IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

15/12/2016.

CASE NO: 76409/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

15/12/16 .....
DATE

.....
SIGNATURE

In the matter between:

LEPELLE INDUSTRIAL AND MINING SUPPLIERS CC	Applicant
and	
STREAKS AHEAD INVESTMENT (PTY) LTD	First Respondent
BOROKA FILLING STATION CC	Second Respondent
THE MINISTER OF ENERGY NATIONAL GOVERNMENT	Third Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	Fourth Respondent
BA-PHALABORWA LOCAL MUNICIPALITY	Fifth Respondent
ERF 344 ONTWIKKELING (PTY) LTD	Sixth Respondent
THE MEC DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM	Seventh Respondent
THE MEC FOR LOCAL GOVERNMENT AND HOUSING, LIMPOPO PROVINCE	Eighth Respondent
REGISTRAR OF DEEDS	Ninth Respondent
CHRIS LODEWYK ALBERTS	Tenth Respondent

JUDGMENT

Baqwa J

[1] The applicant has brought this application on an urgent basis in terms of Rule 6 (12) of the Uniform Rules of Court seeking an order declaring the second and tenth respondents to be in contempt of court and directing them to comply with a judgment of this court handed down on 24 November 2016 under case number 76409/2014.

[2] At the commencement of the proceedings the second and tenth respondents brought an application for postponement on the basis that they had been given short notice by the applicant and that as a result they had not had sufficient time to prepare their opposing papers. This situation had been exarcerbated by the serving of further affidavits on the applicants on the morning of the hearing.

[3] The respondents submitted that those affidavits raised new matters which their counsel needed to obtain instructions on. The issues addressed in the documents served pertained mainly to the second respondent and the tenth respondent and the role the latter had played and was allegedly still playing in the activities of the second respondent.

[4] The applicant opposed the application for a postponement on the basis that in its replying affidavit and in the further confirmatory affidavit it was merely replying to or dealing with matters raised by the respondents in their answering affidavit.

[5] It was common cause that the tenth respondent had been a member of the second respondent but had since resigned. The respondents alleged that he was no longer involved in the affairs of the second respondent and that the second respondent is now owned by two trusts. The applicant, while not disputing the ownership by the trusts alleged that the tenth respondent was a trustee of one of the trusts and that in that capacity he was equally liable for the acts or ommissions of the second respondent.

[6] After considering submissions by counsel I came to the conclusion that the tenth respondent could not be denied the constitutional right to respond particularly to the allegations made by the applicant which he was disputing and that for that reason he was entitled to a postponement. I considered that the case of the second respondent was on a different footing in that it was aware of the judgment and that as such it had a case to meet and was not entitled to a postponement.

[7] The applicants had also brought an application for a costs order **de bonis propriis** against the attorney for the second and tenth respondent on the basis that his advice had led to the second respondent not complying with the court order. He was seperately represented by counsel in that regard.

[8] Counsel for the respondents' attorney submitted and I accepted that with the postponement of the tenth respondent's case it would also be appropriate to postpone the application for a costs order against the respondent's attorney whereupon I ruled that the case against the tenth respondent be postponed **sine die** together with the application for costs **de bonis propriis** against the respondent's attorney.

Urgency

[9] The respondents whilst pursuing the application for a postponement also challenged the bringing of the application on an urgent basis.

[10] Whilst it is trite that an applicant has to show good cause why the time for bringing an application should be abridged and why it could not be afforded substantial redress in due course it is also true that where an applicant brings an application to compel compliance with an order of court which has been legitimately obtained, this is usually treated as a matter of urgency. This is so because a litigant is entitled to a legitimate expectation that an order of court will be complied with otherwise the rule of law and the administration of justice is put in jeopardy.

[11] A similar matter was dealt with in **Protea Holdings v Wriwt and Another** 1978 (3) SA 865 (WLD) where the court pronounced as follows:

"As one of the objects of contempt proceedings is by punishing the guilty party to compel performance of the order, it seems to me that the element of urgency would be satisfied if in fact it was shown that the respondents were continuing to disregard the order of 3 August 1977. If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed. I therefore cannot agree with the submission under consideration made on behalf of the respondents and I turn to a consideration of whether it has been shown that the respondents are in fact continuing to commit contempt of court, or at least a breach of the restraint.... The applicant was justified in launching the application as a matter of urgency."

