

SOUTH AFRICA / JUDGMENT

(3289/18) [2020] ZAMPMBHC 46; [2020] ZAMPMBHC 5 (6 March 2020)

[2020] ZAMPMBHC 46**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

2653/2017

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

Source record**IN THE HIGH COURT OF****SOUTH AFRICA****MPUMALANGA DIVISION,****MBOMBELA (MAIN SEAT)****CASE****NUMBER: 2653/2017****(1) REPORTABLE: YES/NO****(2)****OF INTEREST TO THE JUDGES: YES/NO****(3)****REVISED.****DATE:**

27/09/2020

SIGNATURE:

TINTSWALO

LODGES (PTY) LTD

APPLICANT

and

MEC

FOR FINANCE, ECONOMIC DEVELOPMENT

AND

TOURISM, MPUMALANGA

1st

RESPONDENT

HEAD

OF DEPARTMENT: ECONOMIC DEVELOPMENT

AND

TOURISM, MPUMALANGA

2nd

RESPONDENT

MPUMALANGA
TOURISM AND PARKS
AGENCY
3rd
RESPONDENT
THE
BOARD OF DIRECTORS OF THE
MPUMALANGA
TOURISM AND PARKS AGENCY
4th
RESPONDENT
BRIAN
SOUTHWOOD
5th
RESPONDENT
THE
OFFICE OF THE CHIEF LAND CLAIMS
COMMISSIONER
6th
RESPONDENT

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

- [1] The main relief applied for by the applicant is the stay of arbitration proceedings between the Mpumalanga Provincial Government and the applicant. In doing so the applicant seeks that the matter be referred to trial before this court. The applicant further seeks the joining of the first- and second respondents to the trial proceedings in their respective official capacities.
- [2] This application was heard during the National Lockdown and via a virtual hearing, it is therefore apposite to mention some interlocutory aspects dealt with before the merits was proceeded with.
- [3] The first was a joinder application brought by the applicant to join the sixth respondent. This application was meant to be set down on the unopposed motion roll prior to this hearing date. Due to reasons unknown and exacerbated by the Nation Lockdown, the unopposed application was removed from the roll by the presiding judge. The

reasons

therefore seems to be that the presiding judge was under the impression that the matter was already dealt with. The joinder application was unopposed and pursuant to argument granted, with costs to be cost in this application.

- [4] Secondly, the first to fourth respondents sought leave to file a supplementary affidavit. This resulted in a Rule 30 notice being delivered by the applicant. The first to fourth respondents elected not to pursue the application and costs were argued. The first to fourth respondents were ordered to pay the costs associated with the application in terms of Rule 6(5)(e), together with the costs associated with the applicants Rule 30 notice, which costs included the cost of two counsel.
- [5] The relief in the main application as per paragraph 1 above, is sought on the bases that:
- (1) the Mpumalanga Provincial Government, despite having been cited as claimant in the arbitration proceedings, is not before the arbitration;
 - (2) to the extent that the Mpumalanga Provincial Government is properly before the arbitration, it raised a question of law on whether the defence of estoppel may be pleaded in respect of a public-private partnership agreement ("PPP-agreement") concluded in terms of the 2005 Treasury Regulations. This aspect the applicant submits is a question of constitutional law and a matter of public importance which should not be determined through private arbitration proceedings; and
 - (3) by raising the aforesaid question, the Mpumalanga Provincial Government has implicated the Mpumalanga Provincial Treasury, the Accounting Officer of the Mpumalanga Department of Economic Development and Tourism and the Accounting Authority of the Mpumalanga Tourism and Parks Agency. These parties are not joined to the arbitration proceedings.
- [6] In order to appreciate and fully comprehend the issues in this application it is necessary to have regard to certain background facts which are predominantly common cause between the parties.

