MINISTER OF WATER AFFAIRS AND FORESTRY v STILFONTEIN GOLD MINING COMPANY LIMITED & OTHERS 2006 (5) SA 333 (W)

Importance	This case is an outstanding example of the kind of judicial approach that is needed if we are to develop a robust mining and environment jurisprudence in South Africa. Hussain J, in this case, granted an order holding the Stilfontein Gold Mining Company (Ltd) and its four directors guilty of contempt of court for failing to comply with a previous court order compelling them to comply with directives relating to the pumping of underground water issued by the Regional Director of Water Affairs and Forestry for the Free State. The court dispensed with the numerous technical arguments put forward by the respondents, holding that the directives were intelligible, that contempt proceedings were an appropriate method of enforcement of their obligations and that the financial position of the SGM and the mass resignation of its directors constituted no defence to non-compliance with the previous court order. The court's pronouncements on the latter issue, in particular, need to be taken up and used by civil society organizations and are reproduced from the relevant paragraph of the judgment at the end of this fact sheet. Unfortunately, the contempt order granted by this court was set aside on appeal in *Kebble v The Minister of Water Affairs and Forestry* 2007 JDR 0872 (SCA) – a case which probably constitutes one of the all time lows for those interested in ensuring the moral and legal accountability of mining companies as regards their environmental obligations.
Parties	**Applicant:** Minister of Water Affairs and Forestry **First Respondent:** Stilfontein Gold Mining Company Ltd **Second to Fifth Respondents:** Directors of Stilfontein Gold Mining Company **Sixth to Tenth Respondents:** Gold mining companies operating in the KOSH basin.
Facts	The facts in this case are linked to those set out in *Harmony Gold Mining Company Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* 2006 JDR 0465 (SCA) and *Kebble v The Minister of Water Affairs and Forestry* 2007 JDR 0872 (SCA). The Stilfontein Gold Mining Company (SGM) was one of a few remaining gold companies in the KOSH basin. SGM had under its control the Margaret shaft at which a daily volume of water needed to be pumped in order to prevent the water from becoming polluted as well as to prevent the flooding of shafts, and consequential loss of property and life for mines situated at a lower gradient. It appeared that SGM was no longer operational and not in a position to continue pumping the water. After the mines in the area could not reach agreement on how the costs of the water pumping could be allocated between them, the

	Regional Director: Department of Water Affairs and Forestry in the Free State, issued two directives in terms of s 19(3) of the National Water Act 36 of 1998. The directives compelled the mines to reach a solution and to submit various relevant forms of information to the department by a set date. The SGM failed to comply with the directives. The Minister of Water Affair and Forestry subsequently went to court and obtained an order (issued by Goldstein J) compelling SGM to comply with the orders of the directive. An interesting angle to this case is that the ninth respondent (one of the other gold mining companies in the KOSH basin, although it is not named) was represented by counsel who had been instructed to support the Minister's application for contempt of court against SGM. The respondents raised a number of arguments against the action to hold them in contempt of court. These included: (i) that the matter was not urgent; (ii) that the order of the court *a quo* which had directed them to comply with the directive issued by the Regional Director: Water Affairs and Forestry had not been served upon them; (iii) that the directives were intelligible; (iv) that the nature of the court order was inappropriate; (v) that SGM was not in a financial position to comply; and (vi) that all the directors of SGM had resigned. This fact sheet will only deal with items (iii) through (vi).
Relief sought	Application for a declaration that the first through fifth respondents were in contempt of court, and for imposition of suitable penalties.
Legal Issues & Judgment	***Legal Issue 1:*** Were the original directives, which formed part of the order of court compelling the respondents to comply, unintelligible as the respondents maintained? ***Judgment:*** After setting out the content of the directives issued by the Regional Director on 13 and 15 April 2005 and 7 May respectively (paras 13.1 – 13.5), Hussain J held that the meaning of the directives becomes plain once they are read together (para 13.6). The court pointed out that all the other mines in the KOSH area to which the same directives were issued had no difficulty in understanding what was required (ibid). Furthermore, the respondents could simply have sought clarity from the respondent or state attorney if they were unable to understand the objectives (para 13.7). Accordingly the directives were not unintelligible or in any way unclear, ambiguous or incapable of being understood (para 13.6).
	Legal Issue 2: The respondents argued that contempt proceedings were inappropriate because the directives imposed an obligation to pay a contribution (*ad pecuniam solvendam*) whereas the approach of the courts has been that civil contempt can only be ordered where the obligation is to do or to refrain from doing a particular thing (*ad factum praestandum*). Could a contempt order thus be issued in regard to that part of the court order that linked to an obligation to pay a contribution to the pumping costs of water in the KOSH basin? ***Judgment:*** The court noted the legal authorities whereby civil

