

SOUTH AFRICA / JUDGMENT

Thelo Rollings Stock Leasing (Pty) Ltd v Elitheni Coal (Pty) Ltd (3900/2014) [2015] ZAECPEHC 37 (26 May 2015) [2015] ZAECPEHC 37

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J W Eksteen

CASE / FILE NUMBER

3900/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE LOCAL
DIVISION, PORT ELIZABETH

Case

No.: 3900/2014

Date

Heard: 23 April 2015

Date

Delivered: 26 May 2015

In the matter between:

THELO
ROLLING STOCK LEASING (PTY)
LIMITED
Applicant
and
ELITHENI
COAL (PTY)
LTD
Respondent

JUDGMENT**EKSTEEN J:**

- [1] The applicant herein seeks an order that an arbitration award made in its favour against the respondent be made an order of court. In addition the applicant seeks an order authorising it to instruct the sheriff to place the respondents mining licence (DMR ref: EC118MR registered on 15 April 2009 under MPT No. 24/2009 at the Mineral and Petroleum Titles Registration Office) under judicial attachment and to sell off same in execution (by the sheriff of this court in terms of the Uniform Rules).
- [2] The application is opposed and the respondent has issued a counter application. In terms of the counter application the respondent seeks an order that the arbitration award be set aside and that the dispute be remitted for decision before a new arbitration tribunal for determination. The respondent's opposing papers and the application to set aside the award were filed out of time. The respondent accordingly seeks an order that the period of six weeks stipulated in section 33(2) of the Arbitration Act, 42 of 1965 (herein referred to as "the Arbitration Act") be extended and for the condonation of the late filing of the opposing papers.

Background

- [3] The dispute has its origin in a contract. The parties hereto entered into a written agreement of lease (herein referred to as "the agreement") on 19 October 2012 in terms of which the applicant leased to respondent 1 500 mild steel containers, each separately identified in accordance with specifications fully set out in the agreement. The respondent was to pay a monthly rental to the applicant in respect of the containers. The agreement further provided that in the event of the respondent committing a breach of the agreement the applicant would be entitled "in addition and without prejudice to any other right or remedy which it may have in terms of the agreement or in law, forthwith and without notice either –

25.2.1 to enforce the agreement; or

25.2.2 to cancel the agreement, repossess the containers and to recover from the lessee as liquidated damages the Termination Sum, together with all other monies for which the lessee may be liable in terms of the agreement all of which shall become immediately due and payable". It is common cause that payment of the Termination Sum is a penalty as envisaged in the Conventional Penalty Act, 15 of 1962 (herein referred to as the "Penalties Act"). The calculation of the Termination Sum is defined in the agreement.

- [4] In due course the respondent breached the terms of the agreement in that it failed to pay the monthly rentals when they fell due. The applicant accordingly cancelled the agreement. At the time of the cancellation of the agreement the respondent was in arrears to the extent of two months rental. The applicant accordingly claimed payment of the amount of R3 301 748,07 being the arrear rental, together with payment of the Termination Sum in the amount of R97 383 816,00 (inclusive of VAT). Payment was not forthcoming.
- [5] It is not in dispute that the agreement contained an arbitration clause. The applicant accordingly instituted arbitration proceedings to recover the aforesaid amounts in accordance with the arbitration clause. A statement of claim was duly delivered in which the applicant claimed the aforesaid sums. A statement of defence followed. In its statement of defence the respondent expressly pleaded that the provision for the payment of the Termination Sum constituted a conventional penalty as envisaged in section 3 of the Penalties Act. It contended further that the applicant had suffered no loss as a result of the cancellation of the agreement and accordingly contended that it should not be held liable for the Termination Sum. The respondent therefore prayed, in its statement of defence, that the arbitrator dismiss the claim for payment of the Termination Sum with costs, alternatively, that the amount claimed in respect of the Termination Sum “be reduced to an extent deemed just and equitable by the arbitrator”. The respondent raised no objection to the jurisdiction of the arbitrator. The respondent further admitted liability in respect of the arrear rentals.
- [6] A pre-arbitration meeting was subsequently held. The minutes of the pre-arbitration meeting reflect that it was agreed that the issues in dispute, which “are defined in the pleadings” be submitted to arbitration. In the submission to arbitration therefore the respondent expressly called on the arbitrator to consider the Termination Sum and in his discretion to reduce the sum to an extent which he deemed just and equitable.
- [7] By virtue of the admission in respect of the arrear rentals an interim award was made by the arbitrator on 24 July 2014 in favour of the applicant for the payment of the amount of R3 301 748,07.
- [8] On 29 September 2014 the arbitrator made a final award which the applicant now seeks to enforce. The award in favour of the applicant was made as follows:
- “(1) The defendant is ordered to pay the claimant a sum of R97 383 816.00, which amount is inclusive of VAT;*
- (2) The defendant is ordered to pay the claimant interest thereon at the prime overdraft rate quoted by Standard Bank (a nominal annual compounded monthly) (as certified by any manager or director of Standard Bank), plus 3% from 17 February 2014 until date of final payment;
- (3) The defendant is ordered to pay the costs of this arbitration.”

