
**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION PIETERMARITZBURG**

**CASE NO. 283/18P**

In the matter between:

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

and

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

**LEE BENTZ** **SECOND RESPONDENT**

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**ORDER**

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1. The first respondent is declared to be in contempt of court in failing to comply with paragraph 6 of the order granted by the Honourable Madam Justice Poyo Dlwati on 22 January 2018 under case number 283/2018P;
2. The second respondent is committed to prison for a period of 30 days 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 283/2018P;

3. The term of imprisonment referred to in paragraph 2 above is wholly suspended on condition that the first respondent complies fully with the order granted by the Honourable Madam Justice Poyo Dlwati on 22 January 2018 under case number 283/2018P;

4. 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 by the Honourable Madam Justice Poyo Dlwati on 22 January 2018 under case number 283/2018P;

5. In the event of the first and second respondents failing to comply with the provisions of paragraph 4 above, then and in that event 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;

6. In the event of the first and second respondents failing to comply with either of the provisions of paragraph 4 or 5 above, then in that event the Sheriff or his duly authorised representative/s is authorised to do all things necessary to give effect to paragraphs 4 or 5 above;

7. 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 client scale, the costs to include the cost occasioned by the use of a senior and a junior counsel.

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**JUDGMENT**

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**K Govender AJ**

[1] This matter was argued before me on the 13th of March 2020. The applicant was represented by Mr GD Harpur SC and by Mr D Ramdhani SC instructed by Norton Rose Fulbright South Africa Incorporated and the respondents were represented by Mr BG Savvas instructed by K Swart and Company and Venn and Muller Incorporated. I am indebted to all the legal representatives for their useful submissions.

**Background and facts**.

[2] While there were no material disputes of fact, it is necessary to set out the facts in some detail in order to determine whether the first respondent acted in contempt of a court order and to determine whether or not to confirm the rule. In terms of a franchise agreement the applicant was to supply petroleum products to the first respondent for onward sale to its retail customers as part of its service station business conducted from the premises that the first respondent currently occupies. The second respondent is a director and shareholder of the first respondent. The applicant, in the main application launched on the 15th of January 2018, sought the eviction of the first respondent from its premises. In the main application, the first respondent denied that its occupation of the premises is unlawful.

[3] Prior to the main application being heard, an interim order was granted by Poyo Dlwati J on the 22nd of January 2018 and paragraph 6, which is material to the determination of this matter, stated:

'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 aforegoing shall not apply to the execution of that order).'

I will refer to this as the order of Poyo Dlwati J. On the day the order was granted, both the applicant and the first respondent were represented by senior counsel and the order was taken by consent. From the 22nd of January 2018 to the 27th of July 2019, the first respondent complied with the terms of the order of Poyo Dlwati J and purchased all its petroleum products from the applicant who in turn supplied these products.

[4] On the 10th of July 2018 D Pillay J granted the eviction order evicting the first respondent from the applicant's premises at 238 Albert Luthuli Street, but these proceedings have not as yet been finalised. Leave to appeal was refused by D Pillay J and this was confirmed by the Supreme Court of Appeal. However, an application by the first respondent for the reconsideration of the decision was referred to oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013. This issue together with the merits of the appeal is yet to be heard by the SCA.

[5] Various disputes pertaining to the charges levied by the applicant for the petroleum products supplied, are amongst the issues to be considered in the arbitration proceedings conducted in terms of s 12B of the Petroleum Products Act 120 of 1977, before Mr Kuper SC. In these arbitration proceedings the first respondent alleges that it is being unfairly overcharged by the applicant for the petroleum products supplied by it. These arbitration proceedings are also ongoing.

[6] After complying with the order of Poyo Dlwati J for about eighteen months, the respondents took the view that the applicant was surreptitiously and unilaterally inflating the invoice price that it had been charging them. As a consequence, the first respondent's attorneys in a letter dated the 24th of July 2019 addressed to the applicant alleged that the latter has been grossly overcharging for supplies and has deliberately not followed industry guidelines and recommendations. They also informed the applicant that the first respondent can source supplies at far better prices and stated 'we have advised it to go ahead and do so unless you can, by no later than close of business on Friday the 26th

July, table for us and our client's consideration a decent proposal.'[1] The letter ends with the following statement:[2]

> 'Should you fail to table a respectable proposal, our client will, without further notice, proceed to source supplies elsewhere.'