	contempt can only be committed in the case of orders *ad factum praestandum* (e.g. *Kate v MEC for Welfare, Eastern Cape, and Another* A 2005 (1) SA 141 (E) ([2005] 1 All SA 745). The appropriate enforcement of orders *ad pecuniam solvendam*, on the other hand, was by writ of execution (para 14.1). The court, however, found that the respondents' attempt to characterize part of the directives as an order *ad pecuniam solvendam* was incorrect and fell to be rejected (para 14.6). For an order to be *ad pecuniam solvendam* it had to a relate to a judgment debt sounding in money for a judgment debt of a commercial character. For a judgment debt there has to be a judgment creditor (para 14.4). The judgment of Goldstein J could not be characterized as an ordinary commercial judgment or a judgment sounding in money. The amount payable in terms of the directives (as a shared contribution to the costs of pumping) was clearly not a judgment debt but an amount payable in terms of a directive authorized by the National Water Act 36 of 1998. The directive is the result of the exercise of an administrative function or power and the costs are payable, not to the party issuing the directive, but towards the shared costs of pumping (para 14.5). As such there was no judgment creditor (para 14.3). Moreover, the obligation to contribute to the shared costs was simply a consequence of the order to collect, extract and treat underground water. The court held that it is a fundamental feature of all mandatory relief that there may be cost implications attached to such relief. That a party ordered to perform in terms of a mandatory order may incur costs does not convert an order into one that is *ad pecuniam solvendam* (para 14.6).
	Legal Issue 3: The respondents maintained that the SGM did not have the money to comply with the directives. Certain facts were presented to the court in justification of this contention. These were materially disputed by the applicant and the ninth respondent. It was also pointed out that on the respondents' own version SGM had funds to comply with the directives for three or four months, which was in order with the directives' notion of an interim payment play to keep pumping operations going (para 15.1). Could it therefore be said that there was wilful and *mala fide* refusal to comply with the court order when a party simply cannot pay? ***Judgment:*** The court held that the order obliging the first respondent to contribute to its share of pumping was an interim one effective from 7 May 2005 to 30 June 2005 (para 15.2). As regards the financial status of SGM, the court stated that the respondents had failed in their opportunity to provide – at the relevant before Goldstein J – evidence of SGM's financial position (para 15.3). On the evidence presented to this court, however, the court found on the facts insufficient credible evidence had been placed before the court justifying a conclusion that SGM was financially incapable of complying with the court order (para 15.5). For instance, SGM's annual report for

	2004 indicated that for the year ending 30 June 2004, the company held total cash and cash equivalent in the amount of R5 639 000. Although the directors maintained that this cash had now been 'utilized' no explanation was forthcoming about how this had occurred (para 15.5).
	Issue 4: I ***Judgment:*** The court noted that after Goldstein J made an order compelling SGM to comply with the directives, they decided to launch an application for the winding-up of the company. This application was lodged and opposed by certain intervening parties. Thereafter, the respondents simply abandoned this application, filing no papers resisting the opposition and even failing to appear in court. The winding-up application was thus dismissed unopposed (para 16.2). The court held that if the directors genuinely believed that it was in the best interests of the company and its members to liquidate the company it should have acted accordingly by defending the application in the face of opposition. The fact that it did not do so was evidence that the directors knew that the winding-up was ill-conceived (ibid). It was thereafter that the directors effected their mass resignation. After an overview of the relevant provisions of the Companies Act 61 of 1973 and relevant provisions of the *King Report on Corporate Governance for South Africa* March 2002) (paras 16.3 – 16.7), the directors acted irresponsibly in merely abandoning the SGM (para 16.7). The court affirmed that at all material times the directors were under a duty to act in the *bona fide* interests of the SGM. Contrary to what the directors maintained, the court was not persuaded that their mass resignation was done in good faith and on reasonable grounds. All that the resignation had achieved was to incapacitate the directors from discharging their duties to the SGM and its members. 'This,' the court said, 'is unacceptable and the second fifth respondents cannot be allowed to merely walk away because it is convenient for them to do so' (para 16.6). The court further held that a directors of a company who, with knowledge of an order of court against the company, causes the company to disobey the order is himself guilty of contempt of court (para 16.8). In this regard the court also noted the emphasis in the *King Report* (p. 12 para 18.7) that good corporate governance requires a non-discriminatory, non-exploitative and responsible attitude toward the environment and human rights issues. The court stated: 'The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for