- [9] I pause to record that the arbitration conducted on 29 September 2014 proceeded in the absence of the respondent. Clause 27.9 of the agreement, forming part of the arbitration clause, stipulates expressly that the arbitrator shall have the power to give default judgment if any party fails to make submissions when due and/or fails to appear at the arbitration. The arbitrator dealt extensively in the award itself with the reasons for granting judgment in the absence of the respondent. As will appear more fully below the respondent in the present matter does not attack the validity of the arbitrator's award on the ground

that it was made in its absence and it is accordingly not necessary to explore this aspect further herein.

- [10] Pursuant to the interim award the applicant contends that it proceeded to attempt to execute against the property of the respondent, without success. It contends that it is apparent that the respondent is unable to pay even the interim award from the realisation of its tangible movable and immovable property, hence the application to attach and sell the respondent's mining licence.
- [11] The respondent's opposition to the award of the arbitrator being made an order of court is predicated upon the success of the counter application in which the respondent seeks an order setting aside the award made by the arbitrator. The argument advanced both in the papers and before me in the application raises a crisp point of law. As will more fully appear below the respondent contends that the arbitrator did not have the jurisdiction to determine the dispute. It contends, as alluded to earlier, that the provision for the payment of the Termination Sum constitutes a conventional penalty as envisaged in the Penalties Act. The Penalties Act, so the argument goes, only empowers a court to consider whether or not the penalty is out of proportion to the prejudice suffered by the applicant and the arbitrator therefore does not have the jurisdiction to do so. In these circumstances, Ms Kheswa, who argued the application before me, acknowledged that the matter cannot be remitted for rescission before a new arbitration tribunal as it too would have no jurisdiction in the event that she were correct in her argument. She did not persist in this relief.
- [12] In respect of the application that the applicant be authorised to instruct the sheriff to place the respondent's mining licence under judicial attachment and to sell same in execution, the respondent, similarly, raises two crisp, but interrelated, points of law. Firstly, the respondent contends that a material non-joinder exists in that the Minister of Mineral Resources (herein referred to as the "the Minister") is an essential party to the litigation, he having a direct and substantial interest in the relief which is being sought. Secondly, the respondent contends that its mining licence is not capable in law of attachment and sale prior to compliance with section 11 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (herein referred to as "the Minerals Act") which requires the consent of the Minister.

- [13] Finally, as earlier alluded to, the respondent's opposing papers were filed substantially out of time and the application to set aside the arbitrator's award was not launched within the six week period provided for in section 33(2) of the Arbitration Act. The respondent accordingly seeks condonation for the late filing of its opposing papers and extension of the period provided for in section 33(2) for an application to set aside the award.
- [14] It is well established that the power of a court to condone the non-compliance with its own rules is subject to the requirement, and safeguard, that good cause must be shown (see for example *Mynardt v Mynardt* 1986 (1) SA 456 (T) at 463H and *Chasen v Ritter* 1992 (4) SA 323 (SE) at 332C). Section 38 of the Arbitration Act similarly requires that good cause should be shown before a court will grant an extension of any period fixed in the Arbitration Act.
- [16] The grounds advanced in support of the application for condonation for the late filing of the opposing papers coincides with the grounds for the application to extend the time period provided for in section 33(2) of the Arbitration Act. I shall revert to this issue later. It is convenient and appropriate to first consider the application to set aside the award of the arbitrator, which the respondent contends is dispositive of the applicant's claim, on its merits.