[7] In response, attorneys for the applicant on the 24th of July 2019 wrote to the first respondent's attorneys,[3] attaching the order of Poyo Dlwati J and reminding them that in terms of the order, the first respondent is obliged to procure all its petroleum products from the applicant. The email expressly stated that the proposed course of action of the first respondent would amount to contempt of court and that contempt proceedings will be launched if the first respondent did not comply with the order of Poyo Dlwati J. In response, attorneys for the first respondent on the 25th July 2019 wrote to attorneys for the applicant and stated:[4]

'Unfortunately, we:

1. Firstly, do not agree that the order is good or and 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 para 6 of the order have to be in accordance with industry-standards if there are any.'

[8] In a response dated the 25th of July 2019, attorneys acting for the applicant reminded the attorneys for the first respondent that the order of Poyo Dlwati J was granted by consent and thus the first respondent was obliged to purchase all its petroleum products from the applicant. It ended by stating 'I trust that you have advised your client of the consequences of the breach of a High Court Order.'[5]

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[1]. Page 59 of the record.
[2]. Page 60 of the record.
[3]. Page 62 of the record.
[4]. Page 66 of the record.
[5]. Page 68 of the record.

[9] It was also common cause that on the 25th of July 2019, the first respondent placed on order with the applicant for petroleum products which was delivered by the applicant on the 27th of July 2019. The first respondent paid the amount charged by the applicant. On the 29th of July 2019, attorneys for the applicant in an email to attorneys for the first respondent stated in the closing paragraph:[6]

> 'I infer from your client's conduct in ordering and accepting fuel from our client that your client will comply with paragraph 6 of the High Court Order that was granted by consent on 22 January 2019.'[7]

[10] In an email dated the 30th of July 2019, attorneys for the first respondent replied by stating that no further orders will be placed with the applicant until it provides it with the information requested earlier. It is not disputed that the first respondent then purchased petroleum products from distributors other than the applicant which was then distributed from the premises to the public. This they did while using the applicant's Caltex trademark and equipment.

[11] The applicant then launched an urgent application which was argued before Bezuidenhout J on the 15th of August 2019 and a rule was granted in terms of paragraphs 2, 3 and 4 of the notice of motion. The relevant provisions of the notice of motion (which is reproduced verbatim) provided:

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

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 283/2018P;

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

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6. Page 75 of the record.
7. It is apparent that this is an error and reference was intended to be made to the court order of 22 January 2018.

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 and that event 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 event 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;

3.

**THAT** the provision of paragraphs 2.3 and 2.4 above operate with immediate effect pending the finalisation of this application.'

[12] Bezuidenhout J found that as the parties were seeking interim relief before him, he did not have to decide whether there was a breach of the court order of Poyo Dlwati J. Bezuidenhout J confirmed that while the order of Poyo Dlwati J made no reference to the purchase price at which the fuel was to be purchased, it did state that the franchise agreement between the parties would continue until the main application is finalised. He concluded as follows on the issue of the purchase price:[8]

'Accordingly, the price that was always paid in terms of the franchise agreement would then be the prevailing price to be paid until the main application is finalised. As also submitted by Mr Harpur SC the purchase price would then be applicant's normal price for such fuel.'

Bezuidenhout J reasoned that the essence of the interim relief that was being sought before him, that all fuel sold at the premises must be purchased from the applicant, was of the same effect as the order granted by Poyo Dlwati J. He was therefore of the opinion

[8]. Para 6 of the judgment delivered on the 21st of August 2019 – paras 237(a) to 237(g) of the record.

that there would be no prejudice to the first respondent and granted interim relief in terms of paragraphs 2, 3, and 4 of the notice of motion.

