



Reportable:	NO	YES
Circulate to Judges:	NO	YES
Circulate to Magistrates:	NO	YES
Circulate to Regional Magistrates:	NO	YES

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: 1285/2018

In the matter between:

**THETA MINING PROPRIETARY LIMITED
LONRHO MINING SA PROPRIETARY LIMITED**

**First Applicant
Second Applicant**

and

**SCARLET SUN 15 PROPRIETARY LIMITED
THE SYDNEY ON VAAL COMMUNAL PROPERTY
ASSOCIATION
DEREK SOREN CORNS
HARRY JAMES LANGEVELD
THOMAS TOMMY SWARTZ
ENRICO IRVIA**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent**

And

In the counter- application between:

**SCARLET SUN 15 PROPRIETARY LIMITED
And**

Applicant

THETA MINING PROPRIETARY LIMITED
LONRHO MINING SA PROPRIETARY LIMITED
MINISTER OF MINERAL RESOURCES
REGIONAL MANAGER, NORTH CAPE REGION
PRINCIPAL INSPECTOR OF MINES,
NORTH CAPE REGION

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

JUDGMENT

O'BRIEN AJ

1. The farm Drooge Veldt is in the Barkley West region. On this farm, the first applicant is a holder of a mining right to mine alluvial diamonds. The first applicant appointed the second applicant as the mining contractor to mine for alluvial diamonds on the farm.

2. The farms Than and Mozib adjoins Drooge Veldt and are under the control of the first and second respondents. The first respondent is a holder of a mining right over both Than and Mozib. The second respondent is a communal property association. The directors of the first respondent are the third to fifth respondents. The sixth respondent acts as the general manager of the first respondent. These farms are owned by the National Government and are held in trust pending transfer of those farms to the second respondent under a successful land claim.

3. In order for the applicants to exploit their mining right on the farm, they have to make use of a road that travels across Than farm. This, they have been doing since 2009.
4. On 01 September 2016, the first and second respondents denied the applicants access to the roads traversing Than farm. The consequence of this prevention compelled the applicants to launch urgent proceedings to obtain access to Drooge Veldt through a road on Than farm.
5. The applicants were successful. On 09 February 2018 Lever AJ made an order ("the access order") the relevant parts of which reads as follows:

"(a) subject to compliance with the sixth respondent's reasonable and necessary health and safety requirements, the applicants and their employees, contractors, invitees and guests are entitled to traverse the Than farm by making use of the road marked B-A-D, traversing the Than farm as described on Annexure "NM1" to the Notice of Motion in this matter, for the purpose of accessing the public road R311 ("the public road") from Droogeveltdt farm identified on Annexure "NM1" of the Notice of Motion and for the purpose of accessing Droogeveltdt farm from the said public road.

(b) save for the reasonable and necessary health and safety requirements referred to above, the first and sixth respondents

are interdicted and restrained from taking any steps to prevent or hinder the applicants and their employees, contractors, guests and invitees from making use of the road marked B-A-D on the locality plan annexed to the Notice of Motion marked "NM1".

6. Not satisfied with this outcome, the respondents applied for leave to appeal, which application for leave to appeal was dismissed with costs on 18 May 2018. Bearing in mind that the order granted by Lever AJ, although final in effect, was an interim order. It seems the respondents were advised not to file a petition to the Supreme Court of Appeal.
7. Under the court order, the applicants attempted to gain access to Drooge Veldt but were prevented by the first respondent. The first respondent, not happy with the court order cited mine, health and safety requirements to be adhered to before granting the applicants access. In order to avoid unnecessary litigation, the applicants tendered to comply with all the health and safety requirements of the respondents. Furthermore, they gave an indemnification to the first respondent accepting responsibility for accidents caused other than through the first respondent's negligence. Stated differently, the employees of the first respondent, should they be injured as a result of a breach of the mine, health and safety regulations the applicant would indemnify them.

