

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. 4:
Resumption 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

11 February 2019

I. BACKGROUND

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
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 annulment application**”).³
5. 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 lodged a request that this Tribunal’s proceedings be suspended pending the outcome of the Singapore annulment application, *excluding* any appeal.
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

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

² 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.

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.

8. This order was made for the following reasons:⁶

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...

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.

9. 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, *inter alia* ordering as follows:⁷

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.

10. On 14 August 2017, the Singapore High Court (per Ramesh J) delivered a judgment in which it “*set aside the [Williams] Award in entirety*”.⁸

⁶ Procedural Order No. 1, §34 and §36.

⁷ Procedural Order No. 2, §16.1.

⁸ *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and Others* [2017] SGHC 195 (“**Singapore High Court judgment**”), §341.

11. On 16 August 2017, the Claimants notified the Tribunal that they intended to pursue an appeal against this judgment, and requested “*that the suspension of the proceedings in this Arbitration be continued until the final determination of the appeal*”. The Respondent agreed.
12. Accordingly, on 28 August 2017, this Tribunal issued **Procedural Order No. 3**, *inter alia* ordering as follows:⁹

This Tribunal’s proceedings are suspended pending the outcome of the Claimants’ appeal against the Singapore High Court judgment.

13. On 27 November 2018, Singapore Court of Appeal (per Menon CJ, with Phang JA, Prakash JA, Tay JA and Chong JA concurring) delivered a judgment in which it dismissed the Claimants’ appeal and affirmed the annulment of the Williams Award.¹⁰
14. On 28 November 2018, the Respondent wrote to the Tribunal, as follows:¹¹

As a consequence of the setting aside of the [Williams Award] by the Singapore High Court, and the judgment of the Court of Appeal upholding that decision, there subsists no basis on which [this Tribunal] has jurisdiction over the Claimants’ claims against Lesotho, and no basis on which the proceedings can continue, save to determine the issue of costs and any other ancillary issues.

15. On 29 November 2018, the Claimants responded as follows:¹²

The Claimants intend to proceed with this Arbitration, and maintain their position that this Tribunal has jurisdiction over the Claimants’ claims against Lesotho. The Claimants disagree with the contents of the Respondent’s letter, and ask that a procedural conference call be scheduled so that the necessary directions can be given by this Tribunal for the further conduct of this Arbitration, including the determination of any jurisdictional challenge the Respondent may wish to mount.

16. On 12 December 2018, the Tribunal issued directions for a procedural hearing to be held in January 2019, and requested the Parties to provide the Registry, in equal amounts, with a supplementary deposit to cover the costs to be incurred by the Tribunal.

⁹ Procedural Order No. 3, §13.1.

¹⁰ *Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho* [2018] SGCA 81 (“**Singapore Court of Appeal judgment**”), §225.

¹¹ Respondent’s letter to the Tribunal, 28 November 2018.

¹² Claimants’ letter to the Tribunal, 29 November 2018, §2.

17. On 15 January 2018, the Parties delivered written submissions concerning the further conduct of this arbitration. In short, and although not precisely framed as such, the issues could be narrowed down to two requests by the Respondent, namely that:
 - 17.1. these proceedings be suspended (again) until such time as the Claimants have given “adequate assurances that they will not subsequently seek to challenge the Tribunal’s jurisdiction to make an order as to the costs of the present proceedings in the event that the Tribunal finds that it is without jurisdiction as a result of the annulment of the Williams Award”, and have satisfied certain costs orders made by the courts in Singapore (“**Request for Suspension**”);¹³ and
 - 17.2. its preliminary objection against this Tribunal having jurisdiction over any dispute between the Parties after the annulment of the Williams Award (the “**Preliminary Jurisdictional Objection**”) be heard separately from, and prior to, the merits of the main dispute and its other Jurisdictional Objections (as defined in Procedural Order No. 1 at §2) (“**Request for Separation**”).¹⁴
18. On 17 January 2019, the Claimants notified the Tribunal that, while they had paid their share of the supplementary deposit, the Respondent had failed to do so. The Claimants accordingly requested the Tribunal to direct the Respondent to pay its share “immediately”.¹⁵ On the same day, the Respondent notified the Tribunal that it was not prepared to pay its share of the supplementary deposit, as “there is an evident and substantial risk that, in the event ... the Tribunal finds that it is without jurisdiction, the Claimants will refuse to comply with any order against them in respect of the wasted costs of the present proceedings, and/or will contest the jurisdiction of the Tribunal to make any such order”.¹⁶ The Tribunal duly added this issue to the agenda for the procedural hearing.¹⁷
19. The Parties exchanged written replies to each other's submissions on 24 January 2019, and presented oral submissions at the procedural hearing, conducted by teleconference on 29 January 2019.
20. The Tribunal is grateful to the Parties and their counsel for their helpful written and oral submissions, which have been carefully considered in the preparation of this Order.