**The issues to be determined**

[13] The main issues before me in deciding whether to confirm the rule is whether the respondents wilfully and with *mala fides* disobeyed paragraph 6 of the order of Poyo Dlwati J and whether the first respondent should be interdicted from purchasing petroleum products from any other distributor other than the applicant. I also have to decide whether to grant the counter application brought by the respondents. In their counter application, the respondents seek to have paragraph 6 of the order of Poyo Dlwati J rescinded ***ex tunc*** or immediately. As an alternative, they seek a declaration that paragraph 6 of the order of Poyo Dlwati J be 'understood to mean that transactions between the parties shall occur at a price which is justified in terms of RAS and agreed to by the parties and the order is accordingly supplemented in so far as it is necessary to read this requirement in.'[9]

**The applicable legal principles.**

[14] The test and applicable legal principles for determining whether there has been disobedience of a court order and whether that constitutes contempt was authoritatively laid down by Cameron JA ( as he then was) in *Fakie NO v CCII Systems (Pty) Ltd* [10] and confirmed by Nkabinde ADCJ in *Matjhabeng Local Municipality v Eskom Holdings*.[11] Nkabinde ADCJ summarised the majority findings in *Fakie* thus:

'In summation, the majority affirmed the availability of civil contempt, and that it passes constitutional muster in the form of a motion court application adapted to constitutional requirements. It is stated that the respondent is not an accused person, but is entitled to analogous protections as are appropriate to motion proceedings. The majority held that an applicant in contempt proceedings must prove all the requisites of contempt beyond reasonable doubt. However, it stated that, "once the applicant has proved the order, service or notice, and

[9] .Notice of the counter application on pages 121 and 122 of the record.
[10]. *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).
[11]. *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2017 (11) BCLR 1408 (CC) para 63.

noncompliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*".' [12]

In *Fakie*, Cameron J[13] dealt with the issue of proof of contempt of court as follows:

'Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and *mala fide*, the offence will be established beyond reasonable doubt: The accused is entitled to remain silent, but does not exercise the choice without consequence.'

This particular standard was adopted to ensure that a person is not deprived of their liberty when a reasonable doubt exists as to whether they acted in contempt of the court order.[14] Further a court commits a contempt respondent to imprisonment in order to safeguard and protect the rule of law and this should be pursued only in the absence of reasonable doubt.

[15] The applicant in the matter before me is seeking to have the second respondent committed to prison for a period of time but accepted that a suspension of that sentence may be appropriate. The applicant does so because the second respondent controls the conduct and actions of the first respondent. It is apparent that the primary objective of the applicant is to enforce compliance with paragraph 6 of the order of Poyo Dlwati J. As the applicant is seeking a punitive committal order, it is clear that the applicant has to prove the requisites of the offence of contempt of court beyond reasonable doubt.[15] However, once the applicant establishes the order, service or notice of the order and non-compliance, the respondents need only adduce evidence in relation to wilfulness and *mala fide* that establishes a reasonable doubt to avoid a finding being made that the first respondent was in contempt of court. There is no legal burden on the respondents to disprove wilfulness and *mala fides* on a balance of probabilities. In *Fakie*,[16] the court expanded on what is meant by deliberate and wilful in the following terms:

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[12]. *Matjhabeng Local Municipality* (note 11) para 63; footnotes omitted.
[13] . *Fakie NO* (note 10) para 22.
[14] . *Fakie NO* (note 10) para 20.
[15] . *Fakie NO* (note 10) para 25.
[16] . *Fakie NO* (note 10) para 9

'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).'[17]

**Analysis and discussion**

[16] The order of Poyo Dlwati J was granted on the 22nd of January 2018 and the respondents unequivocally knew and had notice of the order. Clause 6 of the order of Poyo Dlwati J expressly stated that the first respondent shall purchase all its petroleum products from the applicant and that the applicant would supply this to the first respondent. The first respondent was represented by senior counsel when the matter was before Poyo Dlwati J and the order was taken by consent. It was not disputed that the first respondent after July 2019 purchased petroleum products from another distributor and therefore did not comply with the order of Poyo Dlwati J. The issue then is whether this non-compliance with the court order was wilful and *mala fide* or whether on the facts of this case the evidence adduced raises a reasonable doubt as to whether the breach was wilful and *mala fide*.

