REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00445

In the matter between:

WEATHERLY MINING NAMIBIA LIMITED	**FIRST APPLICANT**
ONGOPOLO MINING LIMITED	**SECOND APPLICANT**
BRAVO COMPLIANCE (PTY) LTD	**THIRD APPLICANT**

and

ADVOCATE ANDREW W. CORBETT SC N.O	**FIRST RESPONDENT**
ADVOCATE STEVE RUKORO N.O	**SECOND RESPONDENT