¹³ Respondent’s Submissions, 15 January 2019, §9 to §14, and §27.

¹⁴ Id, §11.

¹⁵ Claimants’ letter to the Tribunal, 17 January 2019, §4.

¹⁶ Respondent’s letter to the Tribunal, 17 January 2019.

¹⁷ Agenda for Procedural Hearing, 28 January 2019, §1.

II. SUPPLEMENTARY DEPOSIT

21. The Claimants contend that Article 43(2) of the UNCITRAL Rules places the Parties under “*an ongoing obligation to pay any and all requests for supplementary deposits made by the Tribunal*”,¹⁸ relying on the reasoning given by the Williams Tribunal in a Partial Award on Deposit on 2 October 2014.¹⁹ At the Procedural Hearing, the Claimants also referred to this Tribunal’s Terms of Appointment, which provide that the Tribunal, through the Registry, “*may request the Parties to make supplementary deposits in accordance with Article 43(2) of the UNCITRAL Rules*”,²⁰ and that “*the Parties shall be jointly and severally liable for any shortfall in such deposit*”.²¹
22. The Respondent distinguished that Partial Award from the present circumstances on the grounds that, before the Williams Tribunal, the existence of a valid arbitration agreement was not in dispute (as it is here), and the Respondent’s share of the deposit had been paid by the Claimants, who were seeking an order for reimbursement.²²
23. The Tribunal is not persuaded that it has the power, either under the UNCITRAL Rules or its Terms of Appointment, to order a Party to make a deposit. In particular, the consequences of non-payment of a directed deposit by a party are regulated by Article 43(4) of the UNCITRAL Rules, namely that the Tribunal will give the other party the opportunity to make the required payment, failing which the Tribunal may order the suspension or termination of the arbitral proceedings. The position would be different, as it was before the Williams Tribunal, where one Party had paid the other’s share of the deposit, and was seeking reimbursement for it (and would, if successful, become the creditor under an award enforceable against its opponent in the usual manner).
24. Consequently, the Claimants’ request for an order compelling the Respondent to pay its share of the supplementary deposit (requested by the Tribunal on 12 December 2018) is refused. The Tribunal will issue a notification under Article 43(4) of the UNCITRAL Rules simultaneously with the issue of this Procedural Order.

¹⁸ Claimants’ Submissions in Reply, 24 January 2019, §5 to §6.

¹⁹ *Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho*, PCA Case No 2013-29, Partial Award on Claimants’ Application that Respondent Reimburse Claimants One-Half of the Deposit, 2 October 2014, §4.1 to §4.12.

²⁰ Terms of Appointment, §11.2.

²¹ *Id.*, §12.5.

²² Respondent’s Oral Submissions at the Procedural Hearing, 29 January 2019.

III. REQUEST FOR SUSPENSION

25. The Respondent contends that the Claimants' "*persistent refusal*" to give an undertaking not to challenge any adverse costs award this Tribunal may make if it finds itself without jurisdiction, coupled with its "*pattern of conduct in seeking to avoid the payment of costs orders in related proceedings*", exposes the Respondent to procedural unfairness and thus warrants a suspension of these proceedings until the Claimants have both provided such an undertaking, and satisfied certain costs orders made by the courts in Singapore.²³ The Respondent relied heavily on this Tribunal's reasons for requiring an undertaking from the Claimants in Procedural Order No. 1.²⁴
26. The Claimants deny any such "*pattern of conduct*", and contend that, in any event, there is no basis for this Tribunal to concern itself with costs orders made by domestic courts.²⁵ As to the undertaking sought, the Claimants contend that requiring such an undertaking "*is unprecedented in international arbitration and unjustified*",²⁶ noting that this Tribunal was addressing different circumstances in Procedural Order No. 1, dealing with the risk of "*wasted costs*" being incurred "*while parallel setting aside proceedings were on foot **and not** costs incurred if a jurisdictional hearing were to occur to ventilate both parties' arguments*".²⁷ Finally, the Claimants state that "*it is open to the Respondent to submit a properly substantiated application for security for costs, instead of seeking security by a 'back-door' request for the undertaking*".²⁸
27. The Tribunal agrees with the Claimants. In particular, the Tribunal has concluded that the present circumstances are materially different from those which, in Procedural Order No. 1, warranted an Order that the Claimants should give an undertaking "*that they will satisfy any order this Tribunal may make in respect of wasted costs consequent upon the annulment of the Williams Award*".²⁹ There are no longer any parallel proceedings, nor any exceptional circumstances exposing the Respondent to procedural unfairness in this arbitration.
28. Consequently, the Respondent's Request for Suspension is refused.

²³ Respondent's Submissions, 15 January 2019, §21 and §22.

²⁴ Id, §7 to §10.

²⁵ Claimants' Submissions in Reply, 24 January 2019, §8 to §14.

²⁶ Id, §15.

²⁷ Id, §17 (emphasis in original).