[17] The main submission made by the respondents was that there was no wilful disobedience of the court order. They contended that paragraph 6 of the order of Poyo Dlwati J is 'wholly inchoate' primarily because the order says nothing about the price to be charged. They contended that the court order could not have meant that the applicant can charge whatever it 'whimsically; feels like charging'. Mr Savvas submitted that the letter from attorneys acting for the first respondent on the 24th of July 2019 requesting the applicant to table 'a decent proposal' as regards the wholesale prices to be charged by the applicant in the future, was an attempt to deal with what they perceived to be unconscionable practices engaged in by the applicant. It is clear from the correspondence that no such proposal was forthcoming from the applicant. In reply, attorneys for the

[17]. References omitted.

applicant urged compliance with the order of Poyo Dlwati J and warned that an application declaring the first respondent in contempt of court would be made if the first respondent failed to purchase all its petroleum products from it. The respondents further submitted that the order of Poyo Dlwati J presupposes that the first respondent is forced to buy fuel at whatever price the applicant decides at 'its whim' to charge. They developed this argument by stating that the applicant had unilaterally inflated the wholesale price it had been charging the first respondent. Hence the conclusion of the respondents that as the order said nothing about the price to be charged, it could not be enforced.

[18] Mr Harpur, correctly, in my view submitted that this was not a case of the price being dependent solely on the will of one of the parties. The order of Poyo Dlwati J stated quite categorically that:

'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.'

The effect of this paragraph of the order was that both parties bound themselves to perform in accordance with their obligations as laid down in the franchise agreement. Clause 6.3 of the franchise agreement in respect of the price stated:

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

The parties therefore bound themselves to buy and sell petroleum products and the price was to be determined in accordance with the franchise agreement. The parties had been functioning in terms of the franchise agreement from about 2015 with the applicant supplying petroleum products and the first respondent making payments to the applicant in accordance with the invoices rendered by it. By consenting to the order of Poyo Dlwati J, the first respondent agreed *inter alia* that the pricing method previously used would continue. It agreed to pay the invoice price and therefore the contention that the price was 'left to the whim of the applicant' is not correct. The following dicta from *Shell SA (Pty) Ltd v Corbitt and another*[18] is apposite in this context:

[18] .*Shell SA (Pty) Ltd v Corbitt and another* 1986 (4) 523 (C) at 526.

‘It is clear, therefore, that what the law insists upon is that the price must be fixed in the contract itself or that it must be determinable by the application of some external standard on which the parties have agreed. If the price is agreed upon in one of those ways, the contract is valid. . . .
Reverting to the contract presently under consideration, it seems to me that the parties adopted the second method referred to by COLMAN J in the *Burroughs Machines* case *supra* as one of the two permissible ways of fixing the price. They agreed on an external standard by the application of which it will be possible to determine the price without further reference to the parties themselves. Clause 3 provides as follows with regard to the price payable in respect of gas supplied by applicant to respondents:

> "Prices according to Shell's (ie applicant's) latest price list ruling at time. Discounts as arranged."

By means of this clause the parties have, I consider, provided the machinery for ascertaining the price. They clearly contemplated sales at the applicant's usual or normal or current price for gas from time to time. A term in a contract that the purchaser will pay the price normally charged by the seller, or the ruling market price, does not make the price uncertain or undeterminable. The price is regarded as sufficiently fixed if it can be ascertained with reference to an existing fact, such as the usual price of the article in a particular shop. . . .’

I am of the view that clause 6(3) of the franchise agreement in the matter before me is analogous to the pricing clause in *Shell v Corbitt* (*supra*). The franchise agreement allowed the applicant to charge its usual, normal or current price and therefore the price was not undeterminable. The parties used this method of payment from 2015 for a number of years and then from 22nd of January 2018 to July 2019 after the granting of the order of Poyo Dlwati J. There was an external standard to determine the price and the parties expressly consented to this in the franchise agreement and again when agreeing to the order of Poyo Dlwati J. They used this external standard to buy and sell petroleum products over an extended period of time. There is thus no substance to the argument that the price was left to the whim of the applicant and neither can the order be said to be void for vagueness.

[19] The applicant claimed that the invoice price charged was determined by it in accordance with the Regulatory Accounting System (RAS) model. The respondents denied this and submitted that they were being overcharged and that the applicant was inflating prices and not charging according to the RAS model. The first respondent had a

viable remedy to address this grievance. It either could have referred this complaint of overcharging to the arbitration, chaired by Mr Kuper, or alternatively requested another arbitration in respect of the allegations of overcharging if these did not fall within the mandate and terms of reference of the arbitration presided over by Mr Kuper. It could thus have had the issue of the fairness or otherwise of the prices charged by the applicant fully ventilated before an arbitrator. The first respondent chose not to avail itself of these options but rather decided to request the applicant to table a 'decent proposal' regarding the wholesale price of fuel and when this was not forthcoming, the first respondent unilaterally decided to purchase fuel from another distributor.