BACKGROUND FACTS

- [7] Pursuant to being awarded a tender, and on/or about 10 October 2001, the applicant entered into a concession agreement with the then Government of the Northern Provinces (as concessor) in respect of the Honey Badger Camp situated in the Manyeleti Game Reserve. In terms of this concession agreement the applicant would operate and administer the camp for profit and would pay annual concession fees.
- [8] The concession agreement was for an initial concession period of 15 years after which the applicant could elect to extend the concession period for a further 15 years, provided that:

- 1) it notified the concessor of its intention to extend the concession period for a further 15 years. This notification had to be in writing and be done 180 business days before the end of the initial concession period; and
 - 2) the concessor is unable to reasonably demonstrate, after due enquiry and prior to giving of the notice of extension, the applicant has not complied with the material terms and conditions of the concession agreement.
- [9] In the absence of the concession period being extended, the concession agreement would automatically terminate at the end of the initial concession period.
- [10] In August 2006 the 'original' concessor ceded its rights and obligations under this concession agreement to the Mpumalanga Provincial Government, who then became the concessor.
- [11] On or about 4 May 2016 the applicant wrote to the Mpumalanga Provincial Government in terms of clause 3 of the concession agreement, to extend the concession period for a further 15 years. The applicant contends that before writing this letter, there was no indication that the Mpumalanga Provincial Government intended to object to the renewal of the concession agreement on the basis that any material terms were breached by the applicant.
- [12] On 15 October 2016 the Mpumalanga Provincial Government responded through KT Mokoena Attorneys, wherein it purported to refuse the renewal of the concession agreement in order to assess the commercial viability of the Manyeleti Game Reserve. This was so communicated to KT Mokoena Attorneys, but no response was forthcoming. It is uncontested that the Mpumalanga Provincial Government did not have the power to do so, and the purported refusal was contrary to clause 3 of the concession agreement.
- [13] The applicant asserts that it was accordingly of the view that the concession agreement was renewed, as notice was given to that effect in terms of clause 3, and the ground raised by the Mpumalanga Provincial Government in an attempt to object to the renewal of the concession period was in conflict with clause 3.
- [14] Pursuant to aforementioned, a dispute arose between the parties in that the Mpumalanga Provincial Government failed and/or refused to provide the applicant with the necessary approvals for the construction of 2 treehouses on the Game Reserve, after the Mpumalanga Provincial Government's objection to the applicant's environmental permits was rejected. As a result hereof and on 6 June 2017, the applicant instituted arbitration proceedings on an expeditious basis against the Mpumalanga Provincial Government, which would be argued before the fifth respondent. This dispute has however since fallen away.
- [15] In the pre-arbitration meeting held on 12 June 2017 the Mpumalanga Provincial Government indicated that it intends counterclaiming for
- (a) a declaratory award that the applicant did not validly renew the concession agreement and

- (b) an award for specific performance for the delivery of information which the Mpumalanga Provincial Government contends the applicant was obliged to provide in terms of the concession agreement.
- [16] On 26 July 2017 the Mpumalanga Provincial Government brought a counterclaim against the applicant in the arbitration proceedings, wherein it is alleged that it is able to reasonably demonstrate that prior to the giving of the notice of extension, the applicant had not complied with the material terms and conditions of the concession agreement.
- [17] The counterclaim is the only remaining claim in the arbitration. Consequently, the Mpumalanga Provincial Government is the claimant in the arbitration. In summation the Mpumalanga Provincial Government alleges that the applicant failed to comply with clause 24 of the concession agreement. Which it contents is a material provision of the concession agreement.
- [18] The applicant in its response to the claim denies that it has not complied with clause 24 of the concession agreement, and in the event that the applicant is found to have been in default of the provision, then clause 24 was not understood or regarded by the parties to be material. Alternatively, the Mpumalanga Provincial Government did not treat clause 24 as material and the applicant was accordingly misled into believing that the term was not material, and therefore the

Mpumalanga Provincial Government should be estopped from treating clause 24 as a material provision.

- [19] In replication the Mpumalanga Provincial Government avers that the concession agreement was a public-private partnership in terms of the Public Finance Management Act 1 of 1999 (“the PFMA”) and the 2005 Treasury Regulations. The Mpumalanga Provincial Government asserts that if the applicant’s reliance on estoppel was to succeed, it would render the material terms and conditions of the concession agreement relied upon by the Mpumalanga Provincial Government not material, which would amount to an amendment of the concession agreement. This amendment would be without the prior written approval of the relevant Treasury, which is a consequence not countenanced by clause 16.8 of the 2005 Treasury Regulations.
- [20] The applicant therefore alleges that the replication by the Mpumalanga Provincial Government argues that estoppel cannot be raised in respect of a PPP-agreement unless Treasury permits and approves the use of this defence.
- [21] The applicant also brought an application before the fifth respondent for an order inter alia directing the third- and fourth respondents’ attorneys to provide evidence of their authority to represent the Mpumalanga Provincial Government in the arbitration proceedings. This was done pursuant to the fifth respondent directing the applicant to make a formal application for the relief sought.

