Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

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

CASE NO.: 2406/2016
Date heard: 10-11-2016
Date delivered: 02-12-2016

In the matter between:

LICIANO COAL (PTY) LTD **Applicant**

And

ASSMANG LTD **1st Respondent**

OCHRE SHIMMER TRADE AND INVEST 78 (PTY) LTD **2nd Respondent**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. On 10 November 2016, after hearing argument in this application which was brought on an urgent basis, I made the following orders:

"1) That first respondent restore the applicant's access to the property known as FARM DOORNFONTEIN 446 forthwith;

2) That first respondent be interdicted and restrained from refusing or in any way prohibiting the applicant access to the property known as FARM DOORNFONTEIN 446; and

3) That first respondent pay the costs of the application on the party and party scale."

I indicated that I would provide reasons for the orders in due course. These now follow.

2. The applicant Liciano Coal (Pty) Ltd, entered into a written agreement with the second respondent Ochre Shimmer Trade and Invest 78 (Pty) Ltd (Ochre Shimmer), which held a prospecting right over the property of the first respondent Assmang (Pty) Ltd (Assmang), on 12 May 2014 and in terms of which Ochre Shimmer conferred use and enjoyment of its prospecting right over the property to the applicant.

3. During 2015 Ochre Shimmer purported to cancel the agreement with the applicant due to non-compliance by the applicant with certain of the terms thereof and locked the applicant out of the property. This led to the applicant bringing an urgent application before Pakati J on 12 June 2015 under case no 1060/15 for *inter alia* access to the property. Pakati J on 21 August 2015 held (in the main) that Ochre Shimmer had prematurely cancelled the agreement, having not complied with

the requisite notice to remedy the breach before cancellation in terms of Clause 8.2 of the agreement between the applicant and Ochre Shimmer and made the following orders:

1. *The first respondent, Ochreshimmer, is ordered to comply with its obligations under and in terms of the agreement between the applicant, Liciano Coal, and the first respondent dated 12 May 2014 set out in Annexure "A" to the Founding Affidavit.*
2. *The respondents, Ochreshimmer, Assmang and Spi Mining are ordered to give the applicant access to the prospecting area in respect of which the first respondent is the holder of a prospecting right granted by the South African Department of Mineral Resources under Protocol No. 075/2009 conferred in terms of section 20 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (as amended).*
3. *The applicant is ordered to comply with its obligations in terms of the agreement, and in particular to make payment to the first respondent of the sum of R1 387 700.00 plus VAT, such payment to be made within 30 (thirty) days of this order, into the trust account of the first respondent's attorneys.*
4. *The aforesaid relief, save for any payments made by the applicant to the first respondent, operate as an interim interdict pending the outcome of the action instituted by the applicant against the first respondent under Case No. 15827/2015 on 29 April 2015 out of the South Gauteng High Court, subject to the following conditions:*
   - *4.1 That in the course of carrying out the prospecting works under and in terms of the agreement the applicant is ordered to provide the first respondent with weighbridge reports accounting to the first respondent for all ore removed from the said prospecting area;*
   - *4.2 That the applicant gives an observer appointed by the first respondent access to the prospecting site at any reasonable time to inspect the applicant's weighbridge reports: Provided that the first respondent's attorney gives the applicant's attorney at least 12 hours' notice of an intended inspection setting out the name of the person who will carry out the inspection and the date and time of the proposed inspection;*
   - *4.3 That the applicant makes timeous payment to the first respondent of all amounts due to the first respondent under and in terms of the agreement for the period of the operation of this interim interdict.*
5. *The first respondent is ordered to pay the costs of this application.*
6. *The applicant is ordered to pay to the first respondent, Ochreshimmer, the wasted costs of 02 June 2015."*

4. In the application before Pakati J, Assmang was cited as the second respondent by virtue of its being the owner of the property and the concomitant interest it might have had in the matter. Assmang did not oppose that application and abided with the decision of the court.

5. In terms of paragraph 3 of the order of Pakati J, the applicant had to make payment to Ochre Shimmer in the amount of R1 387 700.00 plus VAT within 30 days of the order.

6. The applicant in its founding affidavit herein, deposed to by Ms Licia Motsepe, the sole shareholder of the applicant, states that due to financial constraints such payment could only be made to Ochre Shimmer during September 2016, almost 1 year and 1 month after the date of the order, therefore 1 year late.

7. During the time before payment the applicant had been denied access to the property – which the applicant had accepted. However after payment had been made and when applicant attempted to access the property on 18 October 2016, it discovered that the entrance gate was locked and access denied by Assmang. During a telephonic conservation with the chief executive officer of Assmang, Mr Mark Oosthuizen, Motsepe was informed that the applicant will not be allowed access to the property.

