



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

Not Reportable
Case no: 1140/2020

In the matter between:

**FORMER WAY TRADE AND
INVEST (PTY) LTD t/a PREMIER
SERVICE STATION**

FIRST APPELLANT

LEE BENTZ

SECOND APPELLANT

and

**BRIGHT IDEA PROJECTS 66 (PTY) LTD
t/a ALL FUELS**

RESPONDENT

Neutral citation: *Former Way Trade and Invest (Pty) Ltd t/a Premier Service Station and Another v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* (1140/2020) [2021] ZASCA 175 (14 December 2021)

Coram: VAN DER MERWE, MAKGOKA, PLASKET, MBATHA
and MABINDLA-BOQWANA JJA

Heard: 16 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 10h00 on 14 December 2021.

Summary: Contempt of court – requisites for contempt satisfied – wilful disregard of the order and mala fides proved on the part of the appellants – duty to comply with court orders – appeal dismissed.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Govender AJ sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Mbatha JA (Van der Merwe, Makgoka, Plasket and Mabindla-Boqwana JJA concurring):

[1] On 22 April 2020, the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) declared the first appellant, Former Way Trade and Invest (Pty) Ltd t/a Premier Service Station, to be in contempt of court. The second appellant, Mr Lee Bentz, as the controlling mind of the first appellant, was committed to prison for that contempt for a period of 30 days wholly suspended on certain conditions. Aggrieved by these orders, the appellants appealed to this Court with the leave of the high court.

[2] The background of the matter is as follows. The respondent, Bright Idea Projects 66 (Pty) Ltd t/a All Fuels and the first appellant, became parties to a franchise agreement. In terms thereof, the first appellant operated a Caltex filling station at premises owned by the respondent and with fuel products supplied to it by the respondent. At all times relevant hereto, the second appellant was the sole shareholder and director of the first appellant. During 2017, however, a dispute arose between the parties to the franchise agreement. The respondent took the stance that the franchise agreement would come to an end on 31 December 2017. The first appellant, on the other hand, alleged that a new franchise agreement had been entered into, which conferred on it the right to continue to conduct business on the premises for a period of five years from 1 March 2015, with a right of renewal.

[3] The respondent consequently launched an application in the high court for the eviction of the first appellant from the premises. The first appellant, in turn, filed a counter-application in which it sought an order enforcing the alleged new franchise agreement, alternatively a stay of the application pending an arbitration that the first appellant had initiated. The main application and counter-application came before Poyo-Dlwati J on 22 January 2018. Both the litigants were represented by senior counsel. The parties managed to reach an agreement. By consent Poyo-Dlwati J made that agreement an order of court (the consent order). It provided for the postponement of the main application and counter-application and for the filing of further affidavits.

[4] Paragraphs 6 and 7 of the consent order provided as follows:

‘6. Pending final determination of the main application and the counter-application:

(a) the parties shall conduct themselves as if the franchise agreement remains of full force and effect and comply with their respective obligations as defined in the franchise agreement;

(b) the Respondent shall source all of its petroleum products from the Applicant, who shall, in turn, supply same to the Respondent.

(It is recorded that the Respondent had placed a further order with Fueltech, on 19 January 2018, and agreed that the foregoing shall not apply to the execution of that order).

7. It is recorded that the Respondent’s consent to this order is granted without prejudice to the Respondent’s defences raised in its answering affidavits, including its claim to a stay of these proceedings pending determination by arbitration either in terms of Section 12B of the Petroleum Products Act, 1977, and/or the franchise agreement.’

[5] For the period commencing on 22 January 2018 to 27 July 2019, the appellants complied with the terms of the consent order. On 24 July 2019, the attorneys for the appellants addressed a letter to the respondent’s

attorneys stating that whilst being aware of the pending litigation and arbitration proceedings between the parties, the first appellant was aggrieved by the alleged gross overcharging for supplies and failure by the respondent to follow the industry guidelines in respect of pricing. The appellants' attorneys intimated that the first appellant would source supplies at better prices elsewhere and that they had advised their client to go ahead and do so. They further stated that the respondent must by no later than the close of business on Friday, 26 July 2019 table to them and for their client's consideration a decent proposal.

[6] On 24 July 2019, in reply to their letter the respondent's attorneys reminded the appellants' attorneys that the consent order obliged the first appellant to procure all petroleum products from the respondent and attached a copy of the order for their attention. The respondent's attorneys further pointed out that the first appellant's intended course of action would amount to contempt of court.