Application to set aside the award of the arbitrator

- [17] The application to set aside the award is made pursuant to the provisions of section 33(1)(b) of the Arbitration Act. Section 33(1)(b) provides that where an arbitration tribunal has committed a gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers, the court may, on the application of any party to the reference, after due notice to the other party or parties make an order setting aside the award. The case made in the papers for this relief is crisply formulated and is convenient to set out the averments fully as they appear in the papers. The respondent contends:

'29. The Arbitrator correctly records that the Respondent pleaded that this sum constitutes a penalty as envisaged in terms of the Conventional Penalties Act ...

30. The learned Arbitrator then went on to consider whether or not the "Termination Sum" stood to be reduced having regard to section 3 of the Penalties Act.

31. The Arbitrator then found in paragraph 23 of the award that:

"there is nothing in the common cause facts or on the pleadings which raises any suggestion that the penalty is out of proportion to the prejudice likely to be suffered by the Defendant (sic) as a result of the Defendant's (contractual) default. On the contrary, the facts pleaded suggest that the penalty was

specifically calculated and agreed upon to recompense the claimant for the type and extent of the prejudice that it would be likely to suffer in the event of the defendant defaulting on the rental agreement prior to the expiry thereof."

32. The Arbitrator then awarded the full amount of the Termination Sum to the Applicant.

33. In doing so, it is submitted, the learned arbitrator exceeded his powers and/or committed a gross irregularity as section 3 of the Penalties Act only empowers a court to consider whether or not a penalty is out of proportion to the prejudice suffered by the Applicant. The Arbitrator usurp (sic) the power granted to a court in terms of section 3 of the Penalties Act by granting the award.

34. In the premises the arbitrator never had the jurisdiction to determine the dispute ...”

[18] At common law, criminal cases, cases of freedom or of status, popular actions or actions involving infamy could not be submitted to private arbitration as these involve the exercise by a judge of public powers. None of these exceptions find application to the present matter and the contrary was not argued on behalf of the respondent.

[19] An arbitrator derives his powers and his authority from the agreement between the parties to the submission and from the Arbitration Act. The Arbitration Act defines arbitration agreements in section 1 as meaning:

“[A] written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not; ...”

[20] Section 2 of the Arbitration Act stipulates that a reference to arbitration shall not be permissible in respect of:

“(a) any matrimonial cause or any matter incidental to any such cause; or

(b) any matter relating to status.”

[21] Save for these exclusions any dispute can be the subject of arbitration. (See *De Lange v Presiding Bishop, Methodist Church of South Africa and Another* 2015

(1) 106 (SCA) at 128H.) It is accordingly necessary to assess whether the dispute which existed between the parties was one “relating to a matter specified in the agreement”.

[22] Clause 27 of the agreement deals extensively with dispute resolution. Clause 27.1 provides:

“Should any dispute arise between the Parties in respect of:

27.1.1 the interpretation of; or

27.1.2 ... or

27.1.3 any of the Parties’ rights and obligations arising from; or

27.1.4 the termination or purported termination of or arising from the termination of; or

27.1.5 ...

this Agreement, or out of or pursuant to this Agreement the Parties shall first endeavour to resolve such dispute on an informal basis within 5 (five) Business Days.

27. Should the Parties be unable to settle a dispute through negotiation in terms of clause 27.1 above, the dispute (other than where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction), shall be submitted to and decided by final, binding arbitration.”

[23] In the English Court of Appeal, Longmore LJ delivering the court’s unanimous judgment (subsequently upheld in the House of Lords) in *Fiona Trust and Holding Corporation and Others v Privalov and Others* [2007] EWCA Civ20 said:

“As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words arising out of should cover every dispute except a dispute as to whether there was ever a contract at all.”

(The aforestated passage was quoted with approval in *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) at 355C-D.)

[24] In the appeal in *Fiona Trust*, supra, in the House of Lords Lord Hoffmann, delivering the speech on behalf of the unanimous court stated:

“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.”

(In *Zhongji Development Construction*, supra, 355A-C.)

[25] In these circumstances and applying these principles, I consider that the arbitration clause clearly envisaged that every conceivable

dispute in respect of the rights and obligations of the parties, or of the termination or the purported termination of the agreement, or arising from the agreement or from the termination of the agreement or out of or pursuant to the agreement should be decided by arbitration. Even if I were incorrect in the interpretation of the arbitration clause I consider that the parties nevertheless

agreed by the submission of the dispute, as recorded in the minutes of the pre-arbitration agreement, to confer jurisdiction on the arbitration to decide the dispute as set out in the statement of claim and statement of defence, which expressly included a request for the arbitrator to rule on the possible reduction of the Termination Sum. No objection to his jurisdiction was raised and his jurisdiction was never in dispute.