8. Motsepe states that she thereafter tried on numerous occasions to engage with Oosthuizen regarding access, but that

Assmang's stance remained the same despite the order of Pakati J and the applicant's compliance therewith. In the mean time the applicant's losses in terms of equipment it had sourced to commence prospecting amount to R35 000,00 per day and it estimates loss in productivity at R4 million per month as a result of Assmang denying it access to the property. This situation is compounded by the fact that the agreement between Ochre Shimmer and the applicant expires on 24 January 2017, which at the time the application was launched left the applicant with less than three months in which to exercise its rights in terms of the agreement.

9. No relief is sought against Ochre Shimmer - which the applicant states has actually assisted it in regaining access. Ochre Shimmer, the second respondent herein does not oppose this application.

10. Assmang in its opposing papers deposed to by Oosthuizen, avers that the order of Pakati J has lapsed due to non fulfilment of the condition contained in paragraph 4 read with subparagraph 4.3 thereof. In addition it avers that the applicant had entered into two agreements subsequent to the order of Pakati J in which the applicant assumed several obligations prior to it being re-admitted to the property – which agreements the applicant failed to disclose in the founding papers.

<u>The order of Pakati J</u>

11. Assmang contends that since payment of the amount of R13 87 700.00 plus VAT had been made a year late, there had been non-compliance with the condition contained in sub-paragraph 4.3 of the order resulting in the order of Pakati J having lapsed.

12. On a proper reading of paragraph 4 of the order however, it excludes the payment of the amount of R1 387 700.00 from the operation of the interim interdict. The payments referred to in sub-paragraph 4.3 are payments which would become due during the period of the operation of the interim interdict, which was granted pending the outcome of an action instituted in the South Gauteng High Court. These payments do not appear to be an issue since the applicant in any event did not pursue its access to the property and its operations until it had paid the amount of R1 387 700.00 plus VAT. Assmang cannot rely on the applicant's late payment of the above amount for its refusal to allow the applicant access to the property. Payment of the stated amount has a bearing only on the applicant and Ochre Shimmer. Should the applicant, for whatever reason, fail to make such payment within the stated time, Ochre Shimmer's remedy would be to enforce the order by execution. It certainly would not mean that the order had lapsed.

13. Whilst on the topic of the order of Pakati J, it should be mentioned that *in casu* the applicant sought orders that

Assmang and Oosthuizen be held in contempt of that order and that a sanction be imposed as a result of such contempt. I refused to grant these orders on the basis that the applicant had not shown that Assmang's and/or Oosthuizen's non-compliance with the order had been both wilful and *mala fide*. In my view there can be no doubt that the disobedience of the order was wilful, but as was held in *Fakie NO vs CCII Systems* (Pty) Ltd 2006 (4) SA 326 at 333 (paragraphs 9 and 10):

> "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).*
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> 10) *These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."*

<u>The subsequent agreements</u>

14. These refer to firstly, an agreement reached between the applicant and Ochre Shimmer following upon a meeting held by their representatives on 7 October 2016. The written document emanating from this meeting is titled Heads of Agreement and it was recorded as a working document to monitor the resumption

of bulk sampling as per the existing MOA (memorandum of agreement) and court order. The second agreement is alleged to be contained in the minute of a meeting held between applicant, Ochre Shimmer and Assmang on 19 October 2016.

15. As far as the first mentioned agreement is concerned, it should be noted that Assmang is not a party thereto. That agreement was obviously entered into between Ochre Shimmer and applicant to regulate their relationship as prospecting right holder and contractor after payment of the outstanding money had been received by Ochre Shimmer and prospecting could resume. Assmang cannot rely on a breach of an agreement (if any) to which it was not a party in order to deny the applicant access to the property.

16. Regarding the meeting attended by all three parties on 19 October 2016. As is apparent from the minute, the meeting was chaired by Oosthuizen who restated Assmang's contractual obligation towards Ochre Shimmer and stated Assmang's intention to deal with Ochre Shimmer only, although it would honour court orders between the applicant and Ochre Shimmer.

17. Oosthuizen also raised certain *"breaches"* of contract relating to the Access agreement entered into between Assmang and Ochre Shimmer, which Assmang expected Ochre Shimmer to rectify before any prospecting would be allowed on the property. (The issues raised pertinently by Assmang in this

application related to a railway crossing which Transnet had prohibited from being used by heavy vehicles, the fencing off of the mining area and rehabilitation of the site as per the Environmental Management Plan (EMP) and the Access agreement. I will revert to these issues.)

18. The minute of this meeting records that Ochre Shimmer's representative acknowledged the contractual shortcomings and agreed to address all issues

19. It is recorded that during this meeting the applicant represented by Motsepe; agreed that they would offer a solution to the stockpile issue; confirmed that the fence be erected; and committed to the rehabilitation plan *"and the timeline completion date of 24 January 2017."*

20. Despite having recorded that Assmang would deal solely with Ochre Shimmer on issues of contractual obligations, the above-mentioned undertakings by the applicant are now what Assmang expects the applicant to comply with before it will allow access to the property.