- [22] The applicant contends that in the authority application the applicant only sought an order that the third- and fourth respondents' attorneys provide proof of a valid mandate. The fifth respondent was accordingly not called upon to decide on the validity of the mandate. The applicant contends that this was so because until the applicant had sight of the mandate relied upon, the applicant was unable to determine the validity thereof.
- [23] On this basis and understanding, the applicant complied with the fifth respondent's direction to file heads of argument simultaneously with the application, and that the applicant would not be permitted to file an replying affidavit.
- [24] In responding to the application, the Mpumalanga Provincial Government filed an answering affidavit attached to which was a power of attorney signed by the Head: Economic Development and Tourism of the Mpumalanga Provincial Government dated 3 November 2017. The fifth respondent dismissed the application and determined that the third- to fourth respondents' attorneys had authority. The applicant persists with the lack of authority argument in the present application.
- [26] As stated supra, the above facts are essentially undisputed, what is in dispute is whether the replication raises a constitutional issue, which is of public importance and thereby ousting the appropriateness of arbitration. In respect of this the applicant contends briefly that if the position set out in the replication by of the Mpumalanga Provincial Government is correct, the applicant is prevented by the principle of legality to rely on estoppel. The implication of aforesaid on PPP- agreements and potentially all agreements concluded under the PFMA, is a constitutional issue and of significant public importance and interest, which ought to be decided by a Court of law and not by an arbitrator within a private arbitration.
- [27] Conversely, the first to fourth respondents contend that the replication does not raise a constitutional issue, and even if it did, it does not relieve the arbitrator of his jurisdiction. It is contended that the applicant's reliance on estoppel amounts to a material amendment of the concession agreement, which raises no constitutional issue, as it merely raises the doctrine of estoppel and issues of contract law relating to the amendment of contracts.
- [28] The first to fourth respondents further contends that the question raised in the replication also does not involve the issue as to whether the written approval of the relevant Treasury is necessary before a party may raise estoppel as a defence. The true issue according to the first to fourth respondents is whether reliance on estoppel can be permitted to subvert the requirements contained in Section 16.8.1 of the 2005 Treasury Regulations, that prior written approval of the relevant Treasury is required for any material amendment to the concession agreement.
- [29] The applicant formulates the important questions somewhat differently and to be (1) whether the applicant's reliance on estoppel amounts to a material amendment of the concession agreement, and if so, whether the written approval of the relevant Treasury is

necessary before a party may raise estoppel as a defence; (2) whether the defence of estoppel in this instance would result in the arbitrator or the court ordering an unlawful state of affairs into being or not and (3) whether it is ever open for a party to a PPP-agreement to raise the defence of estoppel without first obtaining the consent of the relevant Treasury.

- [30] In furtherance the applicant contends that the Mpumalanga Provincial Government's reliance on the principle of legality places the matter strictly under the jurisdiction of this court. This it was argued is so, as the PFMA is national legislation which gives effect to the Constitution and an alleged failure to act in accordance with, or in contravention of the PFMA amounts to unconstitutional conduct.
- [31] Per the applicant, if regard is had to Section 167(7) of the Constitution, the issues raised constitute constitutional matter in that the PFMA gives effect to Section 217 of the Constitution and the 2005 Treasury Regulations relied on by the Mpumalanga Provincial Government in its replication, read with the PFMA, enforce and give effect to Section 216 of the Constitution.
- [32] By raising the question of legality in a private arbitration, the applicant contends it is deprived of the court's power to make a just and equitable remedy, as set out in Section 172(1)(b) of the Constitution. An arbitrator not having this power in the face of illegality.
- [33] The applicant further states that the reach of that raised in the replication is beyond the arbitration, because if clause 24 was material, then it was the accounting officer (the second respondent) that bore the ultimate responsibility to ensure that the Mpumalanga Provincial Government receive the required documents. The failure by the second respondent to do so would amount to the failure to uphold its obligation under the PFMA, the effect of which is financial misconduct under Section 81 of the PFMA. If found same was wilful, it would be an offence in terms of Section 86 of the PFMA, resultant being found guilty of either financial misconduct or a criminal offence. The second respondent is not a party to the arbitration. The first to fourth respondents did not specifically deal with these allegation on the papers, save to record that this is disputed.

