



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 12441/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 19 MARCH 2021
SIGNATURE [REDACTED]

In the matter between:

ASSEN IRON ORE MINE (PTY) LTD

Applicant

and

FRANCO LE ROUX MINING (PTY) LTD

Respondent

J U D G M E N T

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020 and revisions thereof. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This is the judgment in an urgent application wherein a small mining company seeks to enforce compliance of an agreement reached with a mining services supplier.

[2] The agreement between the parties:

2.1 On 11 February 2021, that is little more than a month ago, the applicant, Assen Iron Ore Mine (Pty) Ltd, an emerging black-owned and – run mining company entered into a written mining services agreement with the respondent, Franco Le Roux Mining (Pty) Ltd.

2.2 The terms of the agreement relevant to the current dispute are the following:

“2.1. The Service Provider delivers and/or provides the service for the purpose of crushing calcific and iron ore and the plant usage thereof ...

3.2 The Service Provider warrants that it had sufficient knowledge and expertise in all aspects of the services and has the level of skill and experience to perform the services. The Services Provider shall use its best endeavours, care and skill in performing all its obligations in terms of this agreement ...

4.1 Notwithstanding the date of signature by all parties, this agreement shall commence on the effective date and shall continue for 12 (twelve) months period or until final delivery of the services per this agreement ...

7. Equipment

7.1 *The below equipment shall be utilised from time to time as the specific needs require and may accordingly be amplified and/or reduced as may be required from the specific circumstances from time to time:*

<i>Quantity</i>	<i>Equipment</i>	<i>Capacity</i>	
1	Jaw Crusher	22 000 kg	224 kw
2	Cone Crusher	33 000 kg	310 kw
1	4.8 Screen	32 000 kg	88 kw
1	2.8 Screen	29 000 kg	98 kw
1	Excavator with hydraulic breaker	25 ton	
3	Front-end-loaders	20 800 kg	163 kw
1	Excavator	35 ton	
1	Excavator	25 ton	

7.2 *The equipment may be used at the site identified and may not be removed therefrom ...*

Fees and remuneration

9.1.1. *Site establishment being payable upfront: R 450 000,00; AGREEMENT TO PAY (R 250 000 upfront and R 200 000 ONCE EQUIPMENT ON SITE) ...*

9.1.4 *The Service Provider shall, within 2 (two) weeks after payment of the site establishment fee, have the necessary plant equipment and within 3 (three) weeks of such payment, crushing will commence.*

12 *TERMINATION, CANCELLATION AND BREACH OF AGREEMENT*

12.1. *This agreement will commence on the effective date and remain in full force and effect for the duration of the agreement subject to the parties' rights of termination as provided in clause 4 and as provided in clause 11.*

12.2. *The Services Provider may terminate this agreement by giving 30 (thirty) calendar days' notice to the COMPANY, provided that nothing shall preclude either party from terminating this agreement summarily for any cause recognized in law as sufficient ...*

12.4. *COMPANY and Service Provider, viz-a-viz may, by 24 (twenty-four) hours written notice of termination to the other party, terminated this agreement and claim damages r elect to enforce this agreement if, in party's sale discretion, the party:*

11.4.1. *has abandoned this agreement or breached a material term of this agreement*

11.4.2. *has breached any other terms of condition of this agreement and has failed to remedy the breach within a period of 2 (two) days after receiving written notice of the breach*

11.4.3. *has persistently or flagrantly neglected to carry out its obligations under this agreement ...*

15.1 *Upon termination of this agreement, the COMPANY shall return to Service Provider all property belonging to Service Provider, including but to limited to any equipment, plant equipment, books ...*

2.3 The “COMPANY” is a reference to the applicant and the “Service Provider” is a reference to the respondent. The effective date was 11 February 2021 being the date on which the Respondent signed the agreement. The agreement envisaged some 20 000 tons of ore to be crushed and a schematic version of the processes, annexed to the agreement, indicated integrated use of the screens and made provision for stockpiling of ore and crushed products. The agreement contained an arbitration clause and made provision for interim relief pending finalisation of any arbitration proceedings. The reference in clause 12.1 to a clause 11, dealing with termination, was clearly a reference to the sub-paragraphs of clause 12.4, numbered 11.4.1 to 11.4.3.

[3] Chronology

The following is a summary of the chronology of events leading up to the hearing of the urgent application:

- 3.1 On the date on which the applicant had signed the agreement, 10 February 2021, it already paid the initial R250 000,00 contemplated in clause 9.1.1 of the agreement.
- 3.2 On the 11th of February 2021, the respondent delivered a diesel bund at the applicant’s premises.
- 3.3 On 15 February 2021, the respondent delivered the “jaw crusher”.
- 3.4 On 17 February 2021, the respondent requested that the applicant provide accommodation for six of the respondent’s employees, which the applicant did, at its own cost.

