

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 55273/2021
NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

24.08.23

In the matter between:

GFE-MIR ALLOYS AND MINERALS SA (PTY) LTD

Applicant

And

MOMOCO INTERNATIONAL LIMITED

Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail, uploading to Case lines and release to SAFLII. The date and time for hand down is deemed to be 14h00 on 24 August 2023.

Flynote: Leave to appeal – section 17 of Superior Courts Act 10 of 2013 – the threshold for leave to appeal – refusal of.

Civil Procedure – Appeal – implementation of appealed order – section 18(3) of Superior Courts Act 10 of 2013.

Summary: The applicant sought an order declaring that the operation and execution of the order ("the execution order") is not suspended and will continue to be operational and executed in full whether there are any applications for leave to appeal and appeals or whether there is any petition for leave to appeal against said order.

Held: that section 18(3) requires a party making the application in terms of that provision must prove the presence of irreparable harm to the applicant, who wants to put into operation and execute the order and the absence of irreparable harm to the respondent, who seeks leave to appeal. The requirements of the section restated.

JUDGMENT

MUDAU, J:

- [1] There are two applications before this Court. First, an application for leave to appeal at the instance of GFE-MIR Alloys and Minerals SA (Pty) Limited (GFE) the order granted by this Court recognising and enforcing a foreign arbitral award stipulated in the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Model Law) and the International Arbitration Act.¹
- [2] Secondly, an application in terms of section 18(3) of the Superior Courts Act²(the Act) at the instance of Momoco International Limited (Momoco) for an order declaring that the operation and execution of the order ("the execution order") is not suspended and will continue to be operational and executable in full whether or not there are any applications for leave to appeal and appeals, or whether or not there is any petition for leave to appeal against said order.
- [3] Section 17(1)(a) of the Act provides that leave to appeal may only be granted where the court is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason the appeal should be heard, including conflicting judgments on the matter under

¹ 15 of 2017.

² 10 of 2013.

consideration. It is trite that an appeal lies only against a court's order and not its reasons.³

[4] I do not intend to deal with the grounds for leave to appeal *seriatim*. Properly distilled, however, GFE contends that this Court was wrong by not finding that Momoco had the onus to establish that the recognition and enforcement of the order would not be against public policy. In this regard, the court had to undertake a primary inquiry, which places no onus on a respondent, to determine whether recognising or enforcing the award would be contrary to public policy of the Republic. GFE contends that this Court was wrong by not finding that section 18(1)(a)(ii) of the International Arbitration Act enjoined the court to protect the public policy of South Africa as opposed to section 18(1)(b) which places an onus on the respondent. GFE places reliance on the authority of this Court's judgment (per Senyatsi J) in *Industrius DDO v IDS Industry Service and Plant Construction South Africa (Pty) Ltd*.⁴ There, Senyatsi J held, correctly that "*the onus is on the party seeking the resistance of the enforcement of the arbitral award to allege and prove any of the grounds set out in s18 of the Act and the Model Law*".

[5] Section 17 of the International Arbitration Act is relevant. It provides thus:

"A party seeking the recognition or enforcement of a foreign arbitral award must produce:-

(a)

(i) the original award and the original arbitration agreement in terms of which an award was made, authenticated in a manner in which foreign documents must be authenticated to enable them to be produced in any court; or

(ii) a certified copy of that award and of that agreement; and

(b) a sworn translation of the arbitration agreement or arbitral award authenticated in a manner in which foreign documents must be authenticated for production in court, if the agreement or award is in a language other than one of the official languages of the Republic: Provided that the court may accept other documentary evidence regarding the existence of the foreign

³ *SA Reserve Bank v Khumalo* (235/09) [2010] ZASCA 53; 2010 (5) SA 449 (SCA) at para 4.

⁴ *Industrius D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* (2020/15862) [2021] ZAGPJHC 350 (20 August 2021).

arbitral award and arbitration agreement as sufficient proof where the court considers it appropriate to do so”.

There is no disputing that Momoco complied with its obligation in terms of section 17 of the Act.

