial place, before the water becomes exposed to underground workings which may affect its quality. A number of mines are affected, including SGM, DRD Gold Ltd, Anglo Gold Ashanti Limited and Harmony Gold Mining Co Ltd.

[6] The KOSH Intermine Water Forum was established in April 2000 to find a 'negotiated solution' to the problem of pumping water from underground in the most effective manner. SGM was a member of the forum. By April 2005 no solution had yet been agreed. Hence the Regional Director, Free State, acting under delegated authority from the Minister of Water Affairs and Forestry, issued directives to the mining companies concerned under s 19(3) of the National Water Act 36 of 1998.

[7] SGM, like the other companies, was ordered to:

1 'collect, remove and contain water arising in the KOSH basin at the most appropriate location, treat it to standards as may be prescribed from time to time, or use or discharge it in a legal manner' . . . .

[2] The background is discussed also in *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* [2006] SCA 65 (RSA).

2 ‘ensure the continued operation and maintenance of all infrastructure associated with any aspect of the management of the water found underground and, in this respect, provide the Regional Director with a weekly report regarding the status of such infrastructure, as well as the provisions made to ensure such continued operation and maintenance . . . starting 22 April 2005’.

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 the cost for the collection, removal, containment, treatment, use and disposal of such waters; . . .

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 . . .

f . . .

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

4 ‘To, before 1 June 2005, submit the outcome of an environmental legal compliance audit conducted on your operations . . . .

5 To, before 1 July 2005, based on the outcome of the environmental legal compliance audit, and following approval thereof by the Regional Director, either --

a apply for the necessary authorisations required under Chapter 4 of the NWA for all water uses . . .; or

b provide satisfactory documented proof to the Regional Director that such provisions are not applicable to your operations.’

[8] There followed other directives and an account of the consequences of non-compliance. The directive of 13 April was followed by another, dated 15 April, purportedly clarifying the prior directive in regard to the management of water found underground, but expressly not in substitution for it.

[9] The attorneys for SGM responded to the first directive on 14 April 2005, pointing out that SGM had closed its mine in 1992 and that the pumping of underground water had since then been undertaken by Hartebeesfontein Gold Mining Co Ltd. They advised further that SGM was not in a financial position to pump and extract underground water from its mine shafts, and that it was accordingly impossible for SGM to comply with the directive or any court order that might follow. They advised also that the shareholders and directors of SGM were considering an application for its winding-up.

[10] There followed another letter from the Regional Director, dated 7 May 2005, which again explained the importance of preventing flooding of mine shafts in the area and the dire environmental consequences if underground water were to be contaminated. A third directive was thus issued in the letter, clarifying the requirements relating to the extraction of underground water. The number of litres per day to be extracted from each shaft before 30 June 2005 was specified. And, most controversially, the directive stated:

'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) (sc 2(a)), 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.'

Again, the implications of non-compliance, including liability to criminal charges under the Act, were set out in full.

[11] On 18 May the Department applied on an urgent basis for an order that SGM and Harmony comply with the three directives. Harmony had paid a contribution to the costs referred to in the directive of 7 May under protest and applied for leave to appeal against an order (dated 22 April 2005) that it comply with the Regional Director's directives. Goldstein J, who heard the urgent

application against SGM, had on the same day given Harmony leave to appeal against that order to this court.[3]

[12] At the hearing of the application against SGM an affidavit (dated 13 May 2005) of one of the SGM directors, Mr G Miller, was handed to the court. It had not been served on the Department. Miller stated that SGM was no longer mining; that the one shaft that was still operative – Margaret Shaft – was being pumped by Hartebeesfontein in accordance with an agreement; that any income from the sale of water obtained was used to defray expenses, and that SGM was unable to contribute to the costs of pumping. Miller stated that if SGM were ordered to contribute to the pumping cost of the KOSH region it would not be able to comply with the order, and might be liquidated.

[13] Goldstein J was not impressed with the affidavit handed up. It did 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 . . .'. The learned judge was willing to order SGM to comply with the directives, and did so with minor changes made to accommodate Harmony and the possible success of its appeal to this court. In effect, the court ordered SGM to comply with the three directives issued.

[14] On 9 June SGM's attorneys wrote to the State Attorney (in response to a letter from it demanding compliance with the court order) explaining again SGM's inability to comply with the directives and thus the court order. But on 14 June 2005 the department brought yet another urgent application, this time against SGM and the directors, for a finding that they were in contempt of the order made by Goldstein J on 18 May. On 17 June, before this application was heard, the directors resigned their offices. The directors had not been parties to the application for compliance with the directives, but were sued in this application as the persons able to ensure compliance by SGM. Nothing, in my view, turns on

[3] The appeal was dismissed: *Harmony Gold* above.

their resignation prior to the hearing of the application for an order that they were in contempt of court.

