

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-CIV-MOT-GEN-2018/00006

In the matter between:

TSUMEB MUNICIPAL COUNCIL

APPLICANT

And

REINHARD TÖTEMEYER NO

1st RESPONDENT

EXPEDITE AVIATION CC

2nd RESPONDENT

THE MINISTER OF URBAN AND RURAL DEVELOPMENT

3rd RESPONDENT

Neutral citation: *Tsumeb Municipal Council v Tötemeyer NO* (HC-MD-CIV-MOT-GEN-2018/00006) [2019] NAHCMD 161 (21 May 2019)

Coram: MASUKU, J

Heard: 11 June 2018

Delivered: 21 May 2019

Flynote: Application – Rule 65(4) – Declaratory and interdictory relief – Partnership Agreement entered into without prior written ministerial approval – Arbitration

agreement concluded to supplement the partnership agreement – validity of partnership agreement challenged – Arbitration agreement cannot exist without the partnership agreement.

Summary: This is an application for a declaratory and interdictory relief. The Applicant is challenging the validity of the partnership agreement entered into between itself and Expedite Aviation, on the ground that the statutorily required prior ministerial consent was never obtained for it to enter into the said agreement. It is Applicant's assertion that, in the absence of such approval, it also did not have the authority to enter into any of the clauses in the partnership agreement, including the arbitration clause and its several clause, specifically.

Expedite Aviation, counters this by arguing that the issues now brought before this court are the same issues that the arbitrator had to decide. The Applicant is thus barred by the doctrine of res judicata in this regard. Further that, there is a valid arbitration agreement, there always has been and the Applicant only at this advanced stage in proceedings before the arbitrator raised the invalidity of the partnership agreement as well as the arbitration agreement, after acting as though the validity was not in question.

ORDER

- a) It is declared that the Partnership Agreement signed by the Applicant and the Second Respondent is void ab initio.
- b) For the avoidance of doubt, it is declared that the following clauses 18.1 and 18.3 of the written partnership agreement between the Applicant and the Second Respondent concerning Tsumeb Airport, annexed to the Applicant's founding affidavit ("the partnership agreement") are invalid:

- c) It is declared that the written agreement styled “EXTENDED ARBITRATION AGREEMENT AGENDA FOR ARBITRATION” annexure “FA2” to the founding affidavit (the 9 June 2017 draft arbitration rules) is not an arbitration agreement as defined in the Arbitration Act 42 of 1965 referring the differences and disputes mentioned in clause 18.1 of the partnership agreement to arbitration that is binding on the Applicant.
- d) It is declared that there is no other agreement binding on the Applicant referring to arbitration the disputes that have arisen in the arbitration before the First Respondent between the Applicant and the Second Respondent.
- e) The arbitration award of the First Respondent dated 15 December 2017 is hereby set aside, including the costs order issued therein.
- f) The Second Respondent is to pay the costs of this application consequent upon the employment of one instructing and one instructed counsel;
- g) No order is made as to the costs in respect of the arbitration proceedings;
- h) Expedite Aviation is, if it is so advised, within 90 court days from the date hereof, to institute an appropriate action against the Applicant and/or its officials, as it intimated during the arbitration proceedings;
- i) The matter is removed from the roll and regarded finalised.

JUDGMENT

MASUKU, J:

Introduction

[1] This is an application in terms of Rule 65(4), of this court's rules and in terms whereof the Applicant seeks an order in the following terms:

'1. Declaring that the following clauses of the written partnership agreement between the applicant and the second respondent concerning Tsumeb Airport, annexure "FA1" to the founding affidavit ("the partnership agreement"), are invalid:

1.1. clause 18.3;

1.2. clause 18.1.

2. Declaring that the written document styled "EXTENDED ARBITRATION AGREEMENT AGENDA FOR ARBITRATION", annexure "FA2" to the founding affidavit ("the 9 June 2017 draft arbitration rules"):

2.1. is not an arbitration agreement as defined in the Arbitration Act 42 of 1965 referring the differences and disputes mentioned in clause 18.1 of the partnership agreement to arbitration that is binding on the applicant; alternatively,

2.2. on a proper interpretation thereof does not refer to arbitration the differences and disputes contemplated in clause 18.1 of the partnership agreement.