COMPETENCE OF RELIEF UNDER SECTION 3 OF THE ARBITRATION ACT

- [34] Before dealing with whether the applicant made out a case for the relief sought, the competency of the relief should be considered as it was argued on behalf of the first to fourth respondents that the relief sought in the application does not conform with any of the relief provided for under Section 3.
- [35] In this respect Mr Vorster on behalf of the first to fourth respondents argued that Section 3 of the Arbitration Act deals with the binding effect of arbitration agreements and the power of the court in relation thereto. No mention is made in Section 3 of a 'stay' of an arbitration. He held that Section 6 deals with the obverse of the relief sought by the applicant, i.e. the stay of legal proceedings where there is an arbitration agreement and is therefore similarly

inapplicable to the present application. Mr Vorster argued that as far as he could find there exists no precedent in law for the order sought by the applicant and if such a stay was authorised, there would have been some precedent in this respect.

[36] He proceeded to contend that the challenge is nothing but a disguised jurisdictional challenge, and a party should not rush to court in said respect, as the fifth respondent is entitled to decision on his own jurisdiction.

[37] Mr Subel on behalf of the applicant argued that although the word ‘stayed’ is used in the notice of motion, the matter falls squarely within the ambit of Section 3, as a stay, as a matter of fact, is provided for under subsections (a), (b) and (c). He implored the Court to have regard to the effect of the order sought, which is that the arbitration agreement should no longer have effect with reference to the disputes, it is nothing else than that provided for in subsection 3(2)(c), notwithstanding the notice of motion not reflecting the word ‘cease’.

[38] Section 3(2) of the Arbitration Act provides as follows:-

“(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-

- (a) set aside the arbitration agreement; or
- (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
- (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”

[39] The word ‘cease’ implies the discontinuation of something already in operation.[1] The word ‘stay’ as an intransitive verb means to stop doing something or to stop going forward.[2]

[40] Notwithstanding the applicant’s election to use the word ‘staying’ in its notice of motion, there can be no doubt that if the relief sought is read with that set out in the founding affidavit, the applicant is seeking the court to do nothing other than that which is provided for in Section 3(2)(c) of the Arbitration Act – being to discontinue the arbitration proceedings and referral thereof for trial before a court. What is actually sought and made out in the affidavit is more important than the word used in the notice of motion to seek same.

[41] The first to fourth respondents’ argument in this respect is, in my view, over-technical and loses sight of the doctrine of substance over form. Although the respondents bemoaned the use of the word ‘staying’ and objected to Mr Subel in reply, seeking an amendment from the Bar to effect conformity with what is set out in the founding affidavit read with section 3(2) of the Arbitration Act, the respondents did not make much of this issue in their answering affidavit, nor did the respondents argue that they suffered prejudice or did not know what the extent of the relief is sought by the applicant.

APPLICATION OF SECTION 3(2) OF THE ARBITRATION ACT

- [42] As already stated herein above, Section 3(2) provides that the court may set aside an arbitration agreement, order that any particular dispute referred to in the arbitration shall not be referred to arbitration, and/or order that the arbitration agreement shall cease to have effect with reference to any dispute referred. In the latter context, the court's discretion must be judicially exercised and clearly there must be "good cause" before a court will release a party to an arbitration agreement and refer the dispute to court. The authorities show that this discretion is seldom exercised.[3]
- [43] Such a discretion has however been exercised where the defendant's counterclaim affected third parties not subjected to the arbitration agreement,[4] allegations of fraud were made and where the technical matters are easily resolvable by court.[5] On the other hand, a court will not set aside an arbitration agreement in the absence of "good cause".[6] In *De Lange v Methodist Church*[7] it was illustrated by analogy that where there are issues requiring other than legal expertise, arbitration before an expert is usually preferable.
- [44] The burden of demonstrating good cause are not easily discharged and there must be persuasive reasons for doing so. Where relevant parties are parties to the arbitration agreement, being those with an interest in the proceedings, this militates against good cause, or put differently, where some parties relevant are not parties to the arbitration agreement and there is a risk of multiplicity of proceedings with conflicting decisions and costs, this may demonstrate "good cause".[8]
- [45] The requirements of "good cause" were discussed in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*,[9] wherein the following was said:-