[20] It is relevant to place the order of Poyo Dlwati J in its proper context. As stated earlier, the parties are embroiled in a protracted dispute with the applicant seeking to evict the first respondent from its premises. Prior to the main application being determined at first instance in July 2018 when D Pillay J granted an order evicting the first respondent, the parties agreed to the order of Poyo Dlwati J in January 2018. The order of Poyo Dlwati J was made pending the final determination of the main application and the counter application. The crux of the order, which was taken by consent, was that the franchise agreement was binding on the parties and remained of full force and effect and that the first respondent was to purchase all its petroleum products from the applicant. The first respondent abided the order of Poyo Dlwati J after the eviction order was granted by D Pillay J in July 2018. They continued to abide the order until July 2019. On the 29th of March 2019, the acting president of the SCA, Navsa JA ordered the reconsideration of the application for leave to appeal. On the 24th of July 2019, attorneys acting for the first respondent claimed that it was being overcharged and stated that unless the applicant tabled a decent proposal, it would source supplies at better prices from other sources. It subsequently purchased petroleum products from other distributors and in so doing undermined the essence of the order of Poyo Dlwati J.

[21] There is a reasonable basis for the contention made by Mr Harpur that the respondents wanted to 'have their cake and eat it.' They wanted to remain on the premises which is marketed as a Caltex service station but were seeking not to be bound

by the essence of the order of Poyo Dlwati J that the first respondent purchase all its petroleum products from the applicant and that they act in terms of the franchise agreement. I am satisfied that the conduct of the first respondent was both wilful and *mala fide*. It initially consented to and acted in accordance with the order of Poyo Dlwati J for approximately eighteen months. During this period there was no indication that the first respondent was unclear and uncertain about the price that it was required to pay for the petroleum products supplied by the applicant.

[22] Further the first respondent made no attempt to rescind or amend the order of Poyo Dlwati J and did not avail itself of the recourse to arbitration to test whether the applicant was overcharging it. The first respondent was warned by the applicant's attorneys that should it purchase petroleum products from other distributors, it would be in contempt of the order of Poyo Dlwati J. Despite being expressly warned that its proposed conduct amounted to contempt, the first respondent went ahead and purchased the petroleum products from another distributor when it was fully aware of the order preventing it from doing this. The first respondent made a deliberate decision not to abide the order of Poyo Dlwati J. The real reason for the first respondent not buying all their petroleum products from the applicant was their dissatisfaction with the price charged by the applicant and not any uncertainty about the price charged.[19]

[23] The net effect of the first respondent's conduct was that fuel purchased from other distributors was being sold as Caltex fuel. In the circumstances, I am satisfied beyond reasonable doubt that the first respondent acted in contempt of the order of Poyo Dlwati J and I am satisfied that the respondents failed to lead evidence that establishes a reasonable doubt that the non-compliance of the first respondent was wilful and *mala fide*. I am satisfied that the evidence demonstrates beyond reasonable doubt that the non-compliance was wilful and *mala fide*. It was clear, from the attempts made by the second respondent in the answering affidavit to convince the court that the breach was not wilful and *mala fides,* that he was the principal architect of the decision to contravene the order of Poyo Dlwati J. I am satisfied that the second respondent controlled the conduct,

[19]. The reasons for this conclusion are found in paragraph 25 below.

decisions made and activities of the first respondent, an artificial person, and caused it to disobey the order of Poyo-Dlwati J. It is proper and appropriate that the second respondent be committed to a period of imprisonment of 30 days. I am also satisfied that it is in the interests of justice that this term of imprisonment be wholly suspended on condition that the first respondent fully complies with the order of Poyo Dlwati J. As the respondents had alternative remedies to address their perceived grievance that they are being overcharged by the applicant and in the light of the express terms of the order of Poyo Dlwati J, I am of the view that the rule should be confirmed. The applicant had a clear right to insist, pending the final determination of the main application, that the first respondent purchase all its petroleum products from it. The first respondent had indicated that it would not do so in the future and the applicant had no other satisfactory remedy other than to approach the court for an interdict and a declaration that the first respondent was in contempt of court. I am satisfied that the requirements for an interdict have been met in this case.