3. Declaring that there is no other agreement binding on the applicant referring to arbitration the disputes that have arisen in the arbitration before the first respondent between the applicant and the second respondent.

4. Reviewing and setting aside the whole of the award of the first respondent of 15 December 2017, including the costs order.

5. Alternatively to prayers 2 to 2.2, declaring that on a proper interpretation of clause 18.1 of the partnership agreement, its provisions do not cover the alternative claims of the second respondent in the arbitration before the first respondent premised on the invalidity of the partnership agreement.

6. Alternatively to prayers 1 to 4 above, that the following disputes, shall not be referred to arbitration:

6.1. the disputes relating to the issues mentioned in prayers 1, 2 and/or 3 above;

6.2. the dispute over the validity of the partnership agreement;

6.3. the disputes relating to the second respondent's delictual damages claims based on the alleged wrongful, intentional or negligent, representations by the applicant (or a person or persons for whose conduct in making the representations the applicant is vicariously liable); and/or

6.4. the disputes relating to all other claims and issues raised in the arbitration before the first respondent between the applicant and the second respondent premised on the invalidity of the partnership agreement.

7. Alternatively to prayers 1 to 4 and 6 to 6.4 above, and to the extent that the claims in prayers 6 to 6.4 above fail, ordering that any arbitration agreement between the applicant and the second respondent shall cease to have effect with reference to the disputes referred to arbitration in the arbitration before the first respondent between the second and the applicant mentioned in prayers 6.1, 6.2, 6.3 and/or 6.4 above.

8. Declaring that the partnership agreement is invalid.

9. Interdicting and restraining the first and second respondents from proceeding with the arbitration of the disputes and/or issues mentioned in prayers 6.1 to 6.4 above.

10. Ordering the second respondent to pay the applicant's costs of the application.

11. Ordering any person other than the second respondent opposing the application to pay the applicant's costs of the application jointly and severally with the second respondent, the one paying the other or others to be absolved.

12. Ordering the second respondent to pay the applicant's costs of the application to stay the arbitration that was refused in the award mentioned in prayer 4 above.
13. Granting further and/or alternative relief.'

The parties

[2] The Applicant is Tsumeb Municipal Council, a local authority duly established under the Local Authorities Act 23 of 1992. The applicant is a juristic person by virtue of s 6(3) of the Local Authorities Act, with its seat situate at No. 263 Moses Garoeb Street, Tsumeb, Namibia. For ease of reference, Tsumeb Municipality, will be referred to as 'the Applicant' throughout the course of this judgment.

[3] The First Respondent is Mr. Reinhard Tötemeyer, in his capacity as Arbitrator. He presided over the arbitration proceedings between the Applicant and the Second Respondent. He is a major male legal practitioner, practicing as Senior Counsel at fourth floor Namlex Building, No. 333 Independence Avenue, Windhoek, Namibia. He will be referred to as 'the Arbitrator' throughout the course of this judgment.

[4] The Second Respondent is Expedite Aviation CC, a close corporation duly incorporated and registered in terms of the laws of the Republic of Namibia, having its registered office at Erf 1554 Sam Nuyoma Drive, Tsumeb, Namibia. It will be referred to as the Expedite Aviation in this judgment.

[5] The Third Respondent is the Minister of Urban and Rural Development, who is responsible for the administration of the Local Authorities Act, care of Government Attorney, 2nd Floor, Sanlam Centre, Independence, Windhoek, Namibia. No order is sought against the Minister, who is cited only for the interest he/she may have in the matter.

Background

[6] On 07 August 2009, the Applicant and Expedite Aviation entered into a written partnership agreement. In terms of this agreement, Expedite Aviation was to manage and operate the Tsumeb Airport. This agreement was intended to be valid for a period of 50 years, subject to a cancellation clause exercisable before the lapse of the 50 years period.

