

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 055281/2023

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.

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DATE

In the matter between:

TAU LEKOA GOLD MINING COMPANY

Applicant

And

NICOLAR (PTY) LTD

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J:

[1] This matter served before me in the Urgent Court on the 27 June 2023 and on the 17th July 2023 I granted the Respondent the orders as prayed for. On the 14th August 2023 I furnished reasons for the orders granted.

[2] The Applicant Nicolor now seeks leave to appeal the judgment and orders. The grounds of appeal are set out in the Applicant's Amended Notice of Application dated the 29th August 2023.

[3] The grounds of appeal are the following:

3.1 That this Court erred in law by not striking the matter off the roll as it was not urgent.

3.2 That this Court erred when it ignored the fact that given the history of the matter and concessions made by the Applicant in correspondence dated May 2023 that a factual dispute exists on the interpretation of the Agreement thus rendering the matter incapable of being resolved on papers.

[4] The provisions of Section 17(1)(a) of the Superior Courts Act 10 of 2013 read as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

(a)...

- (i) The appeal would have a reasonable prospects of success; or
- (ii) There is some other compelling reason why the appeal should be heard including conflicting judgements on the matter under consideration.

(b) The decision sought on appeal does not fall within the ambit of Section 16(2)(a).”

[5] The first ground of appeal relates to whether I correctly made a ruling that the application was urgent and thus enrolled same for hearing in accordance with Rule 6(12). The Applicant maintains that urgency is self-created.

[6] It is easy for a judge safely to dispose of an urgent application by striking it from the roll for lack of urgency without fear of being clearly wrong. However, the real result is that litigants who approached Court like in this matter to seek protection are in effect deprived of their right of access to justice.

[7] The Court in **IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981 (4) SA 108 C** at 112G-113A held as follows:

“The Courts power to abridge the times prescribed and to accelerate the hearing of the matters should be exercised with judicial discretion and upon sufficient and satisfactory grounds being shown by the Applicants. The major considerations normally and in these two (2) applications are three (3) in number viz the prejudice that the Applicants might suffer by having to wait for a hearing in the ordinary course. The prejudice that other litigants might suffer if the applications were given preference and the prejudice that the Respondents might suffer by the abridgement of the prescribed times and early hearing.”

[8] In terms of Rule 6(12) an application is considered “urgent” when a litigant will not obtain substantive redress at a hearing in due course. If the redress would not be substantive the matter falls to be determined as a matter of urgency. The Supreme Court of Appeal in **Commission; South African Revenue Service v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at (a)** concluded as follows:

“Urgency is a reason that may justify deviation from the times and forms the Rules prescribed. It relates to form, not substance and is not a prerequisite to a claim for substantive relief.”

[9] In this matter the relief sought by the Respondent Tau Lekoa is to enforce an undertaking in a contract. That contract is the only manner in which the Respondent secures the protection of its rights. Any delay in obtaining a hearing will result in the Respondent forfeiting that right.

[10] The Applicant maintain that urgency is self-created and not brought timeously or expeditiously in view of letters dated the 6th April 2023 and 14th April 2023 in which the Respondent had threatened litigation but did nothing until the 8th June 2023 when the urgent application was launched.

[11] A litigant who prior to approaching Court on urgency makes effort and attempts to settle an impasse cannot be accused of delay and thus self-creating urgency. The SCA in **Transnet Ltd v Rubenstein 2006 (1) SA 591 at 603 B-C** conclude as follows:

“The application was thus urgent because of date for cancellation specified by Transnet was looming. Rubenstein cannot legitimately be criticised for attempting to settle the matter before resorting to litigation. Counsel representing Transnet submitted that the explanation given by Rubenstein should have been in the Founding Affidavit. I disagree. It formed no part of his cause of action on the merits. It was also not incumbent upon him, when dealing with the question of urgency in terms of Uniform Rules 6(12) to anticipate the Complaint made by Transnet.”

[12] The Respondent’s Founding Affidavit at paragraph 17 and 18 sets out attempts it made to amicably resolve the issue without litigation and failed. I accordingly reiterate my finding that urgency was not self-created.

[13] The second ground of Appeal relates to whether this court erred in not taking into consideration that there existed serious disputes of facts incapable of being resolved on the papers.

[14] I need not deliberate further on this aspect as I stand by my finding as appear in paragraph 17 to 21 of the judgement. In short the Applicant failed to set out what those dispute of fact were.

[15] In the result I remain unpersuaded that the appeal would have reasonable prospects of success nor are there in my opinion compelling reasons why the appeal should be heard.

ORDER

(a) The Application for Leave to Appeal is dismissed.

(b) The Applicant is ordered to pay the Respondent's taxed party and party costs including costs of Counsel.

Dated at Johannesburg on this day of October 2023

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 16 OCTOBER 2023
DATE OF JUDGMENT : 18 OCTOBER 2023

FOR APPLICANT : ADV RIP SC
INSTRUCTED BY : DLA PIPER SOUTH AFRICA (RF) INC.

FOR RESPONDENTS : ADV BOTHMA
INSTRUCTED BY : VAN COLLER BLOM INC