[26] Section 3 of the Penalties Act provides:

"If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question."

[27] Section 3 of the Penalties Act contains no express prohibition precluding the reference of a decision in respect of the reduction of a penalty clause to an arbitrator. It confers upon a court a discretion and imposes upon it a duty which arises "upon the hearing of a claim for a penalty" in a court.

[28] It is nevertheless argued on behalf of the respondent that by virtue of the provisions of section 3 of the Penalties Act the arbitrator is by statute precluded from determining the dispute. The argument centres on the use of the word "court" in the provisions of section 3 of the Penalties Act. The term "court" is not defined in the Act. Ms Kheswa, argues, however, that the use of the term "court" excludes the term "arbitration".

[29] I am not persuaded that this is correct. It is a well-established principle of interpretation of statutes to ascribe to words their ordinary English meaning, unless this leads to an absurdity or is at variance with the supposed intention of Legislature. The New Shorter Oxford English Dictionary (1993 ed) defines the term "court" in the context used in the statute, as "(a session of) an assembly of judges or other persons acting as a tribunal legally appointed to hear and determine causes". I consider the definition to be equally consistent with an interpretation which permits an arbitrator to be appointed to determine the enforcement or reduction of a penalty, if that is what the parties wish. As set out earlier, he was duly appointed by agreement between the parties to resolve the dispute set out in the pleadings, including the possible reduction of the penalty.

[30] I am mindful thereof that the dictionary definitions serve merely to mark out the scope of the meanings available for a word and that it remains the task of the court to ascertain the particular meaning and sense of the language intended in the context of the statute under consideration. (Compare *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council* 1972 (1) SA 88 (W) at 94.) The ordinary meaning of the enactment must therefore be determined with reference to all other structurally relevant elements of the enactment. The Penalties Act is a very brief enactment. The only other reference to a "court" is to be found in section 1 of the Penalties Act. Section 1(1) of the Penalties Act states as follows:

"A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court."

[31] I can find nothing in the provisions of section 1(1) or of the Penalties Act read as a whole which would preclude the parties from appointing an arbitrator to decide upon the enforceability or reduction of a penalty if they so wish. On the contrary, to my mind, if the parties agree to subject their dispute to arbitration and they appoint an arbitrator to determine the cause the arbitration tribunal is a “competent court”.

[32] In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529(CC) O’Regan ADCJ, writing on behalf of the majority, stated at 592 para [219]:

“The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.”

[33] She went on to state at p. 598 para [235]:

“To return then to the question of the proper interpretation of s 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently.”

[34] All these considerations militate in favour of an interpretation of section 3 of the Penalties Act which permits of a resolution of the dispute before an arbitrator. To my mind such an interpretation does no violence to the intention of the Legislature. The dispute between the parties relates to a private contract and there are no policy considerations which require a judge exercising public powers to resolve their dispute. I can conceive of no reason in logic or in law why the parties should be precluded from requesting an arbitrator to assess the reasonable reduction of the penalty if they so wish.

[35] I was referred during argument to the decision in *Afriscan Constructioin (Pty) Ltd v Umkhanyakude District Municipality and Another*

[2005] JOL 14365 (D). In *Afriscan* the applicant was the claimant in arbitration proceedings in which it claimed that the first respondent, as defendant in the arbitration

proceedings was liable to pay penalties on the late completion of two civil engineering contracts. In that instance it would appear that the parties were in agreement that the arbitrator was not called upon to determine whether the penalties fell to be reduced. They held the view that only the high court had the power to reduce a penalty and they therefore agreed that, in the event of penalties being awarded, the applicant would be afforded the opportunity of seeking relief from the high court in terms of section 3 of the Act. This is what in fact occurred. Van der Reyden J in

setting out the background to the claim for a reduction of the penalty stated:

“In terms of the Act only the court has the power to reduce a penalty and hence the necessity for this application.”