[7] The first appellant attorneys' response, dated 25 July 2019, was as follows:

'Unfortunately, we:

1. Firstly, do not agree that the order is good and/or valid or capable of implementation since no binding "contract" can exist without a price.
2. Secondly, we do not see that our directive to your client to comply with 'lawful' pricing as opposed to unilaterally imposed prices violates the order as it must be implied that the prices underlying paragraph 6 of the order have to be in accordance with industry standards if there are any.'

In response thereto, the first appellant's attorneys were reminded by the respondent's attorneys that the order which obliged the first appellant to purchase petroleum products from the respondent was taken by consent. The correspondence ended with a sound warning to this effect:

‘I trust that you have advised your client of the consequences of the breach of a High Court order.’

[8] Despite the tense exchange of letters the first appellant placed an order for petroleum products on 25 July 2019, which were delivered and paid for by the first appellant on 29 July 2019. Unexpectedly, on 30 July 2019, the first appellant’s attorneys emailed a letter to the respondent stating that no further orders will be placed with the respondent until it responded fully to its letter of 24 July 2019. It is common cause that the first appellant proceeded to source various petroleum products from other distributors and sold those products from the premises of the respondent, using the respondent’s equipment and brand name, Caltex.

[9] By that time, the main application and counter-application had not been finally determined. Therefore, the respondent approached the high court on an urgent basis for a rule nisi operating as an interim interdict. It cited the first and second appellants as the first and second respondents respectively. On 21 August 2019 Bezuidenhout J issued a rule nisi calling upon the appellants to show cause why the following order should not be made final:

‘2.1 **THAT** the first respondent is declared to be in contempt of court in failing to comply with paragraph 6 of the order (“*the order*”) granted by the Honourable Madam Justice Poyo Dlwati on **22 January 2018** under case number 283/2018 P;

2.2 **THE** second respondent be committed to prison for such period as this Honourable Court may determine for the first respondent’s contempt of paragraph 6 of the order granted by the Honourable Madam Justice Poyo Dlwati on **22 January 2018** under case number 283/2018 P;

2.3 **THAT** the first respondent is interdicted and restrained from conducting the business of a fuel retail service station as Caltex Premier Service Station (*alternatively* any other fuel retail service station, from the premises described as Sub 27 of Lot 2725, Pietermaritzburg Administrative District of Natal, Province of KwaZulu-Natal and

situated at 238 Albert Luthuli Street, Pietermaritzburg, KwaZulu-Natal) on any basis other than sourcing all its fuel from the applicant in compliance with paragraph 6 of the order of this court granted on **22 January 2018** under the present case number;

2.4 **IN** the event of the first and second respondents failing to comply with the provisions of paragraph 2.3 above, then . . . the first respondent is interdicted and restrained from conducting the business of a fuel retail service station as Caltex Premier Service Station alternatively any other fuel retail service station, from the premises described as Sub 27 of Lot 2725, Pietermaritzburg Administrative District of Natal, Province of KwaZulu-Natal and situated at 238 Albert Luthuli Street, Pietermaritzburg, KwaZulu-Natal;

2.5 **IN** the event of the first and second respondents failing to comply with either of the provisions of paragraph 2.3 or 2.4 above, . . . the Sheriff or his duly authorised representative/s is authorised to do all things necessary to give effect to paragraphs 2.3 or 2.4 above;

2.6 **THAT** the first and second respondents are ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved, on an attorney and own client scale . . .’

He also ordered that paras 2.3 and 2.4 of the rule nisi operate as an interim interdict with immediate effect, pending the finalisation of the application.

[10] On the extended return date, K Govender AJ confirmed the rule nisi. As I have said, the order committed the second appellant to prison for a period of 30 days, wholly suspended on condition that the first appellant complies fully with the consent order.

[11] Before I deal with the issues raised on appeal, it is appropriate that I briefly set out the law on contempt of court proceedings. This Court in *Fakie N O v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA), among others, found that the contempt of court proceedings has survived constitutional scrutiny and is a necessary tool to enforce compliance of court orders. To be successful in contempt of court

proceedings the applicant needs to prove the existence of an order; service or notice thereof; non-compliance; wilfulness and mala fides beyond any reasonable doubt. Once the first three requisites are established, the respondent bears the evidential burden in relation to wilfulness and mala fides. If he or she fails to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful or mala fide, contempt would have been established beyond a reasonable doubt.