21. The Access agreement between Assmang and Ochre Shimmer provides in clause 14 thereof for the procedure to be followed in the event of breach of contract.

22. In terms of clause 14 of the agreement the aggrieved party should by written demand give the party in breach 14 days

notice to remedy the breach. Should the parties be unable to resolve the dispute, provision is made for mediation and if that fails, arbitration.

23. I think one can safely assume, no mention being made by Assmang in its opposing affidavit of putting Ochre Shimmer or, for what its worth, the applicant on terms as provided for in clause 14 of the agreement, that the provisions of clause 14 have not been complied with. What Assmang is in fact doing is to side-step the existing agreement between itself and Ochre Shimmer on the basis of some vague undertakings and commitments made by the applicant, while Oosthuizen himself acknowledges that the contractual obligations are between Assmang and Ochre Shimmer. This cannot be allowed.

24. Though not strictly necessary for purposes of this application, I deal briefly with the breaches alleged by Assmang since I allowed argument thereon.

The issue of the railway crossing

25. In its replying affidavit the applicant has attached correspondence with Transnet from which it appears that Transnet would be willing to assist should heavy vehicles have to cross the railway line. That should put to rest any concern Assmang has regarding the railway crossing.

The issue regarding the fencing of the mining area

26. The Access agreement between Assmang and Ochre Shimmer provides that whenever deemed necessary Ochre Shimmer erect a fence around the mining area to provide protection against the entry into such area of small or large livestock. This is typically an issue covered by clause 14 of the agreement and should be dealt with accordingly.

Rehabilitation of the site.

27. The EMP submitted by Ochre Shimmer in support of its application to the Department of Mineral Resources for a prospecting right, estimates the duration of final rehabilitation of the site at 3 months. Assmang contends that the rehabilitation process should in terms of the EMP have commenced on 24 October 2016 i.e. 3 months before the expiry of the contract between Assmang and Ochre Shimmer. The stance taken by Assmang is that the applicant could not be allowed to start rehabilitation when it should in fact have commenced the rehabilitation process. This EMP which Assmang so heavily relies upon, does not prohibit prospecting during the prospecting phase and it in fact states that rehabilitation will be done concurrently with prospecting. In any event the Access agreement between Assmang and Ochre Shimmer (clause 7 thereof) provides for rehabilitation to take place within 60 days of termination of the agreement, for whatever reason, failing which Assmang would be entitled to employ a third party to attend to the rehabilitation, the costs thereof to be paid by Ochre Shimmer. The Access agreement also records that

Ochre Shimmer has procured a financial guarantee in favour of the Department of Minerals and Energy as security for its environmental obligations.
This reason for denying the applicant access to the property is in my view insupportably.

28. Mr Alli who appeared for Assmang, argued in addition that the applicant is not entitled to interdictory relief since it has an alternative remedy, that of a claim for damages against Assmang. In *Setlogelo v Setlogele* 1914 AD 221 the requisite is stated as *"the absence of similar protection by any other ordinary remedy".* While it may be that a claim for damages is an alternative remedy, it is not necessarily a bar to the granting of an interdict. (See *Peri-Urban Areas Health Board v Sandhurst Gardens* 1965(1) SA TPD *Health Board v Sandhurst Gardens* 1965(1) SA TPD 683 at 684 G.) Would a claim for damages constitute similar protection of the applicants rights? I think not. It must be noted that the granting or refusal of an interdict is discretionary. Given the history of this matter, Assmangs obstructive attitude and the continuous violation of the applicant's rights I see no reason why the applicant should be put through the expense and delay of an action for damages when an interdict is the obvious remedy.

29. I now turn to the issue of urgency. Assmang has denied that the matter is urgent and if found to be so it contends that the urgency is of the applicant's own making. Firstly in making payment as per paragraph 3 of Pakati J's order one year late

and secondly by waiting approximately one month and one week after making such payment before bringing this application. As already stated herein the applicant has explained that it was not in a position financially to make payment to Ochre Shimmer before it did so. I have no reason not to accept the explanation. Regarding the period after payment, the applicant states that it had secured equipment for its operations from 18 October 2016. Two and a half weeks later, when negotiations with Assmang proved fruitless, this application was launched. Having regard to the expiration date of the contract I was of the view that this application was indeed urgent.

Costs

30. The applicant being substantially successful, there existed no reason to depart from the rule that costs follow the result. The applicant however sought a punitive cost order against Assmang. An award of attorney and client costs is however not lightly granted, and if granted it would be on occasion where the opposing party had displayed dishonesty, improper conduct or fraud – generally *mala fides*. I am not of the view that this is a proper case to award a punitive cost order.

The above are the reasons for the order of 10 November 2016.

CC WILLIAMS

JUDGE

For Applicant:	Adv. MJ Cooke Makgahlela Mashaba Attorneys c/o Mervin Joel Attorneys
For 1st Respondent:	Adv. Y Alli Edward Nathan Sonnenbergs c/o Duncan & Rothman Attorneys