

KEBBLE v MINISTER OF WATER AFFAIRS (2007) JDR 0872 (SCA)

<p>Importance</p>	<p>This case, per Lewis JA of the Supreme Court of Appeal, must surely rank as one of the all-time lows of a developing jurisprudence on mining and the environment. The main precedent that emerges from the case is that a person can only be held liable for contempt of court where the court order is capable of implementation. In this instance, the court found that the directives issued by the Regional Director of the Department of Water Affairs and Forestry in the Free State were unclear, unintelligible and unenforceable in a number of respects. The judgment, however, is characterized by a complete blindness to the context in which the directives were issued. Firstly, that since April 2000 the remaining mines in the KOSH basin had participated in an inter-mine forum relating to the pumping of underground water and that the directives assumed that they would thus be able to reach agreement amongst themselves. As the respondent point out, no mine other than the Stilfontein Gold Mining Company (SGM) had trouble in understanding what was required. Secondly, the court’s emphasis on SGM only being in non-compliance by a certain date (30 June 2005), failed to take into account the environmental impacts of SGM’s <i>daily</i> non-compliance to extract and treat a specified amount of litres of underground water; i.e. the filling of the basin with water, and thus the creation of conditions conducive to the generation of acid mine drainage. Linking due performance to one specific date in these circumstances was thus wholly inappropriate. Thirdly, the court unwillingness to determine a standard of accountability in regard to the pumping of underground mine water, against which the directors’ mass resignation could have been evaluated, is highly disappointing. It is also a curious feature of this case is that it seems to have been decided without reference to any other legal authority.</p>
<p>Parties</p>	<p>Appellants: Former directors of Stilfontein Gold Mining Company Ltd Respondent: Minister of Water Affairs</p>
<p>Facts</p>	<p>The directors of the Stilfontein Gold Mining Company (SGM) had been held in contempt of court for failing to comply with a court order relating to a directive that had been issued by the Regional Director of the Department of Water Affairs and Forestry, Free State. This case is thus linked with the facts of <i>Harmony Gold Mining Company Limited v Free State, Department of Water Affairs and Forestry</i> 2005 JDR 0465 (SCA) and, in particular, <i>Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd & others</i> 2006 (5) SA 333 (W). The circumstances relating to the issuing of the directive dealing with the pumping of water in the KOSH basin during April 2005 are set out in the latter case. In essence, however, there were two directives which required the remaining mining companies in the KOSH basin to determine their ‘historic contribution’ to carrying responsibilities</p>

	<p>relating to the cost of collecting, removing, containing, treating underground water according to certain criteria; to conduct an environmental legal compliance audit (prior to 1 June 2005); and, on the basis of the audit, to apply for the necessary authorizations in terms of the National Water Act. A letter subsequently issued to SGM’s attorneys contained a third directive clarifying the number of litres per day which were required to be extracted from each shaft before 30 June 2005. In this letter it was also indicated that the costs of ensuring continued water pumping operations be shared equally between AngloGold Ashanti Limited, Harmony Gold Mining Company, Stilfontein Gold Mining Company and DRD Gold Limited. The directives were issued against the context of these companies having participated in the KOSH Intermine Water Forum since April 2000.</p> <p>SGM failed to comply with any of these measures. The government successfully sought a court order compelling their compliance, but this also failed to initiate any action, whereupon contempt of court proceedings were initiated. Prior to the contempt proceedings on 14 June 2005, the directors of SGM resigned <i>en masse</i>. Hussain J, in the Johannesburg High Court, nevertheless convicted both SGM and the directors, fining all the parties R15 000 each and, failing payment, to 6 months imprisonment. The appellants subsequently appealed against this decision to the Supreme Court of Appeal.</p>
Relief sought	The appellants sought to overturn the decision of the Johannesburg High Court holding them in contempt of court for failing to comply with a court order compelling them
Legal Issues & Judgment	<p>Issue 1: Were the directives incapable of implementation on the grounds that they were so vague?</p> <p>Judgment: The court held that the directives issued by the Regional Director were incapable of implementation (paras 4, 21). The ‘principal difficulty’ in relation to the directive lay in the apportionment of costs. According to the court the amount was not determined, the person to whom payment had to be made was not known, the date by which payment was to be made was not indicated (para 17). The court dismissed the Department’s contention that the other mining companies had not had similar doubts regarding the modalities of payment (para 18).</p> <p>The court also made much of the fact that contempt proceedings were initiated before 30 June 2005 (para 15). Although the directives clearly stated that action was to be initiated <i>before</i> this date, and the action entailed collecting and treating from various shafts a number of litres of underground water per day, in the court’s view the appellants had <i>until</i> 30 June 2005 to comply with the directive. Performance was only ‘due’ on this particular date (para 17). The ‘daily’ non-compliance (which would result in the basin filling with water) was thus not relevant.</p> <p>The court also agreed with the appellants that the provisions of the</p>

	<p>directives relating to the pumping of water and the maintenance of infrastructure for the management of underground water were ‘largely beyond the control of SGM’ (para 19). Similarly the court found that the requirement that SGM provide the Director with a determination of its historic liabilities for water treatment in the KOSH basin was both ‘unclear’ and beyond the control of SGM (ibid).</p> <p>The court also viewed the fact that the Department had failed to respond to the fact that SGM no longer had any directors in a negative light (para 20), The court appeared to sympathize with the fact that they had all been ‘forced’ to resign because the directive was incapable of implementation and SGM contributing to the costs of water pumping would mean that other amounts required for the rehabilitation of the environment would be jeopardized. The fact that SGM had brought the resignation of the directors to the Department’s attention indicated that the court order was not completely ignored (ibid).</p> <p>In summary, the court held that an order that a person is in contempt of court, which carries with it criminal sanctions, should only be made where the court order allegedly flouted is clear and capable of enforcement.</p>
Outcome	The court upheld the appeal, thus overruling the contempt of court order issued in the Johannesburg High Court.
Obiter	Interestingly, Lewis JA held that ‘[n]othing ... turns on their resignation prior to the hearing of the application for an order that they were in contempt of court’ (para 14). Regarding the directors’ mass resignation she held: ‘[G]iven my conclusion that the order was so unclear that it could not be implemented, it is not necessary to determine whether the directors deliberately or recklessly flouted it. Nor is there any purpose in labelling their conduct as reckless or contemptible: irresponsible conduct - if that is what their resignations as directors amount to - is not necessarily contemptible and in this case is not contemptuous (para 22).