²⁸ Id, §23.

²⁹ Procedural Order No. 1, §63.1.

IV. REQUEST FOR SEPARATION

29. The Respondent contends that its Preliminary Jurisdictional Objection should be dealt with separately and “*determined without an oral hearing*”,³⁰ as “*the consequences of the setting aside of the Williams Award is a pure question of law which requires no further factual evidence*”.³¹
30. The Claimants disagree, contending that the Preliminary Jurisdictional Objection (which they describe as an “*Additional Jurisdictional Objection*”) overlaps with the Respondent’s other Jurisdictional Objections, as well as the merits of the main dispute, and “*cannot be dealt with as a distinct issue of law without the benefit of factual evidence, and would require at the very least an assessment of the factual and lengthy procedural background to the matter, on which the Parties have different views*”.³² Citing this Tribunal’s observation in Procedural Order No. 1, that “*further piecemeal adjudication of the issues would create the possibility of further delays, which ought to be avoided*”,³³ the Claimants also contend that a separate award on the Preliminary Jurisdictional Objection will be subjected to lengthy annulment proceedings by the losing Party, further delaying the resolution of claims which have been pending for 28 years.³⁴ The Claimants accordingly seek an order that “*all of the issues in dispute between the Parties, i.e. both jurisdiction and merits, including quantum) are to be addressed at a single substantive hearing, through the cross-examination of witnesses and experts, as well as the presentation of oral legal argument.*”³⁵
31. In resolving this issue, the Tribunal is guided by Article 17(1) of the UNCITRAL Rules, which reads as follows:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.

³⁰ Respondent’s Submissions, 15 January 2019, §11.

³¹ Respondent’s Submissions in Reply, 24 January 2019, §2.d.

³² Claimants’ Submissions, 15 January 2019, §10.

³³ Id, §8, citing Procedural Order No. 1, §50.

³⁴ Id, §9 to §12.

³⁵ Claimants’ Submissions, 15 January 2019, §14.

32. The Tribunal considers that the current circumstances are materially different from those that informed its refusal, in Procedural Order No. 1, to bifurcate the other Jurisdictional Objections. The Preliminary Jurisdictional Objection is clearly distinguishable from:
 - 32.1. the Non-Exhaustion Objection, as it is not “*so intertwined with the merits that it is very unlikely that there will be any savings in time or cost*”;³⁶ and
 - 32.2. the Temporal and Material Scope Objections, as it would (unlike them) “*dispose of*” the disputed issues on the merits.³⁷
33. The Tribunal has concluded that considerations of fairness and efficiency are in favour of having the Preliminary Jurisdictional Objection heard and determined separately from, and in advance of, the other Jurisdictional Objections and the merits of the main dispute.
34. Furthermore, the Tribunal is not persuaded by the Respondent’s contention that the Preliminary Jurisdictional Objection is a pure question of law that should be determined on the papers. In this regard, the Tribunal is mindful of the fact that the Claimants wish to rely on factual evidence which is relevant to the Objection, and agrees that provision should be made for this in the Order below.
35. Consequently, the Respondent’s Request for Separation is granted, but the Preliminary Jurisdictional Objection shall be heard in the manner set out below.

V. ORDER

36. For the reasons set out above, the Tribunal hereby orders as follows:
 - 36.1. The Claimants’ request for an order compelling the Respondent to pay its share of the supplementary deposit is refused.
 - 36.2. The Respondent’s Request for Suspension is refused.
 - 36.3. The Respondent’s Request for Separation is granted, and will be dealt with in the manner set out below.
 - 36.4. The Respondent’s Preliminary Jurisdictional Objection shall be addressed, as soon as practicable, at a single oral hearing, and in advance of the other issues in this case, pursuant to directions given as per para 36.5 below (the “**Hearing**”).

³⁶ Procedural Order No. 1, §47.

³⁷ Procedural Order No. 1, §49.

- 36.5. The Parties shall each, within ten business days of this Order, furnish the Tribunal with submissions in respect of the following matters:
- 36.5.1. which Party should bear the duty to begin;
 - 36.5.2. what provision should be made for the service of pleadings or similar statements of case in respect of the Respondent's Preliminary Jurisdictional Objection;
 - 36.5.3. what directions should be given for the service of witness statements and/or expert reports (including statements and reports in rebuttal);
 - 36.5.4. whether further disclosure of documents relevant to such Objection is required, identifying such documents;
 - 36.5.5. the place, date and estimated duration of the Hearing;
 - 36.5.6. the date of service of consolidated, paginated and indexed hearing bundles;
 - 36.5.7. the date of service of written Opening Submissions;
 - 36.5.8. any other matter relevant to the Hearing.
- 36.6. The Tribunal shall issue a further Procedural Order after considering the Parties' submissions under paragraph 36.5 above.
- 36.7. All questions of costs are reserved.

For the Tribunal:



Peter Leon
Presiding Arbitrator