[7] The harmonious partnership was, however, short lived it started navigating on potholes. On 12 January 2016, the Ministry of Works and Transport sought legal advice from the Office of the Attorney-General on how it could 'opt out' of the partnership agreement. The Attorney-General, advised that the Applicant gives Expedite Aviation three months' notice of cancellation of the agreement as required in terms of clause 19.1.2 of the partnership agreement.

[8] Consequently, the Applicant, in line with the advice rendered, at its monthly council meeting held on 28 January 2016, resolved that the Applicant should cancel the 'lease agreement'. By notice dated 01 February 2016, Applicant gave Expedite Aviation, notice of its termination of the 'partnership agreement', effective from the last day of April 2016.

[9] Expedite Aviation took issue with the fact that Applicant had given it short notice and had thereby breached their partnership agreement, which required that a three months' notice be given. Expedite Aviation, by letter dated 28 April 2016, informed the Applicant that its cancellation was invalid as it did not comply with the three months' cancellation period, as per clause 19.1.2 of the partnership agreement. This non-compliance was communicated to the Applicant, which was invited to rectify the defect.

These communications, it would seem, fell on deaf ears, as the Applicant did not move an inch. This failure prompted Expedite Aviation to cancel the partnership agreement on the grounds that the Applicant had repudiated the partnership agreement.

[10] By letter dated 14 March 2017, Expedite Aviation conveyed its purported cancellation as aforesaid and indicated that it was entitled to damages suffered as a result of the Applicant's breach and that failure to pay would be regarded as disputed. In that event, Expedite Aviation would refer the matter for arbitration in terms of the arbitration clause.

[11] By 05 June 2017, it would appear that the parties were ad idem on going for arbitration. By even date, they had agreed on appointing First Respondent as Arbitrator. They arranged to meet the Arbitrator on 09 June 2017 to discuss deadlines for filing pleadings and to agree on other procedural aspects and modalities in respect of the intended arbitration hearing.

The Arbitration Agreement

[12] The Applicant's legal representative could not attend the meeting of 09 June 2017. In his absence, the legal representative for Expedite Aviation and the Arbitrator set timelines for the filing of pleadings and other ancillary matters. This document was reduced to writing and titled 'Extended Arbitration Agreement: Agenda for arbitration', hereafter referred to as the 'arbitration agreement'. The arbitration hearing was set down for the week 21-25 August 2017.

[13] By 12 July 2017, the Applicant did not raise any objection to the arbitration agreement and in fact reiterated that it will comply therewith. The Applicant's

representative signed the arbitration agreement on 26 July 2017 and Expedite Aviation's legal representative signed same on 25 August 2017.

[14] Various correspondences were exchanged between the parties in the weeks leading up to the arbitration hearing. On 14 July 2017, the Applicant, in its statement of defence, informed Expedite Aviation that the partnership agreement was invalid for lack of prior written ministerial approval, as required by the Joint Business Venture Regulation. This Regulation states thus:

'A local authority council may, for the purposes of exercising, performing or carrying out its powers, functions or duties in terms of the Act, and subject to - (a) sub-regulation (2); (b) these regulations; and (c) the prior written approval of the Minister on such conditions as the Minister may impose, enter into a joint business venture with the Government, whether for profit or non-profit purposes, or any company or any trust, or co-jointly with the Government and any company or any trust, in order to provide directly or indirectly for the advancement of persons within the Republic of Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or to promote economic development and employment creation within its area or in order to supplement its funds referred to in section 80(1) of the Act.'¹

[15] By letter dated 25 July 2017, Expedite Aviation took issue with the fact that the Applicant had not previously raised the issue of the validity of the partnership agreement and alleged that if that was the case then, the Applicant had been fraudulently induced to enter into the partnership agreement by the Applicant and/or the officials who represented it in the 'conclusion' of the partnership agreement.

¹ *Joint Business Venture Regulations* No.:114: Local Authorities Act, 1992, Government Gazette No.3864, 27 June 2007.