- [6] GFE contends that the effect of payment in South Africa of a foreign arbitral amount accommodating a tax evasion scheme will be contrary to the public policy of the Republic as it is public policy in the Republic that courts will not enforce arbitral awards that will have the effect of supporting a scheme of tax evasion.
- [7] GFE maintains that it is perfectly entitled to rely on this dilatory defence until Momoco demonstrates that the payment to it will not offend the public policy of the Republic. GFE relies on the authority of, inter alia, *Cool Ideas 1186 CC v Hubbard and Another*⁵ and *Blacher v Josephson*.⁶
- [8] In *Cool Ideas* it was found by the majority of the justices that as the award violated a statutory prohibition backed by a criminal sanction, it was contrary to public policy and unenforceable. Similarly, in *Blacher* the full court concluded that enforcing an arbitral award endorsing unlawful credit agreements would subvert National Credit Act [34 of 2005] and for that reason, such award would be against public policy.
- [9] Both these cases are distinguishable and do not come to GFE’s aid. It is well established that where a party seeks to avoid contractual consequences on the basis that they are contrary to public policy, that party and not the party enforcing the agreement bears the onus.⁷
- [10] As Momoco points out, the defence in relation to tax evasion in the United Kingdom was considered by the tribunal and by this Court and was rejected as being irrelevant. It remains irrelevant in the present proceedings and any other proceedings which would implicate the enforcement of the underlying contracts, the arbitral award, and the execution order.

⁵ (CCT 99/13) [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

⁶ 2023 (3) SA 555 (WCC).

⁷ *Beadica 231 CC v Trustees, Oregon Trust and Others* (CCT 109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 37.

[11] As this Court pointed out in para 27 of the main judgment, which is the subject of the leave to appeal:

“there is no illegality in relation to the underlying agreement or the award. None was suggested. Nor is there any suggestion that the main transaction agreement with the arbitration clause was concluded with the intention of committing an illegal act requiring public policy considerations”.

[12] This Court followed precedent of this Division in *Commissioner of Taxes, Federation Rhodesia v McFarland*⁸ and held that:

“[courts of the Republic] have no jurisdiction to entertain legal proceedings involving the enforcement of the revenue laws of another State”.⁹

and that:

“[t]he imposition of a tax creates a duty that is not to be likened to any other debt. The fiscal power is an attribute of sovereignty”.¹⁰

[13] In light of the above, it follows that GFE’s application for leave to appeal must fail. There is no reasonable prospect of success on appeal nor is there any compelling reason to subject this matter to an appeal.

Section 18(3) application

[14] In terms of section 18(1) of the Superior Courts Act, the ordinary effect of the pending application for leave to appeal is that a court’s order is suspended. But section 18(3) empowers a court to order otherwise. The principles applicable to an application in terms of section 18(3) were pointed out by this Division in *Incubeta Holdings (Pty) Ltd v Ellis and Another*,¹¹ a judgment by Sutherland J (as he then was). At para 16, it was held:

⁸ 1965 (1) SA 470 (W).

⁹ Id at 471D.

¹⁰ Id at 473H.

¹¹ *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) endorsed by the SCA in *Ntlemeza v Helen Suzman Foundation and Another* (402/2017) [2017] ZASCA 93; 2017 (5) SA 402 (SCA) at paras 35-36 and in *University of the Free State v Afriforum and Another* (929/2016) [2016] ZASCA 165; 2018 (3) SA 428 (SCA) at paras 9-10.

“It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- First, whether or not ‘exceptional circumstances’ exist; and
- Second, proof on a balance of probabilities by the applicant of —
 - o the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
 - o the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.”

[15] In this matter it is not in dispute that GFE received the goods consisting of the core wire, utilised those goods in its business, retained those goods, made a profit thereon and has not returned the goods or tendered return of said goods to Momoco. It has refused to pay the debt for a period of at least 12 years. In opposing this application, GFE contends that the arbitration award, which has been made an order of court is a judgment sounding in money. The fact that the money claim originates from an international arbitration does not alter nor should influence the inquiry whether Momoco has satisfied the section 18(3) requirements. GFE contends that there's nothing exceptional in the money judgement Momoco seeks to enforce pending the appeal.

[16] In *Incubeta*¹² Sutherland J held, with which I agree that:

“[27] In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. 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’.”

Further at para 28 Sutherland J said:

“The plight of the victor alone is probably all that is required to pass muster. Nonetheless, I am not unconscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture. A court order ought not to be lightly allowed to evaporate, a fate which, seems to me, would tend to undermine the role of courts in the ordering of social relations.” [emphasis added]

¹² Id.

