

PCA CASE No. 2016-21

In the matter of an arbitration before a Tribunal constituted in accordance with the United Nations Commission on International Trade Law Rules of Arbitration, as revised in 2010
("UNCITRAL Rules")

between

(1) **MR. JOSIAS VAN ZYL (SOUTH AFRICA)**
(2) **THE JOSIAS VAN ZYL FAMILY TRUST (SOUTH AFRICA)**
(3) **THE BURMILLA TRUST (SOUTH AFRICA)**
(the "Claimants")

and

THE KINGDOM OF LESOTHO
(the "Respondent", and, together with the Claimants, the "Parties")

PROCEDURAL ORDER No. 5:
Non-Payment of Supplementary Deposit

Arbitral Tribunal

Mr Michael Tselentis QC
Judge Frederik Daniël Jacobus Brand
Mr Peter Leon (Presiding Arbitrator)

Tribunal Secretary

Mr. Ben Winks

Registry

Permanent Court of Arbitration

26 February 2019

1. As reflected in its Terms of Appointment signed on 14 August 2016,¹ this Tribunal was constituted in accordance with a Partial Final Award on Jurisdiction and Merits made on 18 April 2016 by a separate tribunal (comprising Mr R Doak Bishop, Judge P M Nienaber and Prof David A R Williams, presiding), in an arbitration seated in Singapore, governed by the UNCITRAL Rules and administered by the Permanent Court of Arbitration under Case No 2013-29 (the “**Williams Award**”).
2. On 24 November 2016, the Tribunal suspended its proceedings pending the outcome of the Respondent’s application in the Singapore High Court for annulment of the Williams Award.² After that application succeeded,³ the Tribunal, on 28 August 2017, suspended its proceedings pending the outcome of the Claimants’ appeal against the Singapore High Court judgment.⁴ After that appeal was dismissed by the Singapore Court of Appeal on 27 November 2018,⁵ the Claimants stated their intention to proceed with this arbitration.⁶ It was clear at that stage that there was an issue between the parties whether the Tribunal has jurisdiction to proceed with the arbitration, in the light of the Williams Award.⁷
3. On 15 January 2019, the Respondent requested, among other things, that this arbitration be suspended again, until the Claimants had given an undertaking not to seek annulment of any costs order the Tribunal may make, as well as satisfied certain costs orders made by the courts in Singapore.⁸ On 17 January 2019, the Respondent refused, until such time as the same conditions had been met, to pay its share of a supplementary deposit that the Tribunal had directed on 12 December 2018 (in the sum of £50,000 per Party) to cover the costs of a procedural hearing.⁹ On 24 January 2019, the Claimants requested the Tribunal to order the Respondent to pay its share of the supplementary deposit immediately.¹⁰
4. On 11 February 2019, in **Procedural Order No. 4**, the Tribunal refused the Respondent’s request for further suspension, as well as the Claimants’ request for an order compelling the Respondent to pay its share of the supplementary deposit, but issued a notice under Article 43(4) of the UNCITRAL Rules, notifying the Claimants “*that they may pay the*

¹ See the Tribunal’s Terms of Appointment, 14 August 2016, §2.3 to §2.7.

² Procedural Order No. 2, §16.1.

³ *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and Others* [2017] SGHC 195, §341.

⁴ Procedural Order No. 3, §13.1.

⁵ *Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho* [2018] SGCA 81, §225.

⁶ Claimants’ letter to the Tribunal, 29 November 2018, §2.

⁷ Respondent’s letter to the Tribunal, 28 November 2018; Claimants’ letter to the Tribunal, 29 November 2018.

⁸ Respondent’s Submissions, 15 January 2019, §9 to §14, and §27.

⁹ Respondent’s letter to the Tribunal, 17 January 2019.

¹⁰ Claimants’ Submissions in Reply, 24 January 2019, §5 to §6.

Respondent's share of the deposit, within thirty calendar days from this notice, failing which the Tribunal may order the suspension or termination of the proceedings".¹¹ Procedural directions were also given in respect of the determination of the jurisdictional issues.¹²