8. Not satisfied with this, the respondents had another string to their bow. The fourth respondent wrote a letter to the principal inspector of the Department of Mineral Resources ("the DMR") to solicit his support in an attempt to avoid complying with the access order. The principal inspector of the DMR indicated to the first respondent that it could not exempt the first respondent from compliance with the Mine Health and Safety Act 29 of 1996 ("the MHS Act").
9. On 30 May 2018, the court order was served on the respondents. On 01 June 2018, the applicants launched the current proceedings against the respondents. They sought orders that each of the respondents are in contempt of the access order; declaring their proposed health and safety requirements and indemnification given to the respondents as complete and adequate, and giving the respondents time to purge the content of the access order. From 01 to 06 June 2018, the respondents, however, revisited their mine, health and safety requirements by insisting that it not only applies to the applicants' employees but also extending it to the applicants' contractors, guests and invitees who may visit Drooge Veldt.
10. On 08 June 2018, the respondents filed a counter-application. In that application, the current applicants are the first and second respondents. The third, fourth and fifth respondents were also cited as parties to the application. The third to fourth respondents in the counter-application took no further part in these proceedings.

11. For convenience sake, I shall refer to the parties as described in the main application. In its counter-application, the first respondent, on an urgent basis, requested an order that the reference to reasonable and necessary health and safety requirements in the court order dated 09 February 2018 includes the granting of an exception in terms of s79 of the MHS Act; that the first respondent be exempted from liability in terms of s79 of the MHS Act; their health and safety requirements apply to any vehicle and/or persons including contractees and invitees of the applicants traversing the road; that the reasonable and necessary health and safety requirements referred to in the court order dated 09 February 2018 be included in that order as set out in Annexure "A" to the counter-application and, that the execution of the court order be stayed pending the granting of an application to the first respondent in terms of s79 of the MHS Act. Annexure "A" to the counter-application refers to the reasonable and necessary health and safety requirements for any person who traverses on road B-A-D.
12. Before dealing with the merits of the main application and the counter-application, it would be apt to set out the subsequent events that ensued pursuant to the granting of the order on 09 February 2018.
13. After the access order, the parties entered into various correspondence. I do not intend to deal with every letter written by the legal representatives of the respective parties. Suffice to say, from the correspondence it appears, as will become apparent later, that the first respondent has applied obfuscatory and dilatory tactics in order to circumvent the access order.

14. As early as 13 February 2018, the applicants' manager attempted to contact the sixth respondent in order to access the roads as per the access order. Instead of doing that, the first respondent's attorneys addressed a letter to the applicants setting out what is regarded as the minimum requirements in terms of the MHS Act.
15. On 19 April 2018, the applicants what they believe are reasonable and necessary health and safety requirements tendered specific health and safety measures for the acceptance by the first respondent. On top of that, the applicants tendered an indemnity in favour of the respondents. On 25 April 2018, the respondents' attorneys noted that they will take instructions from their client and will revert. However, on the same day, the fourth respondent addressed a letter to the principal inspector of mines stating that the access order is in breach of the conventions of the MHS Act and solicited the intervention the DMR to explain to the applicants all the responsibilities and accountabilities in terms of the MHS Act. In response to that letter, the DMR on 26 April 2018 wrote to the first respondent informing it that an exemption cannot be granted unless an application is made in terms of s79 of the MHS Act and the Minister grants permission.
16. In answer, the first respondent indicated that it intends to apply for an exemption in terms of s79 of the MHS Act. In its view, the access order cannot impose an obligation on them unless an exemption for traversing the road is granted.

17. On 21 May 2018, the applicants addressed a letter to the respondents informing them about non-committal of the tendered measures and that s79 of the MHS Act is irrelevant. The respondents were warned that should they fail to respond to the tendered measures contempt proceedings would be launched. On 22 May 2018, the applicants again failed compliance with the access order.
18. On 23 May 2018, the respondents' attorneys repeated their call that s79 should be incorporated as a reasonable and necessary health and safety requirement failing which, they would be entitled to refuse to comply with the access order.
19. On 24 May 2018, the applicants requested compliance with the access order again. Notwithstanding this request, the respondents' attorneys indicated that access would be refused and persisted with their argument that an s79 application should be dealt with under reasonable and necessary safety requirements.
20. On 01 June 2018, the applicants filed this application seeking declaratory relief based upon the tendered measures. First, the respondents is in contempt of court. Second, if the Court should find that the respondents had not acted willfully or *mala fide* a declarator be issued setting out the proposed health and safety requirements. However, between the period 01 to 06 June 2018, the respondents have changed tack and made revisions to its various health and safety protocols.