[16] On 15 August 2017, both parties were represented at the arbitration proceedings. However, the arbitration could not take place as inter alia, further discovery had to be made; the issue whether the Arbitrator had jurisdiction to arbitrate, in light of the fact that the partnership agreement may be invalid, was raised and talks about separation of issues also featured. As a result, a new date for arbitration was fixed for 20 November 2017.

[17] In the meantime, the Applicant filed an application for stay of the arbitration proceedings. On 25 August 2017, the date for the application for stay of proceedings was fixed for 13 October 2017. This was to be an interlocutory hearing, to determine whether the arbitration proceedings should be stayed, pending a decision by the High Court on the issue of the arbitrator's jurisdiction.

The Application to Stay Proceedings

Submission on behalf of the Applicant before Arbitrator

[18] The Applicant applied for stay of the arbitration proceedings, pending litigation in the High Court by it for an order that the following disputes not be referred to arbitration and/or that the arbitration clause entered into by and between the parties and dated 07 August 2009, shall cease to have effect in terms of s 3(2)(b) and (c) of the Arbitration Act, 42 of 1965:

- a) Dispute over the validity of the partnership agreement, including:
 - i) Partnership agreement as a whole;
 - ii) Partnership agreement, excluding clause 18.1 – 18.3; and

b) The Fraud claim (in respect of which the Applicant expressed the desire to defend itself in open court)

Submissions on behalf of Expedite Aviation before the arbitrator

[19] Expedite Aviation was of the opinion that the Applicant had to show good cause in terms of s 3(2) of the Arbitration Act and to do so in a bona fide manner. According to Expedite Aviation, the only good cause shown by the Applicant in its application for stay of proceedings, was its desire to have the allegations of fraud adjudicated in open court and to allow it to enjoy the benefit of appeal proceedings should it not derive joy from the judgment of the High Court.

[20] According to Expedite Aviation, this application to stay proceedings was a dilatory stratagem, aimed at delaying the finalization of the arbitration proceedings. If as the Applicant asserts there is no valid arbitration agreement, on what basis could the arbitration proceedings proceed? On what basis was the arbitrator appointed and the arrangements regarding the arbitration proceedings made? These are the questions Expedite Aviation posed in its rebuttal of the Applicant's claims.

[21] It was further Expedite Aviation's case that, for all intents and purposes, the Applicant acted as though there had been a valid arbitration agreement and that the issue of the lack of jurisdiction had been brought up at a belated stage as some kind of subterfuge, so to speak.

Arbitration Award in respect of the application for stay

[22] The Arbitrator found that s 3(2) of the Arbitration Act requires that there be an existing arbitration agreement. However, since the application for stay was brought on the basis that there was an invalid arbitration agreement, the application could not be accepted as having have been brought in terms of s 3(2) of the Arbitration Act. According to the arbitrator, the application for stay was brought outside the realms of s 3(2) of the Arbitration Act.

[23] The Arbitrator further found that in light of the above finding, the proper test to be applied was whether there was an assertion made by the Applicant of the invalidity of the partnership agreement and whether such assertion was not wholly unfounded. He further held that, should he find there was an arbitration agreement *dehors* the partnership agreement, it would be unnecessary to deal with the issue of the validity of the partnership agreement and this would render the premise upon which the application is brought, wholly unfounded.

[24] The Arbitrator, in his wisdom, found that there was indeed an arbitration agreement *dehors* the partnership agreement and that the scope of his jurisdiction was determined by clause 18.1 of the partnership agreement. He also held that he was not going to decide whether clause 18.1 of the partnership agreement extends his jurisdiction to determine the validity of the partnership agreement in those proceedings.

[25] He further held that any invalidity attaching to the partnership agreement would not invalidate the arbitration agreement, as it exists *dehors* the partnership agreement. Finally, the Arbitrator issued an adverse order for costs against the Applicant. As a consequence, the Applicant, aggrieved by this award, applied to this court for declaratory and interdictory relief as set out in paragraph [1] above.