5. The Claimants responded that they were not prepared to pay the Respondent's share of the supplementary deposit, and requested that the Tribunal's proceedings be suspended pending the outcome of a claim to be instituted against the South African government in the South African courts, "*for constitutional damages suffered resulting from the unlawful suspension and dismantling of the SADC Tribunal*".¹³ The Respondent contends that this "*very lengthy but indeterminate delay*" would achieve "*the opposite of a fair and efficient process*", which is required by Article 17(1) of the UNCITRAL Rules, and thus that the Tribunal's proceedings should be terminated as a "*natural consequence*" of the Claimants' election not to pay the Respondent's share of the supplementary deposit.¹⁴ In reply, the Claimants revised their request, and sought a suspension until such time as the Respondent's share of the deposit was paid, alternatively for eighteen months.¹⁵
6. Article 43(4) of the UNCITRAL Rules gives no direction as to the circumstances in which a suspension of proceedings would be more appropriate than termination, when a deposit has not been paid. The Tribunal is, however, guided by the broad discretion given to it by Article 17(1) of the UNCITRAL Rules "*to conduct the arbitration in such manner as it considers appropriate,*" which it is required to exercise so as "*to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*". In this regard, the Tribunal reminds itself of the approach which it adopted in **Procedural Order No. 1** (in particular, §21 and §22), to the effect that the Parties are presumptively entitled to have the arbitration proceedings continue at a normal pace, and that in the absence of agreement between the Parties there are strong policy reasons for not placing the arbitration "*on hold*".¹⁶
7. This arbitration has not yet progressed to such a stage that there would be any substantial duplication of work if the Claimants had to bring their claims afresh before a new tribunal at some point in the future. Before *this* Tribunal (as distinct from the SADC Tribunal), no pleadings have been filed, no evidence has been led, and no findings have been made

¹¹ Registry's letter to the Parties, 11 February 2019.

¹² Procedural Order No. 4, 11 February 2019, §36.5.

¹³ Claimants' letter to the Tribunal, 12 February 2019.

¹⁴ Respondent's letter to the Tribunal, 18 February 2019.

¹⁵ Claimants' letter to the Tribunal, 21 February 2019. The First Claimant also made several separate submissions on 21 and 24 February 2019, which the Tribunal has taken into consideration.

¹⁶ Procedural Order No. 1, 3 November 2016, §22, citing *S. D. Myers Inc. v Government of Canada*, Procedural Order No. 18, 26 February 2001, §1.

on any substantive aspect of the Parties' dispute. Moreover, there is now no certainty as to whether and when this arbitration will be in a position to proceed (i.e. whether and when the Respondent's share of the supplementary deposit will be paid). The Tribunal has therefore concluded that the further suspension sought by the Claimants would indeed lead to an "*unnecessary delay*", and that the interests of efficiency or fairness would not be better served by a further suspension than by a termination of these proceedings.

8. The Tribunal does not accept the Claimants' contention that "*the Claimants would be irreparably prejudiced if the Arbitration is terminated and they are unable to pursue their claims due to no fault of their own, but rather, the Respondent's breach of its obligation to pay its own share of the supplementary deposit*".¹⁷ As indicated in **Procedural Order No. 4**, it appears to the Tribunal that the Partial Award on Deposit issued by the Williams Tribunal on 2 October 2014 would support an application by the Claimants for an award in their favour for the reimbursement of the Respondent's share of the deposit, in the event that the Claimants paid such share in the first instance.¹⁸ Furthermore, there was no suggestion by the Claimants (apart from the non-specific contention which we have cited) that a discontinuation of this arbitration under Article 43(4) of the UNCITRAL Rules would have *res judicata* effect, so as to preclude the Claimants from instituting fresh arbitral proceedings at a later date, and the Tribunal is not persuaded that this would be the case. Finally, the Tribunal finds persuasive the Respondent's contention that a lengthy suspension of these proceedings may well be prejudicial to it.¹⁹ In short, the Tribunal has concluded that the Claimants have failed to show that considerations of prejudice point to a suspension rather than a termination of these proceedings in the event that the Respondent's share of the supplementary deposit remains unpaid (by either Party).
9. In the circumstances, the Tribunal considers that it is appropriate to terminate these proceedings under Article 43(4) of the UNCITRAL Rules, if the Respondent's share of the deposit remains unpaid by 6 p.m. London time on 26 March 2019.
10. The Tribunal thus orders as follows:

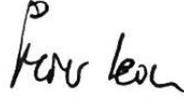
Unless the Respondent's share of the supplementary deposit, in the amount of £50,000, originally directed by the Tribunal on 12 December 2018, is paid in full by either Party by 6 p.m. London time on 26 March 2019, these proceedings will terminate pursuant to Article 43(4) of the UNCITRAL Rules.

¹⁷ Claimants' letter to the Tribunal, 21 February 2019, §7.

¹⁸ Procedural Order No. 11 February 2019, §23.

¹⁹ Respondent's letter to the Tribunal, 18 February 2019, §5.

For the Tribunal:

A handwritten signature in black ink, appearing to read "Peter Leon". The signature is written in a cursive style with a small loop at the top of the first letter.

Peter Leon
Presiding Arbitrator