- 3.5 On 19 February 2021, the respondent confirmed that it had delivered the “jaw crusher”, 2 stone crushers, a diesel tank and an excavator, a stacker conveyer, a water bowser, “jojo” tanks and another container on site.
- 3.6 On 25 February 2021 (that is two weeks after the signing of the agreement), the respondent undertook to deliver the following outstanding equipment the next day: steelwork for the 4,8 big screen and three front-end loaders. Of this, only the steelwork for the screen was delivered, but not the rest and neither was the screen assembled.
- 3.7 As a result of the delays caused by the respondent’s failure to proceed with bringing its equipment on site so that crushing can begin as agreed, the applicant sent a letter to the respondent in 2 March 2021. As the respondent sought to rely on the contents of this letter for justification of its later conduct, I quote the contents thereof in full:

“Good day Mr F Slabbert,

Assen is currently under immense production constraints, hence there was a need to get additional iron ore from different streams. We have entered on this crushing and screening contract in order to rectify and resolve our product output decline.

However, were not satisfied with delays and other late deliveries that have led to the crushing process not to start on the agreed date of 1st March 2021. We have explained and agreed with your project managers the importance of resuming crushing on the 1st of March 2021, until now, after 2 weeks:

- *3 front end loaders have not arrived on site as per agreement*

- *Work delay on a 4.8 32t screen (operators still waiting for Metso to set up)*

This shows that we have lost ±1920t product (or R1, 4m) from our mine production schedule because of these delays, from yesterday and today 2nd March 2021, both 12 hr shifts, respectively. Assen will not be able to recover from this opportunity cost, as we are still greatly cash constrained.

It is only fair that Franco Le Roux to offset at least R 50k (fifty thousand Rand) per day from the outstanding site establishment while there is crushing delays.

I hope this sincere letter finds attention and courtesy from your company”.

- 3.8 There was no response from the respondent and neither was there any compliance with its obligations. Instead, the respondent’s attorneys wrote a letter on 3 March 2021, advising, inter alia, as follows: “Writer confirm (sic) that our office act on instruction from Franco Le Roux Mining (Pty) Ltd (our client) in the abovementioned matter and on (sic) whose behest and instruction this letter and demand is addressed to you. Our office has been placed in possession of your correspondence dated 2 & 3 March 2021 (there was only one letter) ... Our office hold instruction that Assen Iron Ore Mine (PTY) Ltd (“Assen”) has failed, refused and/or neglecting (sic), alternatively is not in a financial position to attend to payment of the upfront site establishment amount, which to date has not been attended to, notwithstanding formal request for payment, constituting a formal and material breach of contract between the parties. It has further been confirmed, on Assen’s own account that Assen is experiencing great cash

constraints, causing great concern of Assen's foreseeable financial circumstances and payment obligations. The above, inter alia, constitute sufficient ground(s) to cancel the agreement, both as breach of contract and common law. In the circumstances, our office has been advised that the agreement ... has been formally cancelled by our client, alternatively cancelled herewith. It is our instruction to advise, which we hereby do, that our client intend (sic), and will attend to the site in order to collect and remove its equipment should Assen persist with its attitude and further prohibit our client, our office shall approach the court on an urgent basis for the required relief ...".

- 3.9 Hereafter the applicant in writing reminded the respondent of the terms of the agreement and that the second of the two site establishment payments is only payable once all the equipment has been delivered (and "established") on site. A full breakdown of the calculation of the losses suffered as a result of the respondent's delays, in the amount of R 34 400 200.00, was furnished. The applicant demanded that site establishment take place and, if not, that the dispute be referred to arbitration.
- 3.10 The respondent did not proceed with site establishment and via a letter from its attorneys, dated 4 March 2021, confirmed its purported cancellation and demanded the return of its equipment in the following terms: *"you may proceed to arbitration, should you wish, at your own peril, after our client has removed its equipment from site"*.
- 3.11 The next day, Friday 5 March 2021 the applicant wrote that it *"... would like to find solutions to the challenges we are currently experiencing and which has delayed the crushing to commence on the agreed times as per*

signed agreement ...". As a solution to resolve the impasse, a proposal was made that the applicant rent the necessary outstanding equipment, that the costs thereof be set off against the second site establishment payment and that the parties proceed thereafter to implement the agreement. A meeting with the respondent was requested by Monday 8 March 2021. The respondent, however, would have nothing of this and still wanted to remove its equipment, before any negotiation, which the applicant refused.

3.12 This led the applicant to draft the current urgent application in respect of which both the founding affidavit and notice of motion had been respectively deposed to and signed on 9 March 2021. The urgent application was issued on 10 March 2021. In it, the applicants, inter alia, claim an interdict preventing the removal of equipment from site and an order forcing compliance with the agreement. This was done on the basis that the respondent's purported cancellation of the agreement had been unlawful.

3.13 The interdictory relief had, in the meantime and unbeknown to the applicant, been thwarted by the respondent who had, ex parte and without notice, obtained a provisional order in the Magistrates Court for the attachment and removal of the equipment by the sheriff. By the time the urgent application was heard in this court on 16 March 2021, the respondent had executed the interim order (the return date thereof is 31 March 2021).