The present proceedings

[26] I am of the considered view that a determination on the issue, whether the Applicant's assertion regarding the invalidity of the partnership agreement is wholly unfounded, would be dispositive of the issues raised in the notice of motion. It is for that reason that I will consider this issue at the outset.

Arguments on behalf of the Applicant

[27] Regulation 2(1) provides that 'A local authority council may, for the purposes of exercising, performing or carrying out its powers, functions or duties in terms of the Act, and subject to - (a) sub-regulation (2); (b) these regulations; and (c) the prior written approval of the Minister on such conditions as the Minister may impose, enter into a joint business venture with the Government, whether for profit or non-profit purposes, or any company or any trust, or co-jointly with the Government and any company or any trust, in order to provide directly or indirectly for the advancement of persons within the Republic of Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or to promote economic development and employment creation within its area or in order to supplement its funds referred to in section 80(1) of the Act.'²

[28] According to the Applicant, the Minister's prior written approval as required in terms of the above regulation, was never obtained and for that reason, the partnership agreement is thus void ab initio. The purpose of this regulation, according to the Applicant is, to empower the Minister to regulate whether and if so, under what conditions a local authority council may enter into a joint business venture. Therefore, it was argued, that the Applicant lacked the power to enter into (without the Minister's prior written approval) a partnership agreement, an arbitration agreement *dehors* the partnership agreement and the severance clause in the partnership agreement. In

² *Joint Business Venture Regulations* No.:114: Local Authorities Act, 1992, Government Gazette No.3864, 27 June 2007.

support of this argument, the Applicant relied on *Wayland v Everite Group Ltd* 1993 (3) SA 946 (W).

[29] It was further argued that the arbitration agreement provides that it supplements and does not replace the partnership agreement. The argument further proceeded thus: the arbitration agreement is inchoate, in that it does not provide what disputes are to be referred to arbitration. It is aimed at disputes already referred to arbitration by the partnership agreement. Finally, it was contended that the Arbitrator thus wrongly conferred jurisdiction upon himself, based on an arbitration agreement *dehors* the partnership agreement.

Arguments on behalf of Expedite Aviation

[30] According to Expedite Aviation, all issues raised in the notice of motion by the Applicant, are issues, which the Arbitrator had to deal with, and thus the Applicant is barred by the doctrine of *res judicata*, from raising these very issues again in a different forum. The current proceedings, according to Expedite Aviation are vexatious and are an abuse of process.

[31] It was further argued on behalf of Expedite Aviation that signature is not a requirement for a valid arbitration agreement. The arbitration agreement at the very latest on 27 July 2017, constituted a valid and binding arbitration agreement independent and *dehors* the partnership agreement and incorporated clause 18 of the partnership agreement.

[32] It was further submitted that the Applicant participated in the arbitration proceedings for a long time – clearly on the premise that there had been a valid referral

to arbitration, without objecting to the validity of same. The Applicant, with its eyes, wide open, fully participated in the arbitration until an adverse award was made. Therefore, if it was found that there was a valid arbitration agreement, there would have been no need to hunt in search of other agreements conferring jurisdiction on the Arbitrator.

Issues

[33] The two issues I will deal with, are firstly, what is the source of the Arbitrator's jurisdiction? Secondly, whether the partnership agreement is void ab initio, for absence of prior written Ministerial approval to enter into same.

[34] It is apparent from a reading on the notice of motion that the prayers sought are couched in the alternative. For that reason and in appreciation thereof, I choose to deal with the aspects of the relief sought, which I consider could be dispositive of one or more of the alternative prayers and therefore the application before me.

Applicable law and analysis

[35] Expedite Aviation relied heavily in argument on *Merit Investment Eleven (Pty) Ltd v Namsov Fishing Enterprises (Pty) Ltd* 2017 (2) NR 393 (SC). The *Namsov* matter is, in my considered view, quite distinct from the present matter. This is because, firstly, there was no challenge in that matter to the validity of an agreement containing an arbitration clause and secondly, it dealt with the issue, whether there had been a written arbitration agreement at all. To that extent, the two cases are thus quite distinct, and as far as the West is from the East.