21. On 02 June 2018, the respondents filed their s79 exemption application.
22. On 09 June 2018, when delivering their replying affidavit in the counter-application, the applicants proposed further revised tendered measures. This the respondents did not accept. Furthermore, on that day the respondents visited the access road together with the DMR in an attempt to obtain an exemption concerning s79 of the MHS Act. However, this was denied by the DMR.
23. After the respondents filed their counter-application, they included their revised mine, health and safety requirements contained in a lever arch file to which the applicants had not had sight of nor access to. Despite asking for inspection of the file, the respondents consistently refused until a formal notice forced them in terms of rule 35(12) calling for the lever arch file.
24. On 25 June 2018, based on the revised safety requirements of the respondents, the applicants tendered further measures in an attempt to comply with the former's revised requirements. On 28 June 2018, the respondents rejected the applicants' revised tendered measures.
25. On 26 June 2018, the respondents in no uncertain terms stated that they would not accept the applicants' revised tendered measures. This was after the applicants agreed with most of the respondents' safety requirements.

The legislative framework:

26. The MHS Act was introduced on 15 January 1997. The objects of the MHS Act is, in essence, to provide for the health and safety of persons at mines; to require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines; to give effect to the public international law obligations of the republic that concern health and safety at mines; to provide for employee participation in matters of health and safety through health and safety representatives and the health and safety committee at mines; to provide for effective monitoring of health and safety conditions at mines; to provide for enforcement of health and safety measures at mines and to provide for investigations and enquiries to improve health and safety at mines. Moreover, the MHS Act seeks to promote a culture of health and safety in the mining industry; the training in health and safety in the mining industry and cooperation and consultation on health and safety between the State, employers, employees and their representatives.
27. What is readily apparent from the objects of the MHS Act is the emphasis on health and safety. Self-evidently, a high premium is to be applied on health and safety at mines. There can be no doubt that the mining industry deals with large machinery and dangerous working conditions. As such, health and safety are given the highest priority.
28. Section 2(1)(b) of the MHS Act reads as follows:

“(1) the employer of every mine that is being worked must –

(a) ...

(b) *ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety of themselves or any other person; ..."*

29. The MHS Act makes provision for a chief executive officer who must make sure that reasonable steps are taken to ensure that the functions of the employer as contemplated in the MHS Act are correctly performed (s2A).
30. In terms of s5 of the Act, an employer must maintain a healthy and safe mine environment. Employers must identify the relevant health hazards and assess the related risks to which persons who are not employees may be exposed and must ensure that persons who are not employees but who may be directly affected by the activities at the mine are not exposed to any hazards to their health and safety.
31. In sum, the MHS Act provides for a whole range of safety measures, safety equipment, safety policies, codes of practice and the provision for safety training. It also clearly stipulates what safety and health measures must be taken when assessing risks, the medical surveillance of employees and the submission of medical reports and exit certificates.
32. Regarding the duties of manufacturers and suppliers who are not employees, the MHS Act is obvious what must be done about health and safety (s21).

33. Notwithstanding the stringent health and safety requirements, the MHS Act does contain an exemption in s79. It reads as follows:

“(1) The employer of a mine may request an exemption from the Minister, and if satisfied that the employer has consulted appropriately with the affected employees or their representatives, the Minister may exempt the employer from any or all the provisions of this Act or from a notice or instruction issued under this Act. An exemption may be –

(a) General or particular;

(b) For any period; and

(c) On any conditions that provide the same overall protection which would result from the full application of this Act.

(2) When an exemption is granted under sub-section (1), the Minister must issue a certificate of exemption to the employer, specifying the scope, period and conditions of the exemption.

(3) The Minister may amend or withdraw a certificate of exemption at any time.

