

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. 2:
Suspension of Proceedings**

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

24 November 2016

I. BACKGROUND

1. As reflected in its Terms of Appointment signed on 14 August 2016,¹ this Tribunal was constituted in accordance with the 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
 - 1.1. Paragraph 11(f) read with paragraph 9.34 of the Williams Award required the Parties to “*establish a new tribunal*”, meeting particular specifications, to determine the underlying dispute between them.
 - 1.2. On 29 April 2016, the Claimants confirmed that they “*agree to submit, and ... consent, to arbitration before the new tribunal on the basis set out in paragraph 11.1(f) as read with paragraph 9.34 of the [Williams] Award.*”
 - 1.3. On 17 May 2016, the Respondent instituted an application in the Singapore High Court “*to set aside the [Williams] Award in its entirety on the basis that the Tribunal ... had erred in law in upholding its jurisdiction over the Claimants’ claims, and had thereby exceeded its jurisdiction*” (the “**Singapore High Court application**”).³ That application is opposed by the Claimants,⁴ and is yet to be heard.⁵
 - 1.4. The following day, 18 May 2016, the Respondent confirmed that it agreed to submit and consent to arbitration before the new tribunal to be constituted in accordance with the terms set out in the Williams Award “*under reservation as to the outcome of its application before the courts of Singapore (including, for the avoidance of doubt, any appeal)*”.⁶
2. On 3 November 2016, after considering extensive written and oral submissions from the Parties, this Tribunal issued **Procedural Order No. 1**, addressing the following matters:
 - 2.1. the Respondent’s request, on 26 August 2016, that these proceedings be suspended pending the outcome of the Singapore High Court application (*excluding* appeals), which the Respondent anticipated would be known by March 2017 (the “**Request for Suspension**”);

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

² It is noted that Judge Nienaber dissented from the Williams Award.

³ Respondent’s Request for Suspension, 26 August 2016, §4.2 and Annex 1.

⁴ See the Claimants’ Response to the Request for Suspension, 31 August 2016, §22.

⁵ *Id.*, §21.

⁶ See the Tribunal’s Terms of Appointment, §2.7.

- 2.2. the Respondent's request, on 15 September 2016, that its preliminary objections be bifurcated from the merits (the "**Request for Bifurcation**");⁷ and
 - 2.3. an appropriate Procedural Timetable for this arbitration.
3. For reasons set out in Procedural Order No. 1, this Tribunal ordered as follows:

63.1. The Respondent's Request for Suspension is refused, on condition that, within two weeks of this Order, the Claimants furnish the Respondent with an unequivocal written undertaking, in terms to be approved by the Tribunal, that they will satisfy any order this Tribunal may make in respect of wasted costs consequent upon the annulment of the Williams Award.

63.2. The Respondent's Request for Bifurcation is refused.

63.3. All questions of costs are reserved.

63.4. Assuming the Claimants' compliance with §63.1 of this Order, the Procedural Timetable, subject to any subsequent revision by the Tribunal, shall be as follows...

4. The Tribunal's reasons for §63.1 of Procedural Order No. 1 were the following:

34. ... The singular circumstances that led to this Tribunal being constituted have left open the possibility, in principle, that, if the Williams Award is ultimately annulled in Singapore, and this Tribunal consequently orders the Claimants to contribute to the wasted costs duly incurred by the Respondent in this arbitration, the Claimants could conceivably resist the recognition and enforcement of such a costs order on the grounds that this Tribunal lacks jurisdiction to make any order at all. While the Claimants have not expressly reserved their right take such a position (which, indeed, would be a direct contradiction of their argument, resisting the Request for Suspension, that this Tribunal's jurisdiction would survive annulment of the Williams Award), there remains a residual theoretical risk that they might do so at some stage. While initially speculative, this risk crystallised when the Respondent challenged the Claimants to furnish it with a written undertaking to the contrary, and the Claimants failed to do so.

35. In order to assess this risk, and how to mitigate it, this Tribunal (without making any definitive findings as to its jurisdiction) considers it necessary to make some provisional observations about the Claimants' challenge to the Respondent's premise that annulment of the Williams Award would deprive this Tribunal of jurisdiction to make any order at all (including as to wasted costs). In short, the Tribunal is presently not persuaded that this arbitration came about from any source other than the letters of consent provided by the Parties pursuant to the Williams Award. ... Accordingly, this Tribunal is provisionally of the view that annulment of the Williams

⁷ See the Respondent's Procedural Proposals, 15 September 2016, §3(b) and §28 to §42; Respondent's Reply to the Claimants' Response to its Procedural Proposals, 26 September 2016, §36 to §38.

Award would deprive this Tribunal of any jurisdiction at all, even to make an award as to wasted costs in that event.

36. *The Tribunal takes the view that this risk could potentially place the Respondent at a procedural disadvantage, and thus procedural fairness demands that it is mitigated, in such a manner that does not compromise procedural efficiency. In the circumstances, the Tribunal is not satisfied that this risk justifies ordering the suspension sought by the Respondent, nor ordering the Claimants to furnish the Respondent with security for costs (which, in any event, the Respondent has decidedly not sought). The Tribunal finds that this risk would be sufficiently mitigated by the Claimants providing the Respondent with an unequivocal undertaking, in writing, within two weeks of this Order, in terms to be approved by this Tribunal, that they will satisfy any order this Tribunal may make in respect of wasted costs consequent upon the annulment of the Williams Award.*

37. *Accordingly, the Respondent's Request for Suspension is refused, on condition that such an undertaking by the Claimants is furnished in a timely manner. For the avoidance of doubt, any failure to do so will require this Tribunal to revisit the Request for Suspension and to make an appropriate order, which may include an order directing the Claimants to provide security for the Respondent's costs.*

5. The Claimants did not furnish the Respondent with the undertaking described in §63.1 of Procedural Order No. 1. Consequently, this Tribunal needs to revisit the Request for Suspension.