**The Counter Application**.

[24] The counter application and the alternative order requested was premised on paragraph 6 of the order of Poyo Dlwati J being void for vagueness for want of a purchase price. As stated earlier in the judgment, I am satisfied that the order of Poyo Dlwati J is neither vague nor inchoate and that the price is determined in accordance with the franchise agreement. The parties agreed in the franchise agreement that the price of the petroleum products would be the invoice price charged by the applicant. This was the normal or usual wholesale price charged by the applicant. As stated in *Shell v Corbitt*, a mechanism was agreed upon to ascertain the price of the petroleum products which was to be the normal invoice price. The parties had used this mechanism in the past and the respondents knew when the order of Poyo Dlwati J was granted, by consent, that this mechanism would be used to determine the price of the petroleum products it purchased from the applicant until the main application was determined.

[25] It appears to me that the real grievance of the respondents is that they can obtain these petroleum products at more competitive prices from other distributors and that the

applicant is overcharging them. In the letter dated the 24th of July 2019,[20] attorneys for the first respondent complained that they are being grossly overcharged for supplies and asserted that the first respondent is able to source supplies at far better prices. They then went on to state that in the absence of a 'respectable proposal' which I assume was meant to read 'reasonable proposal', the first respondent would proceed to source supplies elsewhere. No mention is made in this letter about paragraph 6 of the order of Poyo Dlwati J being inchoate or void for vagueness. That assertion only emerged after attorneys acting for the applicant stated in an email[21] that the proposed course of action would amount to contempt of the order of Poyo Dlwati J. It was in response to the emails from the applicant's attorneys that attorneys for the first respondent stated that the order is invalid and incapable of implementation as no contract can exist without a price. If it was the absence of the price that in some form prevented the first respondent from complying with the order of Poyo Dlwati J, I would have anticipated that this would have featured prominently in the letter of the 24th of July 2019. I am satisfied that the order was not void for vagueness or inchoate. The price agreed upon in the franchise agreement was neither uncertain nor undeterminable or void for vagueness. In the circumstances, the counter application and the alternative order requested are dismissed.

**Various other arguments made by the respondents**

[26] Mr Savvas did not pursue these arguments with any vigour during his oral submissions but indicated that in the event that he is not successful in the main application, he stood by these arguments.

[27] The respondents applied in terms of Rule 6(15) of the Uniform Rules of Court to have paragraphs 96 to 124 of the applicant's founding affidavit struck out. These paragraphs pertain to the salient facts in the main application. I am satisfied that these paragraphs are relevant and material to the present application as they provide a context to understand the circumstances fully that led to the order being granted by Poyo Dlwati J. The summary of the salient facts in the main application enables a better and more

[20]. Page 59 of the record.
[21]. Page 62 of the record.

comprehensive understating of the importance of clause 6 of the order of Poyo Dlwati J in maintaining the status quo between the parties pending the final determination of the main application. These paragraphs are also relevant to the question of whether the rule should be confirmed. For these reasons, I am of the view that paragraphs 96 to 124 are not frivolous, vexatious and irrelevant and the application to strike out these paragraphs is dismissed.

[28] The second respondent complained that it was incorrect for the applicant to use the same case number (283\18P) in both the main application and in the contempt application. The second respondent speculated about confusion that may arise as a consequence of appeals by the use of the same case number. This is mere speculation and I have not been referred to any principle of law preventing the applicant from using the main application's case number in contempt proceedings.

[29] The second respondent submitted that as he was not a party to the main application, he should not have been cited in these contempt proceedings. It is clear that while the second respondent was not cited in the main application, he was intrinsically involved in the main application as he was a deponent throughout for the first respondent. The applicant is correct in stating that contempt proceedings would be ineffectual if only brought against an artificial person such as the first respondent. The second respondent is a director and the person controlling the activities of the first respondent. It is appropriate and proper that the second respondent be cited as a party in these contempt proceedings.