- [36] Van der Reyden J was not called upon to determine whether the parties to an arbitration were entitled by agreement to confer jurisdiction upon the arbitrator to consider the reduction of a penalty. His remarks are obiter and I do not consider that Van der Reyden J intended to lay down a principle of law. To the extent that it may have been the intention to declare that only a court as provided for in section 166 of the Constitution would have such jurisdiction, for the reasons which I have set out earlier herein, I do not agree.
- [37] In all the circumstances I consider that the arbitrator did have the jurisdiction to decide on the reduction of the penalty. He was expressly asked by the parties to do so. This he did and his decision in that regard is binding. In the result the counter application cannot succeed and it follows that the applicant is entitled to have the arbitrator's award made an order of court.

Attachment of mining licence

- [38] I turn to consider paragraph 2 of the applicant's notice of motion. The applicant seeks to attach and sell the mining licence of the respondent pursuant to the unsuccessful attempts to execute against other assets of the respondent. The substance of the respondent's opposition to this relief is set out earlier herein at para [12]. The respondent argues that the Minister has a direct and substantial interest in the relief sought as he, on behalf of the State, is the custodian of all minerals in terms of the Minerals Act.
- [39] Section 4 of the Minerals Act provides that when interpreting the provisions of the Act any reasonable interpretation which is consistent with the objects of the Act must be preferred over any other interpretation which is inconsistent with such objects. Where the common law is inconsistent with the provisions of the Act the Act prevails. I shall endeavour to give effect to this purposive approach.
- [40] The objects of the Act are set out in section 2 thereof. The material portions of section 2, for purposes of the present application, read as follows:
- “The objects of this Act are to-*
- (a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
 - (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
 - (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) ... (f)

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

(i) ...”

[41] The manner in which the State exercises sovereignty over the mineral and petroleum resources is broadly provided for in section 3.

[42] Section 3(2) gives effect to the State's custodianship of the mineral resources. It provides that as custodian of the mineral and petroleum resources the State, acting through the Minister, may grant, issue, refuse, control, administer and manage any mining right. In doing so he is enjoined by section 3(3) to ensure the sustainable development of South African's

mineral and petroleum resources within a framework of national and environmental policy, norms and standards.

[43] Mining rights granted by the Minister pursuant to section 3(2) are dealt with in section 5 of the Act. Section 5(1) provides for the registration of mining rights and categorises them as “limited real rights” in respect of the mineral or petroleum and the land to which such rights relate. The holder of a mining right is entitled to perform all the functions set out in section 5(3). He is entitled to enter onto the land and to bring onto the land any plant, machinery or equipment and to build or lay down any surface, underground or undersea infrastructure required for purposes of mining (Section 5(3)(a)). He is entitled to mine or produce for his own account on or under that land for the mineral or petroleum for which such right has been granted (section 5(3)(b)). He is entitled to remove and dispose of any such minerals found during the course of mining (section 5(3)(c)). Furthermore, he may carry out any other activity incidental to mining which activity does not contravene the provisions of the Act (section 5(3)(e)). All of this he is entitled to do for his own account. The mining right is accordingly a limited real right of significant commercial value in the hands of the holder of the mining rights. As such, it may be encumbered by mortgage or as security to obtain a loan or guarantee for purposes of funding or financing a mining project (section 11(3)) and it may be sold or otherwise disposed of, subject only to the consent of the Minister being obtained (section 11(1)).

[44] The relevant portion of section 11(1), for purposes of the present application, provides:

“A ... mining right ... may not be ... transferred, ... or otherwise disposed of without the written consent of the Minister, ...”

