REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE No: **2018/37941**
2018/38743

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

15 March 2019

SIGNATURE DATE

In the matter between:

OKAVANGO MINERALS (PTY) LTD Applicant

and

BILA MINING (PTY) LTD First Respondent
GILBERT KHOSA Second Respondent
RICHARD BILA Third Respondent

JUDGMENT

AMEER, AJ

1. In this application, the applicant, Okavango Minerals (Pty) Limited ("Okavango") seeks an order holding the first respondent, Bila Mining (Pty) Limited ("Bila Mining") and the third respondent, Richard Bila ("Bila"), in contempt with the relevant ancillary punitive sanctions, including imprisonment and the payment of certain fines.

2. It is alleged that Bila Mining and Bila are in breach of a court order granted by Tsoka J on 20 November 2018 ("the Tsoka order"). The effect of the Tsoka order is that Bila Mining must, continue to supply Okavango "*with all the material ordered and to be ordered in terms of the supply agreement concluded between the parties on 20 September 2018*".

3. At the time that the order was granted, the agreed price recorded in the court order was R260.00, excluding VAT, per tonne of material.

4. It is common cause that Bila Mining and Bila were aware of the court order. It is also common cause that they had failed to supply chrome ore at the rate of R260.00 per tonne, excluding VAT.

5. In his founding affidavit the deponent on behalf of Okavango, Gregory Munsamy ("Munsamy"), contends that on 4 February 2019 he placed an order on behalf of Okavango for the purchase of 20 000 tonnes of material. Munsamy alleges that the attorney representing Bila Mining and Bila, Mr Eric Mabuza ("Mabuza"), addressed a letter to Okavango's attorney. Mabuza's letter recorded as follows:

> "5. *As you are aware, since the conclusion of the supply agreement on 30 September 2018 the Chinese economy has deteriorated significantly and this has in turn affected the global economy including South Africa.*

6. *We have been instructed to inform your client that given the aforegoing and despite its best endeavours the price of R260.00 per tonne is no longer commercially viable or feasible for our client. To put it bluntly, our client is currently supplying the material to your client at a loss.*

7. *Our client will therefore no longer be able to supply the material to your client at R260.00 per tonne due to inter alia adverse market conditions, economic downturn and hardship. Given the continued low reference prices and economic factors referred to above, our client does not know when it will be able to resume supplying the material to your client at R260.00 per tonne.*

8. *In the circumstances our client hereby invokes clause 12 of the supply agreement and declare a force majeure event based on inter alia hardship and/or adverse market conditions and/or economic downturn.*

9. *Our client is willing to meet with your client to discuss the matter including providing the necessary documents in support of the force majeure event.*"

6. This letter is attached to the founding papers and demonstrates, in my judgment, that Bila Mining, as it was entitled to, relied on a provision of the contract to excuse performance at the specific price.

7. Clause 12 of the agreement which is relied upon reads as follows:

"*12.1 For the purposes of this agreement the expression 'event of force majeure' means in respect of a party, any event or circumstance or combination of events or circumstances*

occurring after the signature date, the occurrence of which is beyond the reasonable control (direct or indirect) of, and could not have been avoided, by steps which might reasonably be expected to have been taken by such party acting as a reasonable and prudent party, including adverse market conditions, economic downturn or hardship, acts of God, civil unrest, block outs, strikes, war and terrorism."

8. Clause 2.2 thereof provides that the party will be excused from performance or punctual performance in the event of force majeure.

9. The simple approach adopted by Okavango is that the order by Tsoka J obliges the delivery of the material, at the price ordered, and the failure on the part of Bila Mining to deliver the goods constitutes a disobedience of the court order. Okavango, of course, insists on paying the amount of R260.00 per tonne.

10. It is trite, as set out by the Supreme Court of Appeal in **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA), that a disobedience of a court order must be deliberate, wilful or *mala fide* for it to amount to a contempt. A mere failure to comply with a court order due to an inability, despite best endeavours to do so, does not amount to contempt or disrespect of a court order. In the answering affidavit the respondents state in relation to their non-performance as follows:

> "*10. First and third respondents have every intention to comply and are complying with the order of Tsoka J as well as to continue with their relationship with the applicant in terms of the supply agreement.*
>
> *11. We do not intend to circumvent or cancel or renege on the supply agreement between the parties. As will be demonstrated below, quite the contrary is true.*

12. *What the applicant seeks, through these contempt proceedings, is to shoehorn us to a base price which is no longer economical to us. The supply agreement permits the parties to change or vary the base price where it is no longer economically feasible for us.*

13. *The supply agreement permits a change in supply pricing dependent on the prevailing market conditions. It is important to stress that the order of Tsoka J does not prohibit us to seek a change in the base price. Tsoka J's order, as I shall discuss below, in essence compels the parties to continue to govern their relationship in terms of the supply agreement.*

14. *Amongst the terms in the supply agreement is clause 12. Clause 12 permits either party, in the event of adverse market conditions, economic downturn or hardship, to suspend compliance with the agreement for as long as the cause of the hardship persists.*

