

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: no
(2)	OF INTEREST TO OTHER JUDGES: no
16/3/2020	<i>N Vally</i>
DATE	SIGNATURE

Case No.: 10467/14
15192/14

In the matter between:

Frajenron (Pty) Ltd

Plaintiff

and

Metcash Trading Limited

First Defendant

Metro Cash & Carry Limited

Second Defendant

Incredible Happenings Trading CC

Third Defendant

Paseka Frans Motsoeneng

Fourth Defendant

JUDGMENT

Vally J

[1] In this matter I handed down a judgment on 25 October 2019. The judgment, which was a culmination of trial proceedings, resulted in Orders which, *inter alia*, required the first defendant, Metcash Trading Ltd (Metcash) to pay the plaintiff, Frajenron (Pty) Ltd (Frajenron), the sum of R9 105 286.52 (Order 2); to

pay interest *a tempore morae* on this amount as from 20 March 2014 (Order 3), and to pay part of the costs of the matter (Order 4). Metcash was unhappy with the judgment and the orders and applied for leave to appeal. I dismissed the application for leave to appeal against the Order requiring it to pay R 9 105 286.52 (Order 2), as well as the order requiring it to pay part of the costs of that hearing (Order 4), but granted it leave to appeal against the order requiring it to pay interest *a tempore morae* (Order 3). Metcash was once again aggrieved. It holds that it should have been allowed to pursue an appeal against Orders 2 and 4. It exercised its right to pursue an application for leave to appeal by petitioning the Supreme Court of Appeal (SCA) (the petition). That petition is pending. In consequence, by virtue of the provisions of s 18 of the Superior Courts Act No 10 of 2013 (the Act), the operation of Orders 2 and 4 is suspended pending the outcome of the petition. Frajenron asks this Court to uplift the suspension. This the Court can do in terms of s 18 of the Act.

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[2] The facts relevant to this application are:

- a. At the commencement of the trial proceedings two of the other defendants sought security for costs from Metcash. Metcash, the Court was told, put up a security of R1m.
- b. Immediately (i.e on 25 October 2019) after the judgment and Orders were issued, Frajenron's attorneys (Werksmans) wrote to the attorneys for Metcash (Fluxmans) asking if Fluxmans would be able to release the R1m to it as part payment of the amount due and owing in terms of Order 2. Fluxmans responded the same day

saying that the security was put up by a third party, and the third party had requested it to refund the money as it was only put up to pay for a possible adverse costs order against Metcash and in favour the two defendants, Incredible Happenings and Mr Paseka Motsoeneng . As no costs order was granted against Metcash, the third party sought the return of its money. The third party is Devland Cash and Carry (Pty) Ltd (Devland).

- c. Prior to the launching of the petition, Frajenron on 31 October 2019 attempted to execute Order 2 at Metcash's registered address. It received a return of service from the Sheriff of this Court stating:

"That on 31 October 2019 at 09h50 at Cnr HENDRIK POTGIETER DRIVE AND RHINOCEROUS ROAD, WELTERFREDEN PARK, ROODEPOORT the writ of Execution could not be executed as the Defendant is unknown at given address as informed by Mrs Moloi, Manager of Metro Hyper at the given address."

- d. Frajenron attempted to execute Order 2 again on 11 November 2019, but at a different address. This time, too, it received a return of service indicating that Metcash did not operate from that address. The Sheriff managed to discover a new address for Metcash and included the new address on the return of service. The new address turned out to be the place from which Devland trades.

- e. On 18 November 2019 Werksmans directed a letter to Fluxmans informing them of the two returns of service and asking the following key questions:

“is your client’s business still in operation? If so, please provide the address at which your client conducts its business;

...

Is your client in a financial position to satisfy the judgment debt, interests and costs should your client be refused leave to appeal or be ultimately unsuccessful on appeal?”

- f. Instead of attending to the contents of the letter and to the concerns raised by Werkmans, Fluxmans chose to ask “*why your client requires the information*”, and on what legal basis Werkmans was seeking the information. Importantly, Fluxmans refused to respond to the issue of the two returns of service or furnish the information. In response, Werkmans sought the information again, only to be told by Fluxmans that “*your client is not entitled to the information requested.*” In short, it refused to say whether Metcash is capable of meeting its obligations in terms of the Order of this Court. For reasons obvious, this only raised concerns on the part of Frajenron.
- g. Frajenron’s attorney undertook further investigations and discovered that Metcash does not trade, and that the address which was obtained by the Sheriff was the address of Devland. On 27 January 2020 Frajenron’s attorney undertook a CIPC search on Metcash and discovered that it was in the process of being “*deregistered*” because it had failed to submit timeously its annual returns to the Registrar of Companies. In essence, the

investigations revealed that Metcash earned no income and may not hold enough security to pay the debt in terms of the Order. Because of Metcash's failure to be transparent and candid with Frajenron, Frajenron fearing, *inter alia*, that it would suffer irreparable harm should it await the outcome of the petition, elected to bring this application.