	profit, over the lifetime of the mine; thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation. For this reason too, the second to fifth respondents cannot be permitted to merely walk away from the company, conveniently turning their backs on their duties and obligations as directors' (para 16.9).
Outcome	The first to fifth respondents were held in contempt of court and sentenced to a fine of R15 000 each, failing payment of which to 6 months imprisonment.
Obiter	On the mass resignation of the directors, Hussain J held: 'It must be said that what the second to fifth respondents did in resigning as directors is a most unusual occurrence. I have not come across a case, in the corporate history of this country, where all the directors of a listed company resigned at once. Not surprising then that I could find no case law in this country G that dealt with this situation, nor was I able to find such a state of affairs in the English case law. This is probably because this is simply not done within the corporate world.' (para 16.1)

Section of case dealing with mass resignation of directors

Resignation of the directors

[16]
[16.1] It must be said that what the second to fifth respondents did in resigning as directors is a most unusual occurrence. I have not come across a case, in the corporate history of this country, where all the directors of a listed company resigned at once. Not surprising then that I could find no case law in this country that dealt with this situation, nor was I able to find such a state of affairs in the English case law. This is probably because this is simply not done within the corporate world.

[16.2] After Goldstein J made the order, the second to fifth H respondents decided that the first respondent was incapable, financially, of complying with the directives and of remaining viable. They therefore decided to launch an application for the winding-up of the first respondent. This application was opposed by certain intervening parties and was ultimately dismissed in Court. Here again, the second to fifth respondents, in my view, must be subject to adverse criticism. After opposition to the application for the first respondent's winding-up was made, the second to fifth respondents simply abandoned the application. They filed no papers resisting the opposition and even failed to appear in Court. When the application came to Court, there was no one present to represent the first to fifth respondents. The application was dismissed unopposed. If the second to fifth respondents genuinely believed that it

was in the best interests of the company and its members to liquidate the company, then they should have acted accordingly. In my view, the second to fifth respondents knew that the application for winding-up was ill-conceived and merely abandoned it in the face of opposition.

[16.3] Having abandoned the winding-up application, the second to fifth respondents resigned as directors on 17 June 2005. According to the directors, they resigned after seeking independent legal advice. They were advised that if, in the circumstances, they continued in office, they ran the risk of being party to reckless trading or they would be forced to manage the first respondent on the basis that it did not comply with court orders. These fears, in my view, are both unfounded and not supported by any facts before me. If the second to fifth respondents applied their minds to the directives, they would have realised that first respondent was indeed capable of compliance. The information sought in the directives was available to the first to the fifth respondents and, on the respondents' own versions, the first respondent was in possession of sufficient funds to comply with the interim payment sought in the directives. There was no risk that the second to fifth respondents would be subject to accusations of reckless trading simply because they complied with an order of Court. Indeed, if there were any recklessness, it was in the second to fifth respondents' mass resignation, thereby leaving the first respondent, a listed company, completely rudderless.

[16.4] The manner and timing of the resignations must equally be criticised. The second to fifth respondents made a decision to resign and they did. The timing of the resignations was rushed in order to meet the hearing date of this application. One does not expect, within the corporate environment, that the entire board of a public company suddenly resigns. There should, at the very least, be some form of notification. At the very least, the second to the fifth respondents ought to have called a special general meeting of the company to inform the members of their decision to resign. At least, then, the members in a meeting could be given an opportunity to decide the future fate of the company. Investors and shareholders do not expect or foresee that all of the directors of a public company will I suddenly resign with no notice. This must have a negative impact on the stock exchange.

[16.5] In terms of s 208 of the Companies Act 61 of 1973:

'(1) Every public company shall have at least two directors and every private company shall have at least one director.

(2) Until directors are appointed, every subscriber to the memorandum of the company shall be deemed for all purposes to be a A director of the company.'

In terms of art 65 contained in Table A to the Companies Act (articles for a public company having a share capital):

'65. The office of director shall be vacated if the director -

. . .

(c) resigns his office by notice in writing to the company and the registrar. . . .'