II. THE PARTIES' POSITIONS

6. After taking advice from counsel,⁸ the Claimants notified the Tribunal that they were “unable and unwilling to risk giving the undertaking as contemplated in paragraph 63.1 of Procedural Order No. 1”, and “accordingly decline[d] to give the undertaking”.⁹

7. Acknowledging that, as a consequence, the Tribunal would be required to revisit the Request for Suspension, the Claimants noted that “the Respondent has not asked for any security for costs”, and submitted that “the Tribunal does not have the power *mero motu* to direct the Claimants to provide security for the Respondent's costs as suggested in paragraph 37 [of Procedural Order No. 1]”.¹⁰ The Claimants requested the Tribunal, in revisiting the Request for Suspension, “to make an appropriate order”,

⁸ See the Claimants' letter to the Tribunal, 8 November 2016, stating *inter alia* as follows: “The Claimants have referred certain aspects of [Procedural] Order No. 1 impacting directly on paragraphs 63.1 and 63.4, considered with paragraphs 33 to 37 and the corresponding footnotes thereto, to their international expert counsel for consideration and advice.”

⁹ See the Claimants' letter to the Tribunal, 9 November 2016, §2 and §3.

¹⁰ *Id.*, §5.

but they made no submissions as to what an appropriate order would be, save that it should “*exclude any cost order against the Claimants*”.¹¹

8. The Claimants also noted that, as a further consequence of their declining to furnish the undertaking described in §63.1 of Procedural Order No. 1, the Procedural Timetable set out under §63.4 “*falls away*”.¹²
9. With the leave of the Tribunal,¹³ the Respondent submitted that the Claimants’ failure to furnish the undertaking described in §63.1 of Procedural Order No. 1 was “*irreconcilable with the demands of procedural fairness*”,¹⁴ and concluded that “*the issue of procedural fairness identified by the Tribunal can now only be addressed by ordering suspension*”.¹⁵ Noting the Claimants’ opposition to any order of security for costs,¹⁶ the Respondent did not make any submissions on whether such an order would be appropriate.
10. In addition to suspension, the Respondent invited the Tribunal to “*make an appropriate order confirming the vacation of the procedural timetable foreseen by paragraph 63.4 of Procedural Order No. 1*”.¹⁷ Finally, the Respondent sought an order that the Claimants bear the costs incurred by the Respondent in the Request for Suspension.¹⁸
11. With the leave of the Tribunal,¹⁹ the Claimants replied *inter alia* that “*whatever order this Tribunal may now make on the Respondent’s request to suspend the proceedings, no order as to costs should be made against any party at this stage and all questions as to costs should be reserved for later determination*.”²⁰
12. In subsequent correspondence, the Claimants appeared to concede that suspension of the proceedings would be the natural consequence of their declining to furnish the undertaking.²¹

¹¹ Id, §9.

¹² Id, §4.1.

¹³ See the PCA’s letter to the Parties, 9 November 2016.

¹⁴ See the Respondent’s letter to the Tribunal, 11 November 2016, §3.b.

¹⁵ Id, §6.

¹⁶ Id, §4.a.

¹⁷ Id, §7.

¹⁸ Id, §9 and §10.

¹⁹ See the PCA’s letter to the Parties, 11 November 2016.

²⁰ See the Claimants’ letter to the Tribunal, 15 November 2016, §12.

²¹ See the Claimants’ letter to the Tribunal, 16 November 2016, §2: “*Procedural Order No. 1 considered with the parties’ aforesaid responses thereto will have the effect that the arbitration proceedings will be suspended subject to the Claimants’ position on consent as stated in their letters of 8 and 15 November 2016 which position and stance are not abandoned but persisted with.*”

III. THE TRIBUNAL'S CONCLUSIONS

13. The Tribunal takes the view that, in the absence of an undertaking of the kind described in §63.1 of Procedural Order No. 1, the Respondent is at risk of procedural unfairness. It appears to be common cause that the appropriate remedy for this risk is not an order of security for costs, and that these proceedings should rather be suspended for a limited period pending the outcome of the Singapore High Court application.
14. In the exercise of its discretion, under Article 17(1) of the UNCITRAL Rules, to “conduct the arbitration in such manner as it considers appropriate”, and mindful of its duty in that exercise “to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute”, the Tribunal considers it appropriate and fair to grant the Request for Suspension for a limited period.
15. The Tribunal does not consider it necessary to make any order vacating the Procedural Timetable set out under §63.4 of Procedural Order No. 1. That Procedural Timetable was subject to the suspensive condition that the Claimants furnish the Respondent with the undertaking described in §63.1. As that suspensive condition was not fulfilled, §63.4 of Procedural Order No. 1 did not and cannot come into effect.

IV. ORDER

16. For the reasons set out above, the Tribunal hereby orders as follows:
 - 16.1. The Request for Suspension is granted for a limited period, which shall terminate on the outcome of the Singapore High Court application. These proceedings are accordingly suspended pending the outcome of the Singapore High Court application.
 - 16.2. Once the result of the Singapore High Court application is known, the Respondent is required forthwith to notify the Tribunal of that outcome and to furnish the Tribunal with whatever judgment, decision or order confirms that outcome. Upon such notification, the Tribunal shall issue appropriate further directions as soon as practicable.
 - 16.3. All questions of costs are reserved.

For the Tribunal:



Peter Leon
Presiding Arbitrator