

SOUTH AFRICA / JUDGMENT

African Rainbow Minerals Ltd v Tam Holdings (Pty) Ltd and Others (2023-097235) [2024] ZAGPPHC 1332 (19 December 2024)

[2024] ZAGPPHC 1332

COURT

North Gauteng High Court, Pretoria

BEFORE

Meaden

CASE / FILE NUMBER

2023-097235

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 2023-097235

1.

REPORTABLE: YES/ NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED: YES / NO

DATE:

19 December 2024

SIGNATURE OF JUDGE:

In the matter between: AFRICAN RAINBOW
MINERALS LTD
Applicant
and
TAM
HOLDINGS (PTY) LTD
First
Respondent
TECHNOLOGY
AND MINERAL HOLDINGS (PTY) LTD
Second Respondent
PIETER
GIDEO VAN DER MERWE
Third Respondent
PRETORIUS
CHEMICAL CONSULTATION (PTY) LTD
Fourth Respondent
DR
GERARD
PRETORIUS
Fifth Respondent

JUDGMENT

MEADEN A J

On 06 NOVEMBER 2024 upon hearing counsel for the parties and considering the papers, I handed down the following Order:

- [1] “The Arbitral Award attached to the Notice of Motion, marked “X,” which was delivered by Jenny Cane SC in the arbitration between the Applicant (the Claimant in the arbitration) and the Respondents (the Respondents in the arbitration), is made an Order of Court in terms of Section 31(1) of the Arbitration Act 42 of 1965;
- [2] the First to Third Respondents are to pay the costs of this application, including costs of counsel on Scale C, on attorney and own client scale.”

The above Order was handed down, taking consideration of the undermentioned:

- [1] This is an application to have an arbitral award dated 13 August 2023, duly delivered by a single arbitrator - Ms Jenny Cane SC, made an order of court and as provided for in section 31 of the Arbitration Act 42 of 1965.[1] The arbitration award itself was annexed to the Notice of Motion as Annexure 1[2] thereto.
- [2] The chronology of this matter is of relevance and in arriving at the above Court Order.

- [3] On 28 February 2019, the applicant entered into and concluded a “SECOND AMENDED AND RESTATED LETTER AGREEMENT REGARDING POWDER-TECH PRODUCTS, THERMO POWER PILOT PLANT, WITBANK PRODUCTS AND THE TAM TECHNOLOGY” (“the letter agreement”) with the 1st, 3rd, and 5th respondents. In concluding this letter agreement, the above parties pooled resources and entered into a joint venture as between the applicant and the 1st respondent for purposes of purchasing vanadium and titanium rich ores, raw materials and products to process and beneficiate these ores for sale and for the benefit of the joint venture.
- [4] Also on 28 February 2019, the 3rd and 4th respondents in conjunction with Gideotech (the guarantors) executed a guarantee in favour of the applicant and in terms of which, the guarantors jointly and severally guaranteed all of the 1st respondent’s obligations arising in terms of the above agreement.
- [5] Per clause 13.9 of the letter agreement - “Governing law and dispute resolution” and at clause 13.9.2.1[3] thereof, the parties agreed when presented with disputes to attempt to negotiate with each other in good faith in resolving these

disputes and failing this; to proceed by way of binding arbitration and on the basis premised on clause 13.9.2.3 of the letter

agreement.[4] The content of 13.9.2.3 is recorded below:

“13.9.2.3 Unless other agreed in writing by the Parties; (i) the appointing authority in terms of the UNCITRAL Arbitration Rules shall be the Association of Arbitrators (Southern Africa), (ii) the arbitration shall be administered by the Parties, (iii) the number of arbitrators shall be 1 (one); (iv) the governing substantive law of the arbitration shall be the law of South Africa,

- (v) the arbitrator shall have the same remedial powers as the court of law in South Africa would have were it adjudicating the dispute, and (vi) the arbitrator shall deliver an award, which award shall be final and binding on the Parties and not subject to appeal, together with written reasons within 20 (twenty) days from the date on which the arbitration ends.”
- [6] On 01 December 2020, the applicant referred a dispute that had arisen between it and the respondents to arbitration and in terms of the above clause 13 of the letter agreement read with clause 8 of the guarantee. The parties jointly agreed to the appointment of Adv. Jenny Cane SC - a member of the Johannesburg Bar and as sole arbitrator in the dispute.[5]
- [7] Prior to the actual conduct of the arbitration, a First Pre-Arbitration Meeting was convened and held on 14 January 2021 and in which the Parties were represented as follows:

Claimant - Adv. T Bruinders SC, R Shein, T Herholdt, K Chaisaka, and M Cramer,

1st, 4th, and 5th respondents – W Niedinger,

2nd & 3rd respondents – Dr. G Pretorius,

Arbitrator – Adv. Jenny Cane SC.[6]

[8] Per the written minutes of this Pre-Arbitration Meeting and specifically in relation to Rules and Conduct of Arbitration, the parties, inter alia, agreed that:

(i) The arbitration be conducted in terms of clause 13.9.2.1 to 13.9.2.3 as set out in Second Amended and Restated Letter Agreement (“letter agreement”) concluded between the claimant and respondents on

28 February 2019,

(ii) the arbitrator be Jenny Cane SC, duly appointed by agreement of the parties;

(iii) the rules of the conduct of the arbitration will be in accordance with the UNCITRAL rules, as supplemented by such directions as the arbitrator may issue and such agreement as may be recorded in the minute of the and Pre-Arbitration meeting;

(iv) the Arbitrator has all the powers provided by the UNCITRAL rules to determine how the arbitration will proceed, including the power to determine procedural principles by which the arbitration is to be conducted as envisaged in article 17; and,

(v) the provisions of Sections 20, 23, and 25 of the Arbitration Act 42 of 1965 be waived. This included waiving time limits associated with the conduct of an arbitration.

[9] Following hereon, the hearing of the arbitration commenced on 04 July 2022 and closing arguments were delivered just short of the year later on 02 June 2023 and whereupon the Arbitrator reserved her award.

[10] On 05 July 2023, the applicant’s legal representative (T. Hoerholdt) per electronic email wrote to the Arbitrator requesting an indication on when the parties may expect to receive the Arbitrator’s award.[7] This correspondence was also simultaneously addressed to WWB Botha Attorneys – then representing the 1st - 3rd respondents and Anderson-Kriel Attorneys representing the 4th and 5th respondents.

[11] On 05 July 2023, Adv. Cane SC electronically responded to all the above referenced addressees advising anticipating giving an award during August 2023.[8] No issue was taken nor objection raised by any of the parties to this arbitration regarding the aforesaid advices received from Adv. Cane SC.

[12] Then on 10 August 2023, Adv. Cane SC emailed the above parties’ legal representatives advising that she will be in a position to make her award “early next week”. With this, Adv. Cane SC requested that the parties’ attorneys confirm that they hold sufficient funds with which to make payment of her fees – R 225 000 plus VAT and which will then require the each of the parties to contribute R 75 000 plus VAT on these fees.

- [13] On 10 August 2023 Bowman Gilfillan for the Claimant undertook to effect payment in favour of Adv Cane SC.[9] On 14 August 2023, WWB Botha Attorneys for the 1st – 3rd respondents confirmed in writing being placed in funds sufficient to settle Adv. Cane’s account.[10]
- [14] Again, no issue was raised by any of the parties on when Adv. Cane SC envisaged presenting her award and further in paying the arbitrator’s account and no reference was made by the respondents to such award being a nullity. The parties to this application awaited production of the award.
- [15] On 16 August 2023, the award was published. This was then followed up by the applicant’s attorneys on 25 August and again on 11 September 2023 with letters of demand then addressed to the 1st – 3rd respondents’ attorneys demanding payment in the sum of R55,336,369 together with interest accruing thereon. The above correspondence was acknowledged by WWB Botha Attorneys on 19 September 2023 and in so doing WWB Botha Attorneys recorded that the 1st – 3rd respondents were considering their options and were afforded a period of 6 weeks post the award in which to launch an application for review of the arbitration award. Crucially, no reference was made here to the award being out of time, a nullity or otherwise.
- [16] In the absence of payment being made on the award, alternatively; arrangements put in place to settle the award over an extended period of time or otherwise in compromising on the award, the applicant on 26 September 2023 launched the above application to have the above award made an order of court. This application was set down for hearing in the ordinary course on the unopposed motion roll for 14 May 2024. On 09 May 2024, the respondents delivered a Notice of Intention to Oppose the above application and on 20 May 2024, the 1st – 3rd respondents filed their answering affidavit.
- [17] The 1st – 3rd respondents premised their opposition to this application on the following:
- (i) The applicant failing to make out a case for the relief sought;
 - (ii) the award that the applicant sought to make an order of court being a nullity. This is averred in circumstances where the respondents submitted that the arbitration proceedings lapsed prior to the purported award having been made;
 - (iii) the award if not a nullity falling to be reviewed and set aside in terms of Section 33 of the Arbitration Act.[11]
- [18] The aforesaid allegations raised on behalf of the 1st – 3rd respondents and in alleging that the award made on 16 August 2023 is unenforceable are when reconciled with the above factual circumstances and chronology, irreconcilable and unsustainable. In this regard, upon resorting to and convening the arbitration and with that, agreeing the modus operandi of the arbitration process in the minuted First Pre-Arbitration meeting held on 14 January 2021, the parties expressly agreed to waive the requirements of Section 23 of the Arbitration Act and with that, the enforcement of specific time limits attributed to the arbitration.