[36] The Applicant relied for its submission that the partnership agreement and consequentially, the arbitration agreement were invalid, on *Wayland v Everite Group Ltd* 1993 (3) SA 946 (W). In that case, Levy, AJ held that ‘If therefore there is some justification for the Respondent’s allegations of invalidity and unenforceability of the contract, then, the arbitration clause itself being in doubt and the consequent jurisdiction of the arbitrator to proceed under it being in doubt, a reference to arbitration would in my view be an improper reference.’³ Competence de la competence is not part of our law. That is, the Arbitrator cannot, where there is doubt about his jurisdiction, decide that issue. If it cannot be established from the contract that jurisdiction is conferred, the court should be approached. This then brings me to the first question.

What is the source of the Arbitrator’s office and scope power/ jurisdiction?

[37] The arbitration clause in the partnership agreement provides that;

‘18.1 If any difference or dispute arises at any time with regard to the interpretation of this agreement, the respective rights and obligations of the parties, the performance or non-performance of any such obligations or any other matter arising between the parties from or in connection with this agreement, then the matter in dispute must be resolved by arbitration, in accordance with the following provisions:

18.1.1

18.1.2

18.1.3 The arbitrator must be a person agreed between the parties

18.1.4

18.1.5

18.2

³ *Wayland v Everite Group Ltd* 1993 (3) SA 946 (W) at 952.

18.3 The provisions of this clause shall be severable from the remainder of this agreement and shall be binding and effective as between the parties notwithstanding that this agreement may otherwise be cancelled or declared of no force or effect for any reason.’ (Emphasis added).

[38] The arbitration agreement provides that, it supplements and does not replace the provisions of clause 18 in the partnership agreement. In the arbitration agreement, the parties appointed the first respondent as the Arbitrator. They also set out the timelines for filing pleadings; the rules and procedures to be followed at the arbitration hearing and payment terms of the Arbitrator.

[39] The source of the Arbitrator’s jurisdiction is clause 18, specifically clause 18.1 and 18.1.3 of the partnership agreement. It is my considered view that without these clauses, he would not have been appointed by mutual consent. If one then has regard to what Levy, AJ said in the *Wayland* matter as quoted above, it would seem sound to accept that, if the partnership agreement containing this arbitration clause (the source of the Arbitrator’s jurisdiction) could possibly be invalid or better yet, if such an assertion is not wholly unfounded, then there is doubt insofar as the jurisdiction of the Arbitrator is concerned. It is important in this regard to bear in mind that the arbitration agreement is not the source of the arbitrator’s jurisdiction, it merely supplements the source of his jurisdiction.

[40] I am accordingly of the considered view that where the assertion of invalidity is not wholly unfounded, it would not be proper for the arbitrator to decide his own jurisdiction and this court should be the appropriate forum to decide the issue with a degree of finality.

Was the Applicant’s assertion that the partnership agreement is invalid, wholly unfounded?

[41] This is not an appeal and this court has to be slow to interfere with the Arbitrator's award, and generally speaking, this court should not interfere unless *inter alia* it finds gross irregularity to have been committed. It is not for this court to determine whether the decision of the Arbitrator was correct, it is however for this court to decide whether the arbitrator properly performed his duties.⁴ In other words, what was the Arbitrator asked to consider at the interlocutory hearing for the application to stay? The Arbitrator had to determine, whether the Applicant's assertion of invalidity of the partnership agreement for absence of prior written ministerial approval, was wholly unfounded.

[42] In *Heyman & Another v Darwins Ltd* 1942 1 ALL ER 337 (HL) at 343, Viscount Simon LC said: 'An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.'

[43] The Arbitrator, and correctly so, if I may add, decided to leave that issue for determination at a later stage and opted to determine the existence of a valid arbitration agreement instead. He found that the extended arbitration agreement was indeed a valid agreement and found that he had jurisdiction to arbitrate the dispute.