- [45] Section 11(1) gives effect to the control and management functions of the Minister provided for in section 3(2) to which I have referred earlier. This right of the Minister to control, administer or manage the said mining right is, however, limited, in the case of the alienation of a mining right, by the provisions of section 11(2). Section 11(2) stipulates that the Minister is obliged to grant his consent to an alienation, or any other disposition, as envisaged in section 11(1), if the transferee or the person to whom the right will be alienated or disposed to: (a) is capable of carrying out and complying with the obligations in the terms and conditions of the right in question; and (b) satisfies the requirements contemplated in section 23. Section 23 which finds application in this case deals with the requirements which must be met before a mining right is granted.
- [46] As I have earlier recorded it is argued on behalf of the respondent that the provisions of section 11(1) vests in the Minister a direct and substantial interest in the relief which is sought and therefore renders the Minister an essential party to the litigation. The relief sought in the present litigation relates to the attachment for sale of the mining right. The attachment of incorporeal rights is regulated by Rule 45(8)(c)(i) of the Uniform Rules of Court. The rule provides that where incorporeal property is available for attachment, it may be attached without the necessity of a prior application to court provided that the attachment shall only be complete when, inter alia, notice of the attachment has been given in writing by the sheriff to all interested parties and, where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, the notice has also been given to the registrar of deeds in whose deeds registry the property or right is registered. (See also *Ormerod v Deputy Sheriff, Durban* 1965
- (4) SA 670 (D).)
- [47] In the circumstances in the event of the relief set out in paragraph 2 of the applicant's notice of motion being granted, notice must be given by the sheriff to the Minister, as a matter of course, before the attachment would be complete. Any sale of the property in execution which may follow pursuant to the said attachment would, when it occurs, require the consent of the Minister in terms of section 11 and such sale in execution would therefore have to occur subject to the Minister consent being granted. That, however, does not preclude the attachment and subsequent process of execution. The Minister's interest in the matter is limited by the provisions of section 11(2) to the administrative function of ensuring that the purchaser meets the requirements set by the section. That he can only do once the identity of the purchaser is known. During the subsistence of the mining licence the Minister has no further interest in the matter. In these circumstances I consider that if an order were granted in terms of paragraph 2 of the applicant's notice of motion it could be carried into effect without infringing in any manner on the rights of the Minister. In these circumstances the first point in limine cannot succeed.
- [48] I turn to the second argument that the attachment and sale of the respondent's mining licence is not legally possible prior to obtaining the consent of the Minister.

- [49] To my mind the attachment of the mining right cannot be said to be an alienation or a disposition of the right. For the reasons set out earlier in paragraphs [46] and
- [47] above I do not consider that the Minister's custodial function is impaired at all by the attachment. The sale in execution would follow later.
- [50] I am not convinced that section 11(1) requires the consent of the Minister prior to the conclusion of an agreement of sale. Rather it seems to me, that his consent is required prior to giving effect to the alienation or disposition, that is to say prior to transferring the right to mine to an outsider. Nevertheless it is not necessary for me to make a finding in this regard.
- [51] Mr Scott, who appeared on behalf of the applicant, acknowledges that the sale in execution would have to be subject to the consent of the Minister being obtained. He has accordingly submitted that the order which is made should provide specifically that the sale is subject to the consent of the Minister being obtained as envisaged in section 11 of the Minerals Act. I consider that to be a salutary precaution and I shall accordingly make provision therefore in the order which I make.

Condonation and extension of time

- [52] By virtue of the conclusion to which I have come in respect of the merit of the counter application the extension of the time period laid down in section 33(2) of the Arbitration Act has become academic and it is not strictly necessary to consider this issue further.
- [53] Similarly, by virtue of the conclusion to which I have come on the merits of the application for the attachment of the mining rights this issue is no longer material.
- [54] It is, however, necessary to deal briefly with these matters in the event that another court may be called upon to consider the matter.
- [55] Much of the papers and argument before me have been devoted to the issue of condonation and the extension of time periods. I do not intend herein to traverse all this material.
- [56] Clearly, as emerges from the conclusions to which I have come earlier herein, I am of the view that the respondent's prospects of success in the counter application and in the opposing to the main application were bleak.
- [57] In order to show "good cause" an applicant for condonation should at least tender an explanation for its default to enable the court to understand how it accrued (see *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A). In addition he should satisfy the court that its explanation is bona fide and not patently false.
- [58] In the present case there have been a number of delays in the filing of the respondent's papers. For purposes of this judgment I shall assume, without making any finding in this regard, that the initial delays have been adequately explained.

[59] There is, however, one explanation for a delay which requires comment. On 20 January 2015, at the first appearance of this matter where respondent sought a postponement of the matter Makaula J made an order putting the respondent to terms to file its answering affidavits (if any), which were already long overdue, and its counter application (if any) on or before 10 February 2015. This the respondent failed to do and ultimately filed such papers on 20 February 2015.

[60] Initially this delay was not addressed at all in the respondent's explanation. Subsequently, on 23 February a supplementary affidavit was delivered to address this delay. In explaining this delay one Rosslee, on behalf of the respondent states:

'7. Pursuant to the court order representatives of the Respondent engaged the Applicant in high level negotiations in an effort to resolve the dispute without making the arbitration award an order to court. During the course of such negotiations we instructed our attorneys Cliffe Dekker Hofmeyr Inc ("CDH") to withdraw as the attorneys of record. The notice of withdrawal as attorneys of record was duly served and filed on 9 February 2015.