[15] The application came before Hussain J on 24 June: he postponed the hearing to 25 and 26 July, and also ordered that the directives be implemented in the interim. As I have said, Hussain J found, almost a year later, that SGM and the directors were in contempt of court. I shall not deal with his reasoning. Nor, as I have said, shall I consider all the grounds of appeal. It should be noted, however, that the contempt alleged was said to have been committed before 30 June 2005, the date given for compliance with the directives by the Department. This is not the least curious feature of the matter.

[16] The basis upon which the directors argue that the application should have failed is that the directives were incapable of implementation because they were so vague. This is illustrated by one of the directors' grounds of appeal: SGM was ordered, in the third directive, to contribute to the costs of pumping water from the shafts in the KOSH area. The directors contend that an order of contempt of court cannot be granted where the judgment is one sounding in money – *ad pecuniam solvendam.* Where money is payable pursuant to a judgment, enforcement of the order is achieved through a writ of execution. Contempt proceedings are therefore inappropriate. It is only where performance of an act is ordered – *ad factum praestandum* – that conviction for contempt of court is permitted as a means of enforcing performance (as well, of course, as a means of punishing those who flout court orders).

[17] The Department contends, on the other hand, that the distinction is not germane to the order granted. The relationship between the parties is not that of debtor and creditor: the Department is not the judgment creditor. That is clearly so. But it is not necessary even to deal with the distinction. The principal difficulty with the directive in relation to the contribution to the costs of pumping water (with which the court ordered compliance) is that the amount is not determined;

the person to whom payment is to be made is not known; and the date by which payment is to be made is not determined. How were the directors to avoid being in contempt of court, and when did their conduct amount to contempt, bearing in mind that SGM had until 30 June 2005 to comply with the third directive? Moreover, no explanation was proffered as to why the application for an order that they were in contempt was brought before performance was due.

[18] The response of the Department is that the other mining companies – respondents before Goldstein J – had not had similar doubts: they had made contributions to the costs of pumping. That does not tell us, however, that they were under an obligation in terms of a court order to make payment, nor to whom it should be made. Counsel for the Department was unable to assist the court in this regard.

[19] Another directive that the directors complain is unintelligible, and incapable of implementation, relates to the pumping of water, and the maintenance of infrastructure for the management of underground water, in the entire KOSH basin, both of which are largely beyond the control of SGM. Similarly, the requirement that SGM provide the Regional Director with 'the outcome of a determination' on its responsibilities in relation to water treatment in the entire KOSH basin is both unclear and similarly largely beyond the control of SGM.

[20] Moreover, the Department has failed to respond to the fact that the company secretary to SGM, in an affidavit in the contempt application, pointed out that SGM was no longer functioning, no longer had any directors, and was unable to implement even those parts of the directive that were clear. Mr Roger Kebble, one of the directors, in his answering affidavit, contended that the directors had been forced to resign because the directive was incapable of implementation, and if a contribution to costs were to be made SGM's ability to pay other amounts required for the rehabilitation of the environment would be

jeopardized. All of this had been drawn to the attention of the Department previously. The court order requiring compliance with the directives was thus not wholly ignored.

[21] In my view, the directors' argument that the order, in the form in which it was made, was so lacking in clarity that it was incapable of enforcement, is correct. SGM could not have known precisely what steps it should have taken to comply. And the directive to contribute to the costs of pumping water was imprecise in the respects discussed above. While the directors, before they resigned, undoubtedly should have been more assiduous in seeking clarity – in particular in regard to SGM's contribution to the costs of pumping – they did not simply flout the order. They advised the Department, through their attorneys and the company secretaries, that they could not comply.

[22] However, given my conclusion that the order was so unclear that it could not be implemented, it is not necessary to determine whether the directors deliberately or recklessly flouted it. Nor is there any purpose in labelling their conduct as reckless or contemptible: irresponsible conduct – if that is what their resignations as directors amount to – is not necessarily contemptible and in this case is not contemptuous.

[23] An order that a person is in contempt of court, which carries with it criminal sanctions, should be made only where the court order allegedly flouted is clear and capable of enforcement. Where that is not so a court cannot find that a party has deliberately not complied with the order. The order made by Goldstein J that SGM comply with the directives of the Department was unclear because the directives themselves were unintelligible in several respects and to some extent also incapable of implementation. There was not, in the circumstances, any wilful failure to comply with the court order. The appeal must thus succeed.

[24] The appeal is upheld with costs, including those of two counsel. The order of the court below is altered to read:
'The application is dismissed with costs.'

C H Lewis
Judge of Appeal

Concur:
Harms ADP
Van Heerden JA
Jafta JA
Kgomo AJA