"Such an onus is not easily discharged. There are certain advantages, such as finality, which a complainant in an arbitration enjoys over one who has to pursue his rights in the courts; and one who has who contracted to allow his opponent those advantages will not readily be absolved from his undertaking... the discretion of the court to refuse arbitration under a submission was to be exercised judicially and only when 'a very strong case' for its exercise has been made out.

This however does not meant that one approach fits all, as courts have held that it is not possible to define, and certainly it is undesirable for any court to attempt to define with any degree of precision, what circumstances would constitute a very strong case."[10]

- [46] The benefit of a court is also a relevant consideration, as held in the matter of *Welihockyj* (supra) at 756C – D, where it was held as follows:-

"These allegations form part of most of the respondents' counterclaims and for this reason alone it would, in my view, be wrong not to allow the applicants the opportunity of having these allegations ventilated in open court and with a right of appeal... here is another reason for upholding the applicants' contentions. The issues in the respondents' counterclaims also relate to and affect third parties which are not subject to the provisions of the SOB and in respect of which the fourth respondent has no powers of investigation. A court of law will not be curtailed by such factors and would be in a

position to adjudicate and conclude all the interwoven issues in one and the same process. The further arguments on behalf of the respondents do not detract from the aforesaid conclusions.”

- [47] In *De Lange v Methodist Church* (supra) the Constitutional Court set out the ‘undefined’ test in matter such as these and held inter alia at paragraph [37] as follows:-

“[37] The Supreme Court of Appeal correctly ventured the view that the requirement of good cause in order to escape an arbitration agreement entails a consideration of the merits of each case in order to arrive at a just and equitable outcome in a specific set of circumstances. Put in another way: is it in the interests of justice to hold a party to an arbitration agreement that would result in a futile, unfair or unreasonable outcome or perhaps an unconscionable burden? The Act is of the pre-Constitution kind. Now our understanding of good cause must embrace an enquiry into whether the arbitration agreement, if implemented, would unjustifiably diminish or limit protections afforded by the Constitution. Absent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists.

HAS THE APPLICANT SHOWN “GOOD CAUSE”?

- [48] The applicant relies on the grounds set out supra, succinctly being that the Mpumalanga Provincial Government is not properly before the arbitration, the question of law raised by the replication which is a constitutional matter and of public importance, resulting and the reach of the issue raised in the replication affecting parties not before the arbitration. These grounds were amplified and stated somewhat differently in the heads of argument filed on behalf of the applicant. Notwithstanding at the forefront is the question where a constitutional issues, of public importance has been raised. If so does it oust the arbitrators competency to rule on the constitutional issues of public importance. I deal with the latter first.

The competency of the arbitrator to rule on a constitutional matter

- [49] Section 165 of the Constitution vests the judicial authority of the Republic in the courts, which are provided for in Chapter 8 of the Constitution. Section 169 of the Constitutions confers on this court the authority to decide:-

“(a) any constitutional matter except a matter that-

- (i) the Constitutional Court has agreed to hear directly in terms of section 167
- (6) (a); or
- (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
- (b) any other matter not assigned to another court by an Act of Parliament.”

- [50] Section 170 of the Constitution deals with lower courts. It provides as follows:-

“All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.”