- h. In answer to the application, Metcash said that it does not trade but refused to say whether it was able to purge the debt arising from the Order should the petition fail. However, in oral submissions, its counsel stated unequivocally that it is unable to comply with the Order should its petition fail.

[3] It is on these facts that Frajenron's claim to the relief referred to in [1] above should be decided. In this regard, three questions are posed for consideration:

- a. Are these facts exceptional?
- b. Do they show that Frajenron will suffer irreparable harm if the order uplifting the suspension and execution of Order 2 is not granted?
and,
- c. Do they show that Metcash will not suffer irreparable harm if the order is made.

[4] The facts reveal that Metcash has not been fully candid with or transparent to Frajenron and to this Court. Metcash has failed to uphold its duty of candour

to this Court. It has not, for example, explained why the first return of service indicated that it did not operate from its registered address, or why Devland operates from the address where it supposedly should be operating from. But, more importantly, they show that Metcash is not able, nor does it intend, to comply with Order 2. This, in my judgment, is certainly exceptional. It means that Frajenron has to wait and to expend unnecessary money defending the judgment and Order, when at the end the judgment may be a *brutum fulmen*. Bearing in mind that I have already found that there are no reasonable prospects that another court would come to a different conclusion with regard to Order 2 Frajenron would in my view be successful in defending that Order. The petition, in my view, is merely an attempt to delay the inevitable. This in itself is exceptional. In these circumstances the uplifting of the suspension and execution of Order 2 is warranted.

[5] Frajenron will no doubt suffer irreparable harm once Order 2 is not complied with. This harm will materialise. That Metcash admits. In this circumstance, there is no justice in requiring Frajenron to wait for the petition to suffer the harm. Once the suspension of the operation and execution of Order 2 is uplifted, Frajenron can execute and if necessary apply for the liquidation of Metcash. Should that application be successful the liquidator can take a fresh look at Metcash's petition and take an independent view on whether it should be pursued or not. And, in any event, the liquidator, once appointed, is obliged to inform the SCA that Metcash is in liquidation. It is then for the SCA to make whatever it wishes with that information. In essence, as the irreparable harm will

on Metcash's own version eventuate, it is only just that Frajenron be allowed to execute on Order 2.

[6] Metcash will not suffer any harm should the suspension of the operation and execution of the Order be uplifted. This is because Frajenron is not seeking payment of the R9 105 286.52. It is asking for the sum to be paid into the trust account of its attorney to be kept in trust. Should Metcash be able to raise the R9 105 286.52, it would be able to recover this amount should its petition and appeal be successful. It would not be paid to Frajenron. Metcash's right to pursue its appeal is not taken away by uplifting the suspension of the operation and execution of the Order. It can always do so. The upliftment only ensures that Frajenron is afforded the remedy s 18 of the Act provides to a litigant in its position.

[7] Taking all the facts referred to in [2] above into account, it is in the interests of justice that the application be granted. As for costs both parties agree that costs should follow the result.

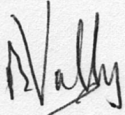
[8] The following order is made:

1. The operation and execution of paragraphs 2 and 4 of the Order granted under case nos. 14/10467 and 14/15192 (the Order) on 25 October 2019 is not suspended by the application for leave to appeal or any pending appeal, and the Order continues to be operational and enforceable. It will operate in full until the final

determination of all present and future leave to appeal applications and appeals in respect of the Order;

2. The first defendant, Metcash Trading Ltd, is ordered to make payment of the sum of R9 105 286.52, within five days of the date of this Order, into the Trust Account of Werkmans' attorneys where that sum, or any portion thereof recovered from Metcash Trading Ltd, shall remain pending final determination of all present and future leave to appeal applications and appeals in respect of the Order.

3. The first defendant is to pay the costs of the application.



Vally J

Dates of hearing:

13 March 2020

Date of judgment:

16 March 2020

For the Plaintiff:

Adv PM Cirone

Instructed by:

Werkmans Attorneys

For the First Defendant:

Adv HA van der Merwe

Instructed by:

Fluxmans Inc.