There is nothing either in the Act or the article which sets out the consequences of all directors resigning simultaneously, or which will prevent them from doing so, even if the effect thereof is to bring about a state of affairs in terms of which the provisions of s 208 are not complied with. I do not believe it was ever conceived that such a set of circumstances would materialise. A listed company can only function through its board of directors. The directors of the company are those who, in terms of its articles, are empowered to exercise all its powers other than those which in terms of the Companies Act or the articles are to be exercised by the company in general meeting. A company, being an artificial legal entity, can function only through human agencies. At any point in time, that human agency is ultimately the board of the company's directors. See Meskin *Henochsberg on the Companies Act* vol 1 at 392; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 216; *Lipschitz and Another NNO v Landmark Consolidated (Pty) Ltd* 1979 (2) SA 482 (W) . The human agency has been described as the company's 'directing mind and will'. See *Levy v Central Mining and Investment Corporation Ltd* 1955 (1) SA 141 (A) . As Viscount Haldane stated in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL):

'In the case of a fictitious person like a company, one must endeavour, as best one can, to ascertain who is or are its directing mind or minds.'

It is not in dispute that, at all material times, the second to fifth respondents were 'the directing minds' of the first respondent.

[16.6] At all material times the second to fifth respondents were under a duty to act *bona fide* in the interests of the first respondent. This is the fundamental duty which qualifies the exercise of any powers which the directors in fact have. The 'interests' in this context, are only those of the company I itself as a corporate entity and those of its members as a body. See *SA Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A) ; *Henochsberg* (*supra*) at 467. I am not persuaded that the second to fifth respondents acted in good faith upon reasonable grounds for their decision to resign. All that the second to fifth respondents achieved was merely to incapacitate themselves from discharging their duties towards first respondent and the first respondent's members. This is unacceptable and the second to fifth respondents cannot be allowed to merely walk away because it is convenient for them to do so. They accepted appointments as directors of a listed company and they thereby accepted the duties and obligations that go with it. Section 182 of the Companies Act provides for the convening of general meetings by the Registrar of Companies in circumstances where all the directors of a company cease to be directors. This section possibly caters for the eventuality where all the directors had resigned. However, this section cannot assist the first respondent in these circumstances. The second to fifth respondents suddenly resigned, all at once, an eventuality that was not anticipated, nor can it be said that it was in the best interests of the first respondent.

[16.7] Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country's economy especially in attracting new investments. To this end, the corporate community within

South Africa has widely, and almost uniformly, accepted the findings and recommendations of the King Committee on Corporate Governance - see the *King Report on Corporate Governance for South Africa* - March 2002. Regarding the board of directors, the *King Report* states the following:

'The Board is the focal point of the corporate governance system. It is ultimately accountable and responsible for the performance and affairs of the company. Delegating authority to board committees or management does not, in any way, mitigate or dissipate the discharge by the board and its directors of their duties and responsibility.' (See *King Report* at 22, para 2.1.1.) The conduct of the second to fifth respondents flies in the face of everything recommended in the code of corporate practices and conduct recommended by the King Committee. In my view, the second to fifth respondents acted irresponsibly in merely abandoning the first respondent, a listed company of which they were the directors.

[16.8] A director of a company who, with knowledge of an order of court against the company, causes the company to disobey the order is himself guilty of contempt of court. By his act or omission such a director aids and abets the company to be in breach of the order of court against the company. If it were not so, a court would have difficulty in ensuring that an order *ad factum praestandum* I against a company is enforced by a punitive order. See *20th Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another* 1978 (3) SA 202 (W) at 203C - D; *Metlika Trading Ltd and Others v Commissioner, SARS* 2005 (3) SA 1 (SCA) in para [51] at 19. The second to fifth respondents argued that the applicant failed to show that the directors did anything to 'cause the company to disobey the order'. I disagree with this. The second to fifth respondents, by resigning as they did, certainly caused or were the principal cause of the first respondent's failure to comply. For this, they must be held responsible.

[16.9] The King Committee, correctly, in my view, stressed that one of the characteristics of good corporate governance is social responsibility. The Committee stated as follows:

'A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits, such as improved productivity and corporate reputation, by taking those factors into consideration.' (See *King Report* March 2002 p 12 para 18.7.) The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for profit, over the lifetime of the mine; thereafter they may simply walk away from their environmental obligations. This simply cannot be

permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation. For this reason too, the second to fifth respondents cannot be permitted to merely walk away from the company, conveniently turning their backs on their duties and obligations as directors. I am persuaded that the second to fifth respondents, notwithstanding their sudden resignation, must be held responsible for the first respondent's failure to comply with an order of court.