- [51] As is evident herein above, the Constitution confers a power on the High Court to determine a constitutional matter, but not on any lower court.[11] The arbitrator is not a court or a judicial forum but a private dispute resolution mechanism. Section 34 of the Constitution accordingly does not apply to arbitration.
- [52] It was held in *Airports Company South Africa Ltd v IOS Leisure OR Tambo (Pty) Ltd* (supra) that parties cannot confer jurisdiction upon a private arbitrator to decide a claim brought in terms of PAJA. Valley AJ (as he then was) held that to allow such would be to allow parties to privatise constitutional disputes and this bears the risk of allowing a parallel constitutional jurisprudence to develop in this country – one that is separate and independent from that developed by the Constitutional Court. Such a development goes against the entire grain of our constitutional system, which is based on recognising the Constitutional Court as the highest, and in some respect the only court that can make pronouncements on constitutional matters. The privatisation of disputes involving constitutional matters is anathema to our constitution, and rightly so.
- [53] I am in agreement with above reasoning and that the privatisation of disputes involving constitutional matters offends our Constitution. Therefore, should the issues between the parties require the resolution of a question of constitutional law or a constitutional issue the matter ought not to be subject to arbitration.
- [54] In my view there is no reason why the reasoning in the *Airports Company South Africa Ltd* matter (supra) should only find application in matters involving PAJA, as opposed to matters involving constitutional issues in general.

Does the respondents’ replication raise a constitutional issue of public importance?

- [55] As to what is a constitutional matter, constitutional issue or an issue connected with a decision on a constitutional matter, the Constitution itself does not offer a definition. In the matter of *S v Boesak*[12] the court held that:

“If regard is had to the provisions of section 172(1)(a) and section 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under section 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters.”

- [56] It was argued on behalf of the first to fourth respondents that the replication does not raise a constitutional issue, as it does not rely on any of the provisions of the Constitution. And even if it did, there is no reason why an arbitrator should not adjudicate same. Mr Vorster argued on behalf of the respondents' that Section 39 of the Constitution makes it clear that not only a court but also a tribunal or a forum is obliged to interpret the Bill of Rights.
- [57] I did not understand the applicant's case to be that the constitutional issue argued for arises from a contravention of the Bill of Rights. I understood the applicant to contend inter alia that the PFMA is national legislation which gives effect to the Constitution, and a failure to act in terms of the PFMA or in contravention thereof, amounts to unconstitutional conduct.
- [58] Further, Section 167(7) of the Constitution, which states that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution, sets the basis that the issue raised by the Mpumalanga Provincial Government's replication constitutes constitutional matters, as the PFMA gives effect to Section 217 of the Constitution, which specifically sets out the requirement of procurement through a fair, equitable, transparent, competitive and cost effective system. So, too the 2005 Treasury Regulation relied upon in the replication, read with the PFMA, gives effect and enforces Section 216 of the Constitution, which deals with Treasury control.
- [59] Further that the raising of the question of legality in private arbitration deprives the court's powers to make a just and equitable remedy, as set out in Section 172(1) of the Constitution, which provides as follows:-
- “(1) When deciding a constitutional matter within its power, a court-*
- (a) ...; and
 - (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”
- [60] It is so that it might be held that clause 24 is immaterial, but it does not do away with the consequence if it is found to be material. This will result in the necessity to adjudicate the issue of estoppel and the question whether it may be raised at all in respect of PPP-agreements. Such pronouncement will have a serious impact on all future contracts between private parties and the State. Aforesaid will require a consideration of the PFMA, Treasury regulation as well as Section 217 of the Constitution and the interpretation and the application thereof.

