

*IN THE HIGH COURT OF
GAUTENG DIVISION,*



*SOUTH AFRICA
JOHANNESBURG*

CASE NO: 55273-2021

1. Reportable: No
2. Of interest to other judges: No
3. Revised

Wright J
2 November 2023

In the matter between:

GFE-MIR ALLOYS AND MINERALS SA (PTY) LTD

APPELLANT

And

MOMOCO INTERNATIONAL LIMITED

RESPONDENT

FULL COURT APPEAL - JUDGMENT

The Court

1. The appellant, GFE bought metal from the respondent, Momoco. GFE took delivery of the metal, used it and made a profit. That was between 2011 and

2014. GFE has not yet paid Momoco. Momoco obtained an international arbitration award against GFE. On 2 June 2023, Mudau J granted an application by Momoco to enforce the award.

2. On 24 August 2023, Mudau J delivered judgment in two applications. He dismissed GFE's application for leave to appeal and he granted Momoco's application, under section 18(3) of the Superior Courts Act, 10 of 2013 enforcing payment by GFE pending further appeal by GFE. The learned judge ordered payment by GFE, not to Momoco but to its attorneys to be held in trust pending due prosecution by GFE of the appeal.
3. Before us is an appeal, by GFE under section 18(4)(iii) as of right and as a matter of extreme urgency against Mudau J's order in favour of Momoco made under section 18.
4. It is common cause that GFE timeously submitted an application for leave to appeal the order of Mudau J (dismissing leave to appeal) to the SCA and that Momoco still needs to deliver an answering affidavit and then GFE may reply. Thereafter, the SCA will make a decision. All of this may take time.
5. The present appeal is heard as a matter of extreme urgency and it necessarily follows that judgment needs to be given as a matter of extreme urgency. If this is not done, the right of GFE to a hearing as a matter of extreme urgency is rendered hollow.
6. We would not now grant an order with reasons to follow. Litigants and their legal representatives are entitled to the reasons for an order. Reasoning, manufactured after an order is granted, to justify the earlier order, is a different concept to the reasons for the order. What is a judge to do if he or she grants an order and later thinks that the order was wrong? There might then be pressure on the judge to force the reasoning to fit the order. That would be unfortunate. This judgment will necessarily be concise.
7. The order of Mudau J was final and accordingly, under section 18(1) his order is suspended pending appeal unless Momoco can show exceptional circumstances why the order should operate pending appeal. Under section 18(3), Momoco needs also to show, on a balance of probabilities, that it will

suffer irreparable harm if the order of Mudau J is not put into effect pending appeal and Momoco needs to show that GFE will not be irreparably harmed if the order is given effect to pending appeal.

8. Momoco says that there are exceptional circumstances in its favour in that, among other things, South African courts should recognize and enforce arbitration awards, local and foreign. Momoco says that public policy calls for such recognition and that the present appeal litigation by GFE is just a time buying stratagem by GFE and is therefore an abuse of court process which should not be countenanced by a South African court. Momoco points to the long delay in the matter.
9. Momoco relies on a number decided cases including the decision in *Incubeta Holdings and Another v Ellis and Another (2013/ 30879) [2013] ZAGPJHC 274; 2014 (3) SA 189 (GSJ) (16 October 2013)* at paragraph 27 where it was held that “*The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of ‘exceptional circumstances’* “.
10. GFE resists, saying that Momoco is a foreign peregrinus with no assets in South Africa. Bare allegations are made that Momoco evades tax in the UK. GFE says, by way of a bald allegation that if it pays the debt it will be complicit in tax evasion by Momoco. Bald allegations do not give rise to real disputes and the impression we gain from reading GFE’s answering affidavit is that it is just trying to buy time.
11. In an answering affidavit in the section 18(3) application, GFE’s deponent says “*GFE’s position remains unaltered. Until such time as Momoco can demonstrate to it that it is not evading tax and that there is no substantial risk of GFE being prosecuted on the basis of complicity, it will not pay.*” This statement is bold and defiant. In effect, GFE is saying, quite wrongly that a mere arbitrator’s award or a court order is not sufficient to trigger an obligation to pay. GFE seeks to add fulfilment of its own, extraneous requirement before it will pay. In our view, this statement, in the context of the matter as a whole, makes the circumstances exceptional. On GFE’s version, Momoco will wait for payment until GFE feels like paying. In this scenario, Momoco is denied

substantial relief pending appeal and the harm to Momoco is irreparable, pending appeal.

12. In *University of the Free State v Afriforum and Another* (929/2016) [2016] ZASCA 165; [2017] 1 All SA 79 (SCA); 2018 (3) SA 428 (SCA) (17 November 2016) at paragraph 15 it was held that the prospects of success on appeal are relevant in deciding whether or not to grant the exceptional relief. In our view, GFE's prospects on appeal are weak.
13. There can be no prejudice or irreparable harm to GFE pending appeal as the order is to pay the money to Momoco's attorneys in trust.
14. While the three requirements which Momoco needs to prove on a balance of probabilities are separate they should not each be considered in a vacuum. The order that the money be held in trust by Momoco's attorneys provides, in our view a fair and sensible end result to the enquiry as a whole.

ORDER

1. The appeal is dismissed with costs including those of two counsel.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

I agree

Siwendu J

Judge of the High Court

Gauteng Division, Johannesburg

I agree

Senyatsi J

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 11 October 2023

DELIVERED : 2 November 2023

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