[30] The second respondent argued that this court is *functus officio* as it had previously given a judgment in this matter. Relying on the *res judicata* principle, it was argued that the second respondent cannot now in the contempt application be joined as a party. Reliance on *res judicata* is without merit. The main application and the contempt application, although linked, do not deal with the same cause of action. The main application dealt with the issue of whether the first respondent should be evicted from the premises, while the contempt application dealt with whether the first respondent had

acted in contempt of the order of Poyo Dlwati J which was made 'pending final determination of the main application.' The judgment of D Pillay J is not final as the SCA has entertained the application for reconsideration made by the first respondent. The order of Poyo Dlwati J thus remains binding on the parties. The applicant is seeking to enforce compliance with the order of Poyo Dlwati J by bringing this contempt application and not citing the second respondent in these proceedings, would render that a futile exercise as the first respondent is an artificial person. The second respondent caused the first respondent to disobey the order of Poyo Dlwati J and was thus properly cited in these proceedings. The *functus officio* argument based on the *res judicata* principle is without merit and the submission that the name of the second respondent be struck off the citation of this application is dismissed.

**Conclusion**

[31] I am satisfied that there is no basis to depart from the reasoning of Bezuidenhout J in this matter and the rule is accordingly confirmed. It is relevant to reiterate that the order of Poyo Dlwati J was made pending the final determination of the main application. Thus once the main application is determined, the order of Poyo Dlwati J will fall away as would the necessity to abide it. I am satisfied that the first respondent breached the order of Poyo Dlwati J and I am satisfied, beyond reasonable doubt, that the non-compliance with that court order was wilful and *mala fide*. The counter application to rescind the order of Poyo Dlwati J and the alternative request for a variation of the order is dismissed. To do otherwise would undermine the *raison d'etre* of the offence of contempt of court which is to prevent the authority of the court being sullied and the rule of law being undermined. I am satisfied that the second respondent caused the first respondent to act in breach of the order of Poyo Dlwati J. As the first respondent is an artificial person and as the second respondent controlled the conduct and actions of the first respondent, it is appropriate to make an order committing the second respondent to a term of imprisonment of 30 days. I am of the view that this term of imprisonment should be wholly suspended on condition that the first respondent complies fully with the order of Poyo Dlwati J.

**Costs**

[32] The applicant argued that costs should be awarded against the respondents on an attorney and own client scale. Mr Harpur drew my attention to intemperate and insulting language used by the second respondent when referring to attorneys acting for the applicant. He referred me to judgments such as *Ebisu Dealers and another v Chevron South Africa (Pty) Ltd and others*[22] where the courts indicated their displeasure with the manner in which Mr Savvas conducted what was described as his insulting style of litigation by ordering him to pay the costs *de bonus propriis* and on an attorney and client scale.

[33] The applicant obtained an order by consent from Poyo Dlwati J with which the first respondent failed to comply and did so wilfully and with *mala fides*. Being deprived of the benefit of the court order of Poyo Dlwati J, the applicant was forced to approach this court again to ensure compliance with that order. I am satisfied that as the first respondent's failure to comply was both wilful and *mala fide* and as the second respondent controlled the activities of the first respondent, they should be ordered to pay costs on an attorney and client scale. I am also satisfied that the costs should include the costs of a senior and junior counsel.

**Order**

[34] In the circumstances the rule is confirmed and the following order is made:

1 The first respondent is declared to be in contempt of Court in failing to comply with paragraph 6 of the order granted by the Honourable Madam Justice Poyo Dlwati on 22 January 2018 under case number 283/2018P;

2 The second respondent is committed to prison for a period of 30 days 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 283/2018P;

3 The term of imprisonment referred to in paragraph 2 above is wholly suspended on condition that the first respondent complies fully with the order granted by the

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[22]. *Ebisu Dealers CC and another v Chevron SA (Pty) Ltd and others* [2017] ZAGPPHC 393.

Honourable Madam Justice Poyo Dlwati on 22 January 2018 under case number 283/2018P;

4 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 granted by the Honourable Madam Justice Poyo Dlwati on 22 January 2018 under case number 283/2018P;

5 In the event of the first and second respondents failing to comply with the provisions of paragraph 4 above, then and in that event 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;

6 In the event of the first and second respondents failing to comply with either of the provisions of paragraph 4 or 5 above, then in that event the Sheriff or his duly authorised representative/s is authorised to do all things necessary to give effect to paragraphs 4 or 5 above;

7 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 client scale, the costs to include the cost occasioned by the use of a senior and a junior counsel.

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K. Govender AJ

Date of Hearing: 13th of March 2020

Date of Judgment: 21st of April 2020.