(4) The employer must prominently and conspicuously display any exemption granted, or deemed to have been granted, under this section to the employees to read.”

34. Against this background must be determined whether the respondents were in contempt of the access order.

Contempt of Court:

35. For purposes of this judgment, it is not necessary to deal with the distinction between criminal contempt and civil contempt. In **Pheko v Ekurhuleni City 2015 (5) SA 600 (CC)** at para 28 the Court stated that the purpose of contempt proceedings is to impose a penalty to restore the court's honour and dignity when a previous order was granted.
36. Court orders are meant to be obeyed. The compliance with court orders is fundamental to the effective administration of justice which should jealously be protected. To denigrate court orders would be counter-productive and severely impact the court's ability to fulfil its constitutional obligations.
37. An applicant in contempt proceedings must prove:
- (a) the existence of a court order;
 - (b) service of that order;
 - (c) non-compliance with the order; and
 - (d) the non-compliance must have been willful or *mala fide*.
- (Pheko (*supra*) endorsing Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)).**
38. It is common ground that requirements (a), (b) and (c) have been proven. The only issue is whether the respondents willfully or *mala fide* failed to comply with the access order. Although the respondents in their counter-application sought various relief, their argument stripped to the bone was in essence that they did not act willfully when they failed to comply with the access order. Secondly, they submit that the s79 application should be part of the

reasonable and necessary safety mechanisms to be complied with before they would allow the applicants to continue mining. I now turn to these issues.

39. After the access order was granted, the respondents through their attorneys, in correspondence set out what they regarded as reasonable and necessary safety measures. When the applicants wanted to comply with the access order and showed their willingness to comply with any reasonable and necessary safety demand of the respondents, the latter change tact and between 01 to 06 June 2018 started to revise its existing mine, health and safety requirements. In my view, this was an attempt to thwart compliance with the access order.
40. When the respondents lodged their counter-application, reference was made to "*one lever arch file*" which contained various protocols and policies which must be complied with as part of their stipulated mine, health and safety requirements. This was the first time that reference was made to the various protocols and policies of the respondents. One can only ask why at such a late stage the respondents sought to present their protocols and policies. Since the granting of the access order, there was much correspondence between the parties regarding what the reasonable and necessary safety requirements of the respondents were. At no stage during these negotiations, did the respondents refer to the lever arch lever file containing the protocols and policies. What is also striking, the applicants had to apply to the Court in terms of Rule 35 to gain access to the file.

41. What is noteworthy, the respondents made changes to their protocols on policies. Notwithstanding this obstructionist conduct, apparently attempting to stifle the applicants, the latter tendered revised measures and proposed a draft consent order containing its revised tendered measures and clarifying their position concerning the indemnity. The respondents rejected this. What this shows, is that the applicants have acted reasonably and at all relevant times attempted to fulfil the safety requirements of the respondents. This notwithstanding, the respondents allow community members to collect wood from the farm, hunt and fish without applying mine, health and safety requirements. The first respondent applies double standards in the execution of their mine, health and safety requirements
42. The respondents' opposition to the revised tendered measures of the applicants is that their mine, health and safety requirements which apply to all employees should also apply to the applicants' employees, contractors, guests and invitees. They contend that the tendered measures of the applicants are incomplete and inadequate. Furthermore, the indemnity was not conclusive.
43. The context and objectives of the MHS Act clearly distinguish between the health and safety of employees and persons at mines. In s2(b) of the MHS Act a distinction is drawn between the situation where employees can perform their work without endangering the health and safety of themselves or any other person. Section 5 of the MHS Act also makes the distinction between employees and persons who are not employees at the mines about

maintaining a healthy and safety mine environment. In s8(c) an employee must establish a policy concerning the protection of persons who are not employees but who may be directly affected by the activities at the mine. The codes of practice again refer to employees and other persons who may be affected by activities at the mine, and there is an obligation on an employer to prepare and implement a code of practice on any matter affecting the health or safety of employees and other persons. There is a duty on every employee at a mine to take reasonable care to protect the health and safety of other persons who may be affected by any act or omission of an employee. These provisions clearly show a distinction between employees at a mine and persons who visit there. One can think of suppliers, manufacturers and guests attending the mine. In these circumstances, the employer must have separate safety policies and protocols concerning persons who are not employees of the mine.