- [19] Further and as evinced in the above chronology, prior to the service of the 1st – 3rd respondents’ answering affidavit; no reference was ever made on the part of the 1st – 3rd respondents regarding the award being a nullity and delivered out of time. This allegation on the part of the 1st – 3rd respondents is actually a very late afterthought creatively conceived of in attempting evading accountability vis-à-vis the arbitration award and is best described as being disingenuous and unsustainable. When presented with the proposed time limits in which the Arbitrator envisaged delivering her award and as summarized in the chronology above, the respondents raised no objection. Further, the respondents assured the Arbitrator that they had sufficient funds to pay the Arbitrator’s fees upon delivery of the award and this then begs the question, if the award was void ab initio, why then would the respondents pay the Arbitrator for the production of the award?
- [20] On the issue of the intended review of the award made, this was initially referenced on the part of the respondents back on 19 September 2023. However, no review application has in the interim been resorted to. In any event, a review of an arbitral award does not stay the actual enforcement of the award.
- [21] Reference was also made on behalf of the respondents regarding the making of the arbitrator’s award an order of court, being against public policy. The respondents do not elaborate hereon and in the process adduce reasons and facts in support of this bald assertion. I construe there being no factual and legal impediment to the arbitrator’s above award being made an order of court and nothing contained in the 1st – 3rd respondents’ Answering Affidavit convinces me to the contrary. What is clearly apparent from the respondents’ above conduct is that there is a deliberate attempt afoot to evade accountability, including in effecting payment of the award and with that, in attempting to delay and frustrate the applicant in enforcing the award and making it an order of this Honourable Court. The allegations made on behalf of the respondents and as summarized in paragraph 17 above are best described as being creative and completely out of sync with the above chronology of the matter and arbitration.
- [22] Bearing in mind that the dispute was declared on 01 December 2020, the First Pre-Arbitration meeting held on 14 January 2021 and whereupon the actual arbitration proceedings were ongoing over the period 04 July 2022 - 02 June 2023; the ensuing delivery of an award three months hence and on 16 August 2023 is certainly not unreasonable and is consistent with that agreed in the above First Pre-Arbitration meeting and again per the chronology duly accepted by the parties.
- [23] The award is valid and stands to be made an Order of Court and thereupon duly enforced.
- [24] Post the publication of the award, the 1st – 3rd respondents enjoyed ample time in which to consider their legal and commercial options, constructively engage with the applicant and with that, put in place arrangements on the payment of the award. What is disconcerting here is that the 1st – 3rd respondents have not chosen to proceed on a mature basis and as above. Instead, they have failed to honour the award, thus placing

themselves in breach and with that engaged in an attrition, forcing the applicant to have to resort in bringing this application. I accordingly and in noting this Court's disapproval of the above conduct, award a special order as to costs against the 1st – 3rd respondents on the attorney and own client scale and including the costs of legal counsel on Scale C.

ORDER

Accordingly, I make the following order:

MEADEN J R

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 13h00 on this 19th day of December 2024

Appearances

For Applicant: Adv. LG Minné Instructed by: Bowmans Gilfillan Inc. For 1st – 3rd Respondents: Adv. R Raubenheimer Instructed by: Willemse Potgieter & Babinszky Inc. For 4th & 5th Respondents: No Appearance Instructed by: Anderson-Kriel Attorneys Date of Hearing: 04 November 2024 Date of Judgment: 19 December 2024

- [1] 02-52.
- [2] 02-6-48. The actual award is set out at 02-47-48 of the Court Bundle.
- [3] 02-150.
- [4] 02-151.
- [5] Annexure RZS3 02-108/109.
- [6] 02-203.
- [7] RZS14 02-211.
- [8] RZS15 02-214.
- [9] RZS18 02-223.
- [10] RZS19 02-227.
- [11] 02-120.

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Prepared on 12 October 2026 · Esheria