15. *We have stated that we are no longer able to supply chrome ore to the applicant at the base price of R260.00 per tonne. We are thus entitled to invoke clause 12. Whether indeed there are market conditions that have necessitated the invocation of clause 12 is a subject of arbitration proceedings. It is not for this court, with respect, to determine.*

16. *The prevailing market conditions, as the first and third respondents have stated in their correspondence to the applicant, have dictated a price higher than R260.00 per tonne as necessary.*

17. *The first and third respondents remain committed to supply to the applicant at a price that is feasible. That price, at the present moment, is at R595.00 per tonne.*

> *The price which the applicant wants to pay is even below our estimated production cost of R458.00 as established by the report of independent mining consultants, a copy of which is attached hereto marked "RB2"."*

11. That, in essence, is the respondents' defence. Mr Badenhorst SC who appeared on behalf of Okavango, submitted that the answering affidavit does not disclose a defence on account of it being bald and sketchy without the necessary evidence to substantiate what is set out therein.

12. Mr Mpofu SC, on the other hand, submitted that in these contempt proceedings, it is not for Bila Mining to prove that there exists a circumstance which triggers the force majeure clause. As I understood his submission, he contended that as long as there was a *bona fide* reliance upon the force majeure clause, Bila Mining was entitled to rely upon it. As to whether the reliance on the force majeure clause, according to Mr Mpofu is ultimately justifiable, is to be determined in other proceedings where that very issue is the subject of determination such as in a contemplated arbitration. Even if it is ultimately found that Bila Mining was not entitled to rely on the force majeure clause, that finding in the future does not mean that Bila Mining's *bona fide* reliance upon the force majeure clause at this stage amounts to contempt of court, for as long as Bila Mining and Bila in good faith and on reasonable grounds hold the view that they are entitled to rely on the force majeure clause.

13. Mr Mpofu submitted that the order of Tsoka J must be interpreted as compelling Bila Mining to comply with the supply agreement as a whole. Mr Badenhorst was in agreement with such a submission.

14. It follows then that if Bila Mining and Bila genuinely and in good faith believe that they are entitled to invoke the force majeure clause, which is what the excerpt of the answering affidavit quoted above states, I cannot find that Bila

Mining and Bila, by refusing to supply at the lower rate requested by the applicant, are either in breach of the supply agreement or in contempt of court. This is so especially since these are motion proceedings and I am obliged to accept the respondents' version unless it is so inherently improbable that it may be rejected out of hand in terms of the **Plascon Evans** rule.

15. In the end, and after the argument, Mr Badenhorst submitted that in the event that I am not inclined to grant the contempt orders, that it would be appropriate for me to refer the matter to oral evidence insofar as there is a dispute of fact. Mr Mpofu objected on several grounds. I point out that the referral to oral evidence was not made at the outset. Mr Mpofu suggested that a contempt application previously instituted, which is referred to in the papers, has been referred to oral evidence and the hearing date for the oral evidence has not been set.

16. A referral to oral evidence in the face of a dispute of fact must be made at the onset. An applicant must make its election. This is particularly when the matter is before urgent court and the court roll is heavily burdened. It is unfair to the court for the applicant to expect the court to read voluminous papers in urgent court, often after hours, in order to be well-prepared for argument and then, when it becomes clear that the application for contempt is unlikely to succeed, largely because of a dispute of fact, for an applicant to then seek a referral. Courts will only accede to such a request when made in the alternative when exceptional circumstances exist. None have been shown in this case. In addition, the founding affidavits anticipated a dispute of fact. I have quoted a letter attached in the founding affidavit which was sent before this application for contempt was instituted from which it became clear that there was going to be a dispute of fact as to whether or not Bila Mining wilfully and deliberately disobeyed Tsoka J's order. Notwithstanding such a potential dispute which ought to have been foreseen, Okavango proceeded by way of motion. Finally, a further factor that militates against the referral is that there is another contempt application on substantially the same facts which has been referred to oral evidence and which is in the course of being heard at some stage.

17. In the exercise of my discretion, I think it is appropriate for that matter to be heard so that the principles of whether or not a failure to supply chrome ore at a loss renders Bila Mining and Bila guilty of contempt. It seems to me, therefore, that the only approach is to dismiss the application.

COSTS

18. Both counsel were *ad idem* that in the event of me finding either way, the cost consequent upon the employment of two counsel is appropriate.

19. Both parties have sought costs on the attorney and client scale. I am strongly minded to order attorney and client costs against Okavango because of its barrage of contempt proceedings, including this one in urgent court where there was a dispute of fact foreseen. However I have decided against it, but just about.

20. In the circumstances, I make the following order: The application is dismissed with costs, such costs to include the cost of two counsel.

AMEER AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANEESBURG

COUNSEL FOR APPLICANTS:	Adv C H J Badenhorst SC with Adv L v R van Tonder
APPLICANTS ATTORNEYS:	Ulrich Roux & Associates
COUNSEL FOR RESPONDENTS:	Adv D Mpofu SC with Adv T Ngcukaitobi and Adv B Mkhize
RESPONDENTS ATTORNEYS:	Mabuza Attorneys
DATE OF HEARING:	14 March 2019
DATE OF JUDGMENT:	15 March 2019