[12] In the present case the fact of non-compliance is not in dispute though the respondents have raised some grounds for justification. Whilst I shall deal with those grounds later in this judgment, I am of the view that the present application was properly brought in terms of the provisions of Rule 6 (12) of the Uniform Rules of Court.

Background

[13] The second respondent is the retailer which manages the filling station and trades in petroleum products whilst the first respondent is the party which transferred its site licence to the sixth respondent. The latter is the owner of the shopping complex where the filling station is located.

[14] Currently the second respondent is continuing to trade despite the granting of a court order, prohibiting him to do so in the interim. The second respondent has not filed any application for leave to appeal though it has indicated in writing that it will do so in due course and has through correspondence further indicated that as soon as the application for leave is filed, the respondents will take the view that the order is suspended.

[15] The applicant contends not only that the second respondent should stop trading in terms of the court order but also that the court order is an interlocutory order that does not have the effect of a final judgment and that it will therefore not be suspended in the event of any application for leave to appeal in terms of section 18 (2) of the Superior Courts Act, 10 of 2013.

[16] The applicant contends further that a definitive finding regarding the question whether the order is an interlocutory order not having the effect of a final judgment, together with the question whether the respondents are in contempt of court, will prevent the second respondent from further trading pending finalisation of the main application. Prior to deciding that question however, it is necessary to decide the question whether the respondents are in contempt of the court order.

Contempt of Court

[17] In **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 3226 SCA at para 42 the following was stated:

"*[42] To sum up:*

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) *But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*

(e) *A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.*"

[18] **In casu**, it is common cause that the respondents received notice of the order and that they failed to obey the order. The burden of proof therefore rests on the respondents to show that they did not act with willfulness or **mala fides**.

The Respondents Defences

[19] The respondents submit that they failed to obey the court order subsequent to legal advice.

[20] By letter dated 25 November 2016 the applicant's attorneys wrote to the respondents' attorneys as follows:

"*Our client has advised us that your client is still trading in petroleum products, despite and in direct contempt of the said judgment of his Lordship. We further take note of the contents of your said letter and are instructed to respond thereto as follows:*

1. *There is nothing ambiguous or difficult to understand about the said judgment;*

2. *The said judgment makes it very clear that, inter alia, all retailing in petroleum products must cease on site;*

3. *The judgment does ot provide any delay in its implementation,* ***IT IS OF IMMEDIATE EFFECT!***

4. *Your clients blatant disregard of this judgment is noted with disdain and concern;*

5. .....

6. .....

7. .....

8. *If your client is currently acting under your advice that he may ignore the said judgment, you are informed that you will be a party to your client's contempt of Court;*

9. *All our client's rights are reserved in the matter, including its rights to approach the Court on an urgent basis to deal with the contempt of Court by your client."*

[21] On 29 November 2016 the respondents' attorneys replied and stated **inter alia** as follows:

"1. .....

2. *In the premises, the court order concerned is the subject of an intended application for leave to appeal and the operation and execution of the decision will consequently be suspended pending the decision of the application concerned. In these circumstances, and where acquiescence in the decision may deprive our clients of the right to appeal, any failure to comply with the order pending the finalisation of the appeal process cannot be said to be mala fide.*

3. *We do not intend to deal with all the allegations contained in your letter under reply and reserve the right to do so at any appropriate time. We however record that our clients are not acting in "direct contempt" of the court order and do not have "blatant disregard" therefor. We precisely advised your client that our clients were considering their position to show our clients' bona fides in seriously considering the judgment. We have certainly not advised our clients that they may ignore the judgment concerned, but have instead advised them of their rights to apply for leave to appeal and the other relevant considerations in this regard, inter alia, as set out above. Our clients are also clearly not ignoring the judgment, but is instead seeking leave to appeal it.*

Yours faithfully
Gerhard Wagenaar Attorneys"

[22] What is clear from the letter quoted above is that the respondents equated compliance with the judgment with "*acquiescence*" to it. Needless to say the corollary to non-acquiescence is non-compliance. Firstly, this is a rather disconcerting attitude from the respondents' attorneys who are officers of this court, who ought to know that judgments of this court are not given for a further consideration by attorneys whether they need to be executed or not especially where the time for execution is explicitly stated.