⁴ *Telcordia Technologies Inc. v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

[44] I am of the respectful but considered view that this is not what he was called to determine. It is important to point out here that, there is a difference between an agreement that never came into force and one that did, but later became invalid for one or the other reason. In the former instance, where the agreement is void from the instance, nothing can be born from a non-existent agreement. It can be regarded as *pro non-scripto*. However, in the latter instance, an agreement came to being and from it flew rivers of life, that is rights and obligations were born therefrom.

[45] In the present matter, the challenge is to determine whether there was ever a valid partnership agreement. If it is found that there was never a valid partnership agreement, it would mean there could never have been an arbitration clause, severable or not. Nothing births nothing. This was crisply explained in *Miller v Prosperity Africa Holding* 2017 (2) NR 370 para. 41, where the court quoted the timeless words that fell from the lips of the legendary Lord Denning of England in *MacFoy v United Africa Co. Ltd*⁵. Where the timeless words were recorded as follows:

'If an act is void then in law it is a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

[46] Needless to say, the arbitration agreement cannot exist independently of the non-existent partnership agreement. A reading of the arbitration agreement suggests that, for a matter to be referred to arbitration, it would have to be a dispute in terms of the partnership 'agreement'. Even if, it was said that the arbitration agreement is a separate agreement, it would not make sense. What dispute could it possibly govern and what contractual relationship could it possibly relate to, considering that the

⁵ *McFoy v United Africa Co. Ltd* [1961] 3 All ER 1169 (PC).

partnership agreement never came into force. It would seem to me that any dispute to be arbitrated in terms of the extended jurisdiction, would have had to emanate from the partnership agreement

[47] In this regard, I am of the respectful opinion that the arbitration agreement is not existent *dehors* the partnership agreement. And the Arbitrator's jurisdiction is not wholly or at all derived solely from the arbitration agreement. His position and jurisdiction exist because of clause 18.1.3, which clause is only supplemented by the provisions of the arbitration agreement. One can even stretch matters as far as to say that, the Arbitrator had no jurisdiction to even determine the existence of an arbitration agreement, in the wake of a doubt regarding the validity of the source of his jurisdiction.

[48] The very wording in paragraph 1 of the arbitration agreement provides that it supplements the partnership agreement. 'Supplement' is defined in the Oxford Living dictionary as 'a thing added to something to complete or enhance it'. I dare to say, that the arbitration agreement supplements the arbitration clause in the non-existent partnership agreement.

[49] Further, the arbitrator could only arbitrate on issues provided for in clause 18.1.1. The issue of the validity of the partnership agreement is not an issue within the jurisdiction of the Arbitrator and that is why he correctly opted against deciding that issue at the hearing of the application to stay, in the hope, one could surmise, that his jurisdiction may be extended at a later stage to cover the issue of his jurisdiction.

[50] With the greatest of respect, I am of the considered view that the Arbitrator, in a genuine attempt to do justice between the parties, which is highly commendable, unfortunately missed the mark in this regard. I should point out that this is not the run of

the mill case where it can be said that the arbitrator's award has to be set aside because it is perverse.

[51] I say so because in this case, I have found that with respect, the learned Arbitrator did not have jurisdiction to arbitrate. That being the case, his award, regardless of how legally sound, it could otherwise be, cannot stand. Furthermore, he was, in my respectful view, incorrect in finding that the arbitration agreement existed *dehors* the partnership agreement. In the circumstances, I am of the considered view that the award cannot, in these circumstances stand, although the award cannot, on the ordinary premise, be regarded as perverse.

[52] In terms of the Joint Business Venture Regulations, as quoted elsewhere above, prior written Ministerial approval is needed for a joint business venture in terms of Regulation 2(1) to be valid. There is no evidence that such prior written approval was ever obtained, despite all parties involved acting and believing that there was a valid agreement. In the absence of such prior written approval of the Minister, the Applicant, in my considered opinion, did not have the authority to enter into the partnership agreement, i.e. to conclude any of the clauses contained in the partnership agreement. It could certainly not be said that there was such approval obtained in respect of the arbitration agreement, which is a consequence of the non-existent partnership agreement as I have found.