8. On the 13 February 2015 the notice of set down was served on the Respondent. It then became apparent to the Respondent that despite the Applicant entertaining the high level negotiations, the Applicant's attorneys were instructed to proceed with the matter. On the 17 February 2014 we again approached CDH regarding the resolution of the dispute. We instructed CDH to finalise the necessary affidavits and/or court processes and to reinstate itself as the attorneys of record.'

[61] In answer to these averments, one Ntuli, on behalf of the applicant states on oath:

'At no point since the aforesaid court order was made did any person identifying themselves as "representatives of the Respondent"

engage with the Applicant in high level negotiations. Both of the quoted averments by the deponent to the supplementary affidavit

are outright lies.'

[62] He contends that Rosslee's contentions in respect of such negotiations are deliberate untruths.

[63] In reply Rosslee contents himself with a bald denial of Ntuli's accusation. He does not venture to suggest who on behalf of applicant the respondent negotiated with or when they met. In respect of the negotiations he states:

"41.4.1 The Respondent has approached a number of investors to assist it with turning around the company for the benefit of all the companies creditors (such as the Applicant), including the Respondent's shareholders."

41.4.2 As part of the turnaround strategy, the Respondent engaged Makomo Resources (PVT) Limited (“Makomo”), Zimbabwean company active in coal mining in Zimbabwe, which also has associated and subsidiary companies in South Africa to consider investing in the Respondent for the benefit of all creditors and shareholders. Makomo intends to acquire a controlling interest in the Respondent in order to implement a strategy to restructure the Respondent’s business and affairs in a manner which would maximise the likelihood of the Respondent (being the holder of a mining right for coal) being in a position to provide better returns for its creditors and shareholders to avoid any potential liquidation of the Respondent.

41.4.3 As a result, Makomo has engaged the Respondent to intervene on its behalf in the current dispute in an attempt to reach a commercial settlement with the Applicant in relation to its dispute. This has been done with the sanction of the Respondent.”

[64] Regrettably this explanation does not serve to instil confidence in the bona fides of the respondent. It is startlingly apparent that there is not a single averment in this explanation of any engagement with anyone on behalf of the applicant. It is certainly not supportive of the initial contention that and respondent engaged the applicant in high-level negotiations.

[65] On a consideration of the explanation I am by no means satisfied that the explanation for the delay is bona fide, nor that it is true, nor that it is sufficiently set out for the court to understand what gave rise to this delay.

[66] In the result the application for condonation and the application for an extension of the time period stipulated in section 33(2) of the Arbitration Act must fail.

[67] In the result I make the following order:

1. The award dated 2 October 2014 made by the arbitrator (JPV McNally SC) which awarded the applicant the following:

1.1 the defendant is ordered to pay the claimant the sum of R97 383 816.00 (inclusive of VAT) (ninety seven million three hundred and eighty three thousand eight hundred and sixteen rand);

1.2 defendant is ordered to pay the claimant interest thereon at the prime overdraft rate quoted by Standard Bank (nominal annual compounded monthly)(as certified by any manager or director of Standard Bank), plus 3% from 17 February 2014 until date of final payment;

1.3 the defendant is ordered to pay the costs of the arbitration

is made an order of court.

2. The applicant is authorised to instruct the sheriff of this court to place the respondent’s mining license (DMR reference: EC 118MR registered on 15 April 2009 under MPT No: 24/2009 at the

Mineral and Petroleum Titles Registration Office) under judicial attachment, and to sell of same in execution (by the sheriff

of this court in terms of the Uniform Rules).

3. Any sale in execution of the said mining right is to be done subject to the consent of the Minister of Minerals and Engery being obtained in terms of section 11(1) of the Mineral and Petroleum Resources Development Act 28 of 2002.
4. The respondent is ordered to pay the applicant's costs of the application.
5. The respondent's counter application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv PWA Scott, SC instructed by BLC Attorneys, Port Elizabeth

For Respondent: Ms A Kheswa instructed by Ayanda Kheswa, Port Elizabeth

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECPEHC/2015/37.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/thelo-rollings-stock-leasing-pty-ltd-v-elitheni-unknown-topic-aecpehc-2015--6a3ea5193b1caa912980fdfc>

Prepared on 12 October 2026 · Esheria