44. The respondents contend that everyone (applicants' employees, contractees, invitees) using the mine should be regarded as the employees of the first respondent. This interpretation offends the provisions of the MHS Act. In my judgment, having regard to the provisions set out in this paragraph, where reference is made to persons it means persons other than employees.
45. The applicants have provided an annexure which is annexed to the notice of motion which refers to the policies contained in the lever arch file of the respondents. Furthermore, they have set out conditions when and how the employees of the applicants should access the road in question. These

tendered measures, in my view, are reasonable and necessary that will protect not only the applicants but also the respondents.

46. Did the respondents act wilfully or *mala fide* when not complying with the access order? In my opinion, the respondents were within their rights to get clarification as to the meaning of reasonable and necessary safety measures. This they did, and to which the applicants responded and eventually exceeded but for a few exceptions. Regrettably, the access order did not state what reasonable and necessary safety measures entail. It was therefore incumbent on the parties to clarify those terms.
47. The respondents' reliance on s79 of the MHS Act is misplaced. As counsel for the applicants puts it: *it is the antithesis of reasonable and necessary safety requirements*. It is noteworthy that no reference was made during the access application to a s79 exemption. Furthermore, it was only at a late stage when the respondents grasped at the s79 extension. The reasonable and safety measures cannot work in unanimity with s79 because they exclude each other. The purpose of s79 is to allow a mine to be excused from specific health and safety measures. In my judgment, the reliance on a s79 application was an afterthought. Incidentally, the DMR when attending the farm on 09 July 2018 reported it would not grant a s79 exemption.
48. The applicants have provided the Court with the reasonable and necessary health and safety requirements which are mirrored upon that of the respondents. The indemnification is complete and adequate. In that regard,

they ask a declaratory order. (**Matjhabeng Local Municipality v Eskom Holdings Limited and Others 2018 (1) SA1 (CC)** at para 54) The reliance on s79 cannot be upheld. Accordingly, the counter-application must be dismissed with costs.

I grant the following order:

1. It is declared that the reasonable and necessary health and safety requirements as referred to in and for purposes of paragraphs 1(a) and (b) of the order annexed as "FA3" to the founding affidavit are those contained in Annexure "A" to this order, inclusive of the manuscript additions, deletions and amendments, save that:
 - 1.1 paragraph 2.18 is included in Annexure "A" that provides "the COPS, SOPS and Policies in the lever file dated and filed 20 July 2018 will apply;"
 - 1.2 those persons who are traversing the Route B-A-D on no more than two occasions per month and who do not drive or use their own transport:
 - 1.2.1 may access the Route when transported by an authorised employee of the applicants;
 - 1.2.2 may not utilise their own transport to access the Route;
 - 1.2.3 other than being obliged to comply with paragraph 1.1, 1.3, 1.5, 2.2(4) and 2.14 of Annexure "A" and filling out a medical form upon entering the Route B-A-D outlining their current medical conditions, need not comply with Annexure "A".
2. It is declared for purposes of implementing the order, the indemnity in paragraph 77 of the founding affidavit is sufficient save that the reference to

"the tendered measures" is a reference to the health and safety requirements described in the preceding paragraph.

3. The relief sought in prayers 2 and 4 of the applicants' notice of motion in the main application is postponed *sine die*.
4. The applicants are granted leave to again set down the main application on an urgent basis if the respondents do not comply with the order.
5. The respondents are to pay the costs of the main application, jointly and severally, the one paying the others to be absolved.
6. The counter-application is dismissed with costs.


S C O'BRIEN AJ

Date of hearing: 08 August 2018

Date of Judgment: 31 August 2018

Obo Applicant: Adv B.M Gillbert

Instructed by: Duncan and Rothman Inc.

Obo Respondent: Adv C.N Van Heerden

Instructed by: Van Der Wall Inc.

