

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. 3:
Further 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

28 August 2017

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
2. 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.
3. 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.”
4. 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
5. On 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)*”.⁴
6. On 26 August 2016, the Respondent made a request that this Tribunal’s proceedings be suspended pending the outcome of the Singapore High Court application, *excluding any appeal* (the “Request for Suspension”).
7. On 3 November 2016, after considering extensive written and oral submissions from the Parties, this Tribunal issued Procedural Order No. 1, *inter alia* ordering as follows:⁵

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

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 Tribunal’s Terms of Appointment, §2.7.

⁵ Procedural Order No. 1, §63.1.

Tribunal, that they will satisfy any order this Tribunal may make in respect of wasted costs consequent upon the annulment of the Williams Award.

8. The Claimants did not furnish the Respondent with such an undertaking. Consequently, after considering further submissions, this Tribunal issued Procedural Order No. 2 on 24 November 2016, ordering 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.

9. On 14 August 2017, the Singapore High Court (per Ramesh J) delivered a detailed judgment in which it "*set aside the [Williams] Award in entirety*" (the "**Singapore High Court judgment**").⁶ It is not necessary, at this stage, to recite its reasons for doing so.

II. THE PARTIES' POSITIONS

10. On 15 August 2017, the Respondent furnished this Tribunal with a copy of the Singapore High Court judgment, and proposed that "*the Tribunal should set an appropriate timetable for the Parties to make submissions as to the effect of the Judgment upon the proceedings before the present Tribunal, and as to any consequential matters*".
11. On 16 August 2017, the Claimants notified the Tribunal that they intended to pursue an appeal against the Singapore High Court judgment to the Singapore Court of Appeal, and requested "*that the suspension of the proceedings in this Arbitration be continued until the final determination of the appeal*".
12. On 17 August 2017, the Tribunal invited the Respondent to express its views on the Claimants' proposal. On 23 August 2017, the Respondent advised the Tribunal that it agreed with the Claimants' proposal.

III. ORDER

13. By agreement between the Parties, the Tribunal hereby orders as follows:

⁶ *Kingdom of Lesotho v Swissbourngh Diamond Mines (Pty) Ltd* [2017] SGHC 195, §341.

- 13.1. This Tribunal's proceedings are further suspended pending the outcome of the Claimants' appeal against the Singapore High Court judgment.
- 13.2. Once the outcome of such appeal is known, the Claimants are required forthwith to notify the Tribunal of that outcome and to furnish the Tribunal with whatever judgment, decision or order confirms such outcome. Upon such notification, the Tribunal shall issue appropriate further directions as soon as practicable.
- 13.3. All questions of costs are reserved.

For the Tribunal:



Peter Leon
Presiding Arbitrator