[4] Evaluation

4.1 On the papers before the court, no demand was ever issued by the respondent to the applicant for payment of the second portion of the site established fee of R 200 000. The applicant was not placed in mora and

the notice requirements of clause 11.4.2, on which counsel for the respondent vainly sought to rely on in oral argument, had not been fulfilled.

4.2 There was no dispute that, with reference to clause 9.1.1., that the aforesaid second payment was in any event only payable after the necessary equipment had been brought on site and “established” thereon. This is also how clause 9.1.4. had to be interpreted, i.e by reading the word “first” therein. No contrary contention was made by the respondent, neither in the papers, nor in argument. The respondent’s counsel, however valiantly tried to argue that the 4.8 screen and the three front-end loaders was not necessary at the time (with reference to the introduction part of clause 7) but this contention was not supported by the evidence. In fact, the respondent’s undertaking of 25 February 2021 referred to in paragraph 3.6 above, states exactly the opposite.

4.3 The grounds on which the respondent, through its attorney, sought to rely on as justification for its cancellation of the agreement, did not exist:

- The applicant did not “fail, refuse and/or neglect” to make the second payment. The payment was not yet due and there was never any failure or refusal as alleged.
- The allegation of financial inability to make payment, held “on instruction” by the attorneys, is without foundation.
- The reference to cash constraints of the applicant, was a reference by the applicant to the pressure placed on it by the damages suffered as a result of the respondent’s breaches. The applicant even referred to lost opportunity costs. The later letter set out the details of the losses. Had

the respondent performed, not only would the losses have been avoided, but the respondent itself would have made money.

- There was no statement by the applicant that it could not pay the establishment costs. At best for the respondent, the applicant merely suggested that it would be “fair” in the circumstances to set off some of the losses against the site establishment costs. This was a suggestion, not a demand and never put on the basis that it would be necessary to do so otherwise the amount would or could not be paid.
- What “common law breach” the attorney otherwise had in mind, was not explained.
- There was no demand made by the respondent prior to cancellation, as alleged.

4.4 The consequences of the above is that the cancellation was unlawful and not authorised in terms of the agreement.

4.5 From the facts, it appears that it was in fact the respondent who had breached the agreement.

4.6 The clandestine fashion in which the respondent had approached the magistrates court for an order for the return of the equipment, amounts to an abuse of process. In the founding affidavit in that court, the respondent’s deponent even stated that the respondent (in this application) had “complied with its obligations in terms of the agreement” and that the current applicant had breached the agreement by having failed to pay the establishment costs “notwithstanding proper request and/or demand to do so”. On the papers before me, both these statements are false. The current

respondent's deponent even went as far as to allege that the applicant (a company) had committed a deed of insolvency. This is equally not supported by the evidence.

4.7 Equally unsupported by any evidence (save for that referred to in the last sentence of paragraph 3.11 above) is the respondent's deponent's statement to the magistrate that it had attempted to reach an amicable solution, but to no avail and the allegation that, should the applicant get wind of the clandestine application, it will "dismantle, attempt to dismantle, strip, hide or attempt to hide the equipment".

4.8 The applicant has sufficiently otherwise satisfied the requirements for an interdict, but the difficulty is the nature of the relief claimed, now that the respondent has already contrived to remove the equipment. However, once the cancellation is found to have been unlawful, as I have already found above, an order holding the respondent to the terms of the agreement (prayer 4 of the applicant's notice of motion) will require it to abandon reliance on the order that it has "sneaked" (in colloquial terms), return the equipment as well as the 4.8 screen and the three front end loaders. This will, in turn oblige the applicant to make payment of the balance of R 200 000.00 establishment fees. The damages will have to be a dispute for another day and another court than the urgent court.

[5] Costs

The general rule is that costs should follow the event and I find no grounds to deviate therefrom. Moreover, the respondent's conduct, particularly that referred to in paragraphs 4.6 and 4.7 above, in an attempt to frustrate the applicant's rights or an attempt to avoid its own obligations, justify a punitive costs order, as claimed by the applicant.

[6] Order

1. It is ruled that his matter is urgent as contemplated in Rule 6(12).
2. The respondent is ordered to forthwith abide by and comply with the terms and conditions of the agreement entered into between the parties on 11 February 2021 and in particular the site establishment obligations contained therein, including the delivery of the 4.8 screen and three front-end loaders and other equipment contemplated in clause 7 of the said agreement.
3. The respondent is ordered to pay the costs of this application on the scale as between attorney and client.


 N DAVIS
 Judge of the High Court
 Gauteng Division, Pretoria

Date of Hearing: 16 March 2021

Judgment delivered: 19 March 2021

APPEARANCES:

For the Applicant:	Adv. A Mahafha
Attorney for Applicant:	BM Mudzuli Attorney, Johannesburg c/o Ernest Nemusombori Attorney, pretoria
For the Respondent:	Adv. S F Fisher-Klein

Attorney for Respondent: Phillip Venter Attorney, Pretoria