[53] It is clear that, for its existence and for it to make sense, the arbitration agreement needs the existence of a 'parent' agreement it will supplement. If the partnership agreement never came into existence then, the arbitration agreement supplements nothing. In other words, a child cannot, in the ordinary course of human intercourse, exist in the absence of a parent, barring of course the extra-ordinary and supernatural story of the birth of Jesus Christ as recorded in the Scriptures.

[54] Although the issue of the validity of the partnership agreement was referred to the Arbitrator, it is clear from his award that he did not decide on the issue. For that reason, therefore, res judicata does not serve Expedite Aviation in this matter.

[55] In the final analysis, I find that the partnership agreement is void ab initio, for the absence of the statutory requirement of prior written approval of the Minister. Therefore, since it never existed, nothing in it or purporting to flow from it ever existed legally speaking. If the Applicant lacked approval to enter into the partnership agreement, it, by parity of reasoning, also lacked power to conclude any of its clauses, including the arbitration clause.

[56] Furthermore, it is my considered view that the arbitration agreement could only have seen the light of day, if there was a valid arbitration clause in the partnership agreement. Without it, the arbitration agreement is meaningless. Any reference to the partnership agreement and clause 18 would have to disappear, as they never existed. In this regard, one would be tempted to ask rhetorically - what jurisdiction would the Arbitrator be exercising and over whom and over what disputes in the absence of the parent agreement, the partnership agreement?

[57] This conclusion, in no way approves or exculpates the conduct of the Applicant and its officials. Officials have a responsibility to ensure that when they deal with their employer's issues, particularly with outsiders, they have ticked all the internal boxes of validity regarding their undertaking. I cannot state the principle any higher than that.

Conclusion

[58] I am of the considered view that the Applicant has made out a case for the grant of the relief sought in the notice of motion. As will be evident above, the notice of motion was couched in a kitchen sink approach, with numerous alternatives prayers sought. The court cannot grant the prayers *holus bolus*, as prayed for in the notice of motion.

Costs

[59] The normal rule governing the award of costs is that costs usually follow the event. I see no reason why there should be a deviation from that beaten track in this matter.

Order

[60] In the result, I make the following order:

- a) It is declared that the Partnership Agreement signed by the Applicant and the Second Respondent is void ab initio.
- b) For the avoidance of doubt, it is declared that the following clauses 18.1 and 18.3 of the written Partnership Agreement between the Applicant and the Second Respondent concerning Tsumeb Airport, annexed to the Applicant's founding affidavit ("The Partnership Agreement") are invalid:
- c) It is declared that the written agreement styled "EXTENDED ARBITRATION AGREEMENT AGENDA FOR ARBITRATION" annexure "FA2" to the founding affidavit (the 9 June 2017 draft arbitration rules) is not an arbitration agreement as defined in the Arbitration Act 42 of 1965 referring the differences and disputes

mentioned in clause 18.1 of the partnership agreement to arbitration that is binding on the Applicant.

- d) It is declared that there is no other agreement binding on the Applicant referring to arbitration the disputes that have arisen in the arbitration before the First Respondent between the Applicant and the Second Respondent.
- e) The arbitration award of the First Respondent dated 15 December 2017 is hereby set aside, including the costs order issued therein.
- f) The Second Respondent is to pay the costs of this application consequent upon the employment of one instructing and one instructed counsel;
- g) No order is made as to the costs in respect of the arbitration proceedings;
- h) Expedite Aviation is, if it is so advised, within 90 court days from the date hereof, to institute an appropriate action against the Applicant and/or its officials, as it intimated during the arbitration proceedings;
- i) The matter is removed from the roll and regarded finalised.

T.S. Masuku

Judge

APPEARANCES:

APPLICANT: Mr. H. Steyn

Instructed by The Government Attorney

2nd RESPONDENT: Mr. T.A. Barnard

Instructed by De Klerk Horn & Coetzee Inc. Windhoek.