[23] Secondly it is not clear to me how the second respondent could raise as a defence against **mala fides**, the advice of attorneys who have stated categorically that "*We have certainly not advised our clients that they may ignore the judgment concerned*". The positions taken by the attorney and client seem to be contradictory. What this implies if logic is to prevail is that the decision to ignore the judgment was the second respondent's own decision not based on legal advice. The legal route advised by the attorneys to apply for leave to appeal to try and interfere with the consequences of the judgment was the one that the second respondent chose to ignore until the launching and hearing of the present application.

[24] Acquiescence in the judgment under the principle of peremption of appeals is a hollow defence in the circumstances as complying with the judgment with reservation of rights pertaining to an application for leave to appeal and disavowing acquiescence in a letter, would have been sufficient to safeguard the respondents' rights. The peremption of appeal principle is a principle which is derived from common law and the respondents' attorneys ought to be alive to the fact that the rights of the parties with regard to judgments and appeals in the current constitutional dispensation are administered in terms of the Superior Courts Act. To hold otherwise would cause chaos in the administration of justice and the management of the many judgments which ensue from this court on a daily basis.

[25] In a rather feeble attempt to further defend the stance taken by the second respondent, the respondent's attorneys have referred to a "*practice*" not to comply with the court order whilst considering or drafting an application for leave to appeal. The attorneys engaged in this "*practice*" despite being admonished by the applicant's attorneys to desist from doing so. There is no evidence of such a practice and there is no authority that such a practice exists. It is in my view a mere obfuscation.

[26] In **Holder v Rex** 1930 NPD 63 at p64 the following is stated:

"***Head note***

The appellant was ordered by a Magistrate, under section 3 of Act 10, 1896 (The Deserted Wives' Protection Act), to pay to his wife a sum of £5 per month. After making one monthly payment, he was advised by his solicitor that, as he intended instituting an action for restitution of conjugal rights, he need make no further payment under the Magistrate's order. In consequence of that advice, he withheld payment though he knew of the existence of the order and was able to comply with it. He was convicted under section 101 of the Magistrate's Courts Act, of wilfully disobeying or neglecting to comply with the Magistrate's order. Held, dismissing an appeal, that the appellant was liable.

[27] Further, the contempt issue is dealt with in Herbstein and Van Winsen – *Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* (Fifth Edition) p1110 as follows:

"*The Respondent is not, however, entitled to refuse to obey a court order served on him on the ground that there was not an opportunity of consulting with an attorney and may be held to have defied the order intentionally notwithstanding that the attorney had advised non-compliance for the time being.*"

See **Culverwell v Beira** 1992 (4) SA 490 (W) at 493H

[28] There is no basis whatsoever, legal or otherwise upon which a litigant can argue that it may ignore a specific and explicit court order pending consideration of an application for leave to appeal or the drafting thereof. If the attorney had not given that advice, the second respondent cannot but be in contempt of court beyond a reasonable doubt.

The Sixth Respondent

[29] Despite the fact that the applicants did not pursue this application against the sixth repsondent, he was represented by counsel who submitted that the prayer for a declaratory order in paragraph 6 of the Notice of Motion should not be granted as originally formulated with reference to section 16 (1) (a) of the Superior Courts Act and for non appealability prior to an application for leave to appeal being filed. This legal point was conceded by the applicant and the matter was not taken any further. Counsel for the second respondent however still persisted with his opposition to the granting of the declaratory order in any form.

Declaratory Order

[30] In its application the applicant has also made reference in its founding affidavit for the need to clarify the nature of the order made by means of a declarator in light of the express intention to file an application for leave to appeal. This in my view may be totologous bearing in mind the wording of the order itself. The application for an interim interdict was brought in two parts namely, Part A and Part B.

[31] The order thus granted reads as follows:

"***ORDER:***

Having heard counsel for both parties, the following order is granted in terms of Part A of the Notice of Motion

60.1 That a temporary interdict be granted in favour of the applicant against the first, second and sixth respondents in the following terms:

60.1.1 The first, second and sixth respondents are prohibited from taking any further steps regarding the construction of a filling station on Erf 3465, extent 3.742ha situated in Township Namakgale B, district of Namakgale held by the sixth respondent under TG12564/2013; and

60.1.2 The first, second and sixth respondents are prohibited from any trading activities and/or retail activities of petroleum products of any nature whatsoever on Erf 3465, extent 3.3742ha situated in Township Namakgale B district of Namakgale, held by the sixth respondent under TG12564.2013.

60.2 The abovementioned temporary interdict shall be valid and binding on all parties to this application pending:

60.2.1 the applicant's review application against the decision of the third respondent on appeal to grant a site licence on Erf 3465 Namakgale B Township under licence application F/2013/02/05/0001, in respect of first respondent and a new retail licence under application F/2013/02/05/0002;

60.2.2 the applicant's internal appeal that has been lodged with the fourth respondent pertaining to the transfer of the site licence in respect of Erf 3465 Namakgale B Township, from the first respondent to the sixth respondent;

60.2.3 any review application that may follow from the decision of the fourth respondent pertaining to the applicant's internal appeal filed as referred to in paragraph 60.2.2 above;

60.2.4 final relief in terms of Part B of this application.

60.3 Costs of Part A of this application, including the costs of three counsel."

[32] The applicant seeks a declaration regarding not only the nature of the order but also an order regarding the appealability thereof. I do not consider it appropriate to make any declaration regarding appealability prior to an application for leave to appeal being lodged with the Registrar of the High Court. That would be tantamount to anticipating a matter that has not yet been placed before me. I, however, consider that I am in a position to make a declarator regarding a matter which is evident from the order I made.

[33] What is apparent from the order quoted above is that it is an order regarding Part A only of the application and that it is made pending the outcome in Part B of the application. What this means is that in the event of the applicant not being successful in the review application, the order made in Part A may be reversed by this court. The order made does not therefore finally dispose of the issues between the parties. It is therefore in the nature of an interlocutory order as contemplated in section 18 (2) of the Superior Courts Act.

[34] In the result, I make the following order:

ORDER:

Having heard counsel for both parties, and having considered the documents filed of record, the following order is granted:

34.1 That it be declared that the second respondent is in contempt of court.

34.2 The second respondent is directed to comply with the judgment of His Lordship Mr Justice Baqwa handed down on 24 November 2016 under case number 76409/2014, with immediate effect.

34.3 In the event that the second respondent should fail to comply with the above court order immediately, the duly appointed Sheriff of the relevant area, assisted by the South African Police Service are directed and requested to attend the filling station situated at Erf 3465 in the township of Namakgale B, District of Namakgale, for the purpose of ensuring the compliance of the second respondent with the aforesaid court order, by shutting down the trading and/or retailing and/or selling of petroleum products on said Erf 3465.

34.4 A declaratory order that the interlocutory order granted by His Lordship Mr Justice Baqwa referred to above, is not a "*decision*", and that it does not have the effect of a final judgment, it is an interlocutory order as meant in section 18 (2) of the Superior Courts Act 10 of 2013.

34.5 The second respondent is ordered to pay the costs of this application on an attorney and client scale.

34.6 The applicant is ordered to pay the costs of the sixth respondent.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	13 December 2016
Delivered on:	15 December 2016
For the Applicant:	Advocate R. Du Plessis S.C. Advocate E. van As Advocate H. Kelaotswe
Instructed by:	A. Kock & Associates Inc.
For the 1st, 2nd and 10th Respondents:	Advocate S. Wagener S.C.
Instructed by:	Gerhard Wagenaar Attorneys
For the 6th Respondents:	Advocate D. van den Bogert
Instructed by:	Jacques Classen Attorneys
For the 10th Respondent's Attorney:	Advocate J. C. van Eeden