[12] In *Pheko and Others v Ekurhuleni City (II)* [2015] ZACC 10; 2015 (5) SA 600 (CC) para 1, the Constitutional Court stated as follows:

‘The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.’

The court emphasised that when a court order is disobeyed, not only the person named or party to the suit but all those, with knowledge of the order, aided and abetted the disobedience or wilfully are party to the disobedience are liable.¹

[13] It was common cause or undisputed that the appellants had knowledge of the consent order. As I have demonstrated, it was also common cause that the second appellant caused the first appellant to disobey the consent order by sourcing petroleum products from other

¹ *Pheko and Others v Ekurhuleni City (II)* [2015] ZACC 10; 2015 (5) SA 600 (CC) para 47; *Twentieth Century Fox Fil Corporation and Others v Playboy Films (Pty) Ltd and Another* 1978 (3) SA 202 (W) at 203.

suppliers than the respondent. The appellants raised only two points on appeal, namely, first, that the consent order was ‘inchoate and incapable of implementation’ and second, in the alternative, that the non-compliance with the consent order had not been wilful.

[14] The first point was based on the contention that the franchise agreement was unenforceable or invalid because it did not state prices for the fuel products nor provided for a method of determination thereof. Clause 6.3 of the franchise agreement provided:

‘The FRANCHISEE will pay CALTEX the CALTEX invoice price for all CALTEX products sold by Caltex to it under the contract’.

With reference to *Shell SA (Pty) Ltd v Corbitt and Another* 1986 (4) SA 523 (C) at 526, the high court held that the franchise agreement had allowed the respondent to charge its usual, normal or current prices and that therefore the prices were determinable. Save for pointing out that it was not appropriate to interpret the clause of the franchise agreement without having regard to its context, it is not necessary to determine whether this approach was correct.

[15] This is so because the consent order created self-standing obligations. In its contextual setting the consent order clearly provided that pending the final determination of the main application and counter-application and without prejudice to the first appellant’s rights, the appellants would continue to operate a Caltex filling station as before, that is, as if the franchise agreement remained of full force and effect. Thus, as an interim measure, the first appellant was bound not only to source all the petroleum products from the respondent, but also to pay the invoiced prices for these products, as it had done since 2015.

[16] To the extent that the appellants might have intended to say that the first appellant's conduct had not been mala fide, they carried the burden to adduce evidence that created a reasonable doubt as to whether the first appellant had in good faith believed that it was entitled to source petroleum products from other suppliers than the respondent. In the light of the circumstances under which the consent order was made, the compliance with it from January 2018 to July 2019 and the contents of the correspondence referred to above, their evidence did not raise a reasonable doubt as to the first appellant's mala fides. The second point can be briefly disposed of. The non-compliance with the consent order was clearly deliberate, that is wilful. The appeal must therefore fail.

[17] Before I conclude, I am constrained to comment on the decision of the high court to grant leave to appeal to this Court. Section 17(6)(a) of the Superior Courts Act 10 of 2013 reads as follows:

'(6)(a) If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider –

- (i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or
- (ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.'

[18] Thus, ordinarily, leave to appeal against a decision of a single Judge of a division of the high court should be granted to the full court of the relevant division. Leave to this Court should only be given after the Judge

is satisfied that the requirements of (i) and (ii) of s 17(6)(a) are satisfied. In the present case, it is not clear whether these provisions were considered when granting leave to this Court. The appeal involves no question of law of importance. There are no differences of opinion to be resolved by this Court. There is no suggestion that the administration of justice, either generally or in this case, requires consideration by this Court. On these considerations, if the high court was minded to grant leave, it should have granted it to the full court, and not to this Court.

[19] In the result, the following order is made:

The appeal is dismissed with costs.

Y T MBATHA
JUDGE OF APPEAL

Appearances:

For appellants: B G Savvas

Instructed by: K Swart & Company c/o Stowell & Company,
Pietermaritzburg
Honey Attorneys, Bloemfontein.

For respondent: D Ramdhani SC

Instructed by: Norton Rose Fulbright South Africa Inc.,
c/o Venns Attorneys, Pietermaritzburg
Webbers Attorneys, Bloemfontein.