- [61] So too, and if the terms of clause 24 of the concession agreement is held material, then the second respondent, who is not a party to the arbitration, bores the ultimate responsibility to ensure that the Mpumalanga Provincial Government had received the required documents. Not having done so amounts to a failure to uphold its obligation under the PFMA which will offend the constitution.
- [62] To confine these issues to a private arbitration will limit the protection offered by the Constitution in terms of Section 172. An arbitrator is merely empowered to apply the law as it stands, and cannot make a just and equitable order as envisaged in Section 172.
- [63] Notwithstanding the different articulation of the questions emanating from the replication, there are of public importance and will require a consideration of whether the above indicated laws and/or conduct is inconsistent with the Constitution. So too it will involve a the potential limitation of parties remedies when contracting with an organ of state. A private arbitration is not an appropriate forum and a High Court or the Constitutional Court ought to adjudicate over these issues.
- [64] Having concluded as aforesaid, I do not consider it necessary to deal with the remaining grounds relied on by the applicant, save to briefly deal with the following.
- [65] It was argued on behalf of the respondents that the arbitrator is in a position to decide his own jurisdiction and ought to be allowed to adjudicate upon the issues raised in the replication, where after, should the applicant be aggrieved, it can invoke the provisions of Section 33 of the Arbitration Act.
- [66] The arbitration provision in the concession agreement does not reserve the parties a right of appeal as such the only further remedy is Section 33. Section 33 only confers a right of review on the aggrieved party, and not of appeal. Therefore by not referring this matter to trial before a High Court, it limits the applicant's ability to challenge a finding made in this respect on appeal, and it would further be against the principle of finality to cause these issues to be adjudicated in a private arbitration, merely to challenge same post fact again before a court. Should a finding ensue that estoppel cannot be raised in PPP-agreements, it would practically mean that remedies ordinarily available to contracting parties are not available when one of the contracting parties are the State, but confined to the knowledge of the parties concerned in the private arbitration. Such an outcome, in my view, requires the attention of the High Court or the Constitutional Court.
- [67] It further appears that the replication and issues raised therein will also affect third parties whom are not subject to the arbitration agreement, such as the accounting authority and accounting officer upon whom the responsibility of compliance with the PFMA rests.

[68] It is so that parties ought not to be lightly released from their contractual election to arbitrate. However, as set out herein above, this is not a hard and fast rule, and each matter needs to be adjudicated upon in the applicable circumstances. In casu, arbitration clause was evoked in respect of a simple issue of specific performance on behalf of the applicant and the respondents'

counterclaim for a declaratory award that the concession agreement was not validly extended and specific performance. It was not

contemplated at the commencement that the dispute would develop as it has. I am therefore persuaded that the applicant is entitled to the relief sought.

CONDONATION

[69] The applicant sought condonation for the late filing of its replying affidavit. It appears from the papers that the replying affidavit was filed 32 days out of time. The respondents did not pursue any opposition in this respect, and condonation is accordingly granted.

COSTS

[70] Having concluded as aforesaid, the only remaining issue is that of costs. I do not believe that there is any reason that costs should not follow the event.

ORDER

[71] I make the following order:-

1. Condonation is granted to the applicant for the late filing of its replying affidavit.
2. The arbitration proceedings between the Mpumalanga Provincial Government and the applicant are stayed and referred to trial before this court.
3. The first- and second respondents in their respective official capacities are hereby joined to the proceedings per 2 herein above.
4. The first- to fourth respondents are ordered to pay the costs.

DATE OF HEARING: 30 JUNE 2020

DATE OF JUDGMENT: 27 SEPTEMBER 2020

HANDED DOWN ELECTRONICALLY BY EMAIL TO THE PARTIES

FOR THE APPLICANT: Advocate Subel SC

Advocate Ben-zeev

Fluxmans Attorneys

FOR THE RESPONDENTS: Advocate Vorster SC

Savage Jooste and Adams Attorneys

-
- [1] Cradock's Estate v Cradock and Others 1951 (3) SA 64 (N)
- [2] Miriam Webster Legal Dictionary
- [3] Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 391; Sera v De Wet
- (1974) All SA 295 (T); 1974 (2) SA 645 (T) at 649 – 650
- [4] Welihockyj and Others v Advtech Ltd and Others 2003 (6) SA 737 (W)
- [5] Sera v De Wet (supra)
- [6] De Lange v Methodist Church and Another 2016 (2) SA 1 (CC)
- [7] 2016
- (2) SA 1 (CC)
- [8] Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another 2011 (4) SA 642 (GSJ) at par [74]
- [9] 1971
- (2) SA 388 (T)
- [10] at 391E - H
- [11] See Lufuno Mphaphuli and Associates v Andrews and Others 2009 (4) SA 529 (CC) at par [212]
- [12]
- [2000] ZACC 25; 2001
- (1) SA 912 (CC) at paragraph 14
-

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/ZAMPMBHC/2020/46.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/zampmbhc-zampmbhc-v-unknown-unknown-topic-ampmbhc-2020--6a3ea51d3b1caa9129813807>

Prepared on 13 October 2026 · Esheria