[17] As counsel for Momoco submitted, the International Arbitration Act, which provides for the enforcement and recognition of foreign arbitral awards ensures that foreign arbitral awards will be recognised and enforced by countries who are parties to the Convention, thus recognising an effective dispute resolution process of international commercial disputes.

[18] There is an added consideration, and that is, the all-important public policy consideration and constitutional imperative of *pacta sunt servanda*. Apart from the considerations referred to above, there is also an overriding public policy consideration that the courts of South Africa enforce and recognise foreign arbitral awards, save in the circumstances provided for in the Act. As informed by the Constitution and its values, public policy also demands that arbitration awards, which give effect to arbitration agreements should generally be enforced by our courts.

[19] In *AB and Another v Pridwin Preparatory School and Others*¹³ the SCA set out the principles governing private contracts and public policy as follows:

“[27] The relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established. It is unnecessary to rehash all the learning from our courts on this topic. It suffices to set out the most important principles to be gleaned from them:

- (i) Public policy demands that contracts freely and consciously entered into must be honoured;
- (ii) a court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
- (iii) where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
- (iv) the party who attacks the contract or its enforcement bears the onus to establish the facts;
- (v) a court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

¹³ (1134/2017) [2018] ZASCA 150 (SCA); 2019 (1) SA 327 (SCA).

(vi) a court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.”

[20] In permitting GFE to delay its obligation to pay the judgment debt on its terms is an abuse the process of court and would be contrary to public policy and the scope and purpose of the International Arbitration Act. In this case, I am thus satisfied that the requirements of section 18(3) of the Superior Courts Act have been met. Also, the order below, considers any probable prejudice the respondent may suffer.

[21] In the circumstances, the following order is made -

1. The application for leave to appeal is dismissed with costs including the costs consequent upon the employment of two counsel.
2. The order granted by this Court on 2 June 2023 (“the Court Order”) shall operate pending the final determination of any appeal or application for leave to appeal of the Court Order.
3. GFE-MIR Alloys and Minerals SA (Pty) Limited is directed to make payment within five days from the date of this order of the amounts awarded in terms of the arbitral award in favour of Momoco International Limited into the trust account of Edward Nathan Sonnenbergs Inc., the details of which shall be disclosed to GFE-MIR Alloys and Minerals SA (Pty) Limited’s instructing attorneys by Edward Nathan Sonnenbergs Inc, to be held in escrow pending the final determination of any appeal or application for leave to appeal of the Court Order, as follows –
 - a. the sum of US\$1 088 488.63 together with interest from 27 January 2014 until 26 November 2018 at a rate of 3.00%;
 - b. the sum of \$65 000.00;
 - c. the sum of RMB236 521.00; and
 - d. the sum of US\$21 776.30.
4. GFE-MIR Alloys and Minerals SA (Pty) Limited is directed to make payment of interest on the sums in paragraph 20 (3) (a) to 20 (3) (d) from 2 June 2023 to date of full payment at the prescribed rate of interest (11.25%), into

the trust account of Edward Nathan Sonnenbergs Inc. pending the final determination of any appeal.

5. Within five days of the final determination or lapsing of any appeal or application for leave to appeal of the Court Order, Edward Nathan Sonnenbergs Inc. shall pay the funds held in escrow, together with all interest credited to and accumulated in the escrow account, either to:
 - a. Momoco International Limited, in the event that any appeal is dismissed or has lapsed or application for leave to appeal of the Court Order is dismissed or has lapsed; or
 - b. GFE-MIR Alloys and Minerals SA (Pty) Limited, in the event that any appeal is granted.
6. GFE-MIR Alloys and Minerals SA (Pty) Limited is ordered to pay the costs of this application on the scale as between attorney and client, including the costs of two counsel.

TP MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Applicant: Adv. F Fine SC and Adv. M Salukazana

Instructed by: Edward Nathan Sonnenbergs Inc.

For the Respondent: Adv. H van Eeden SC and Adv. H Fischer

Instructed by: Spellas Lengert Kubler Braun Inc.

Date of Hearing: 16 August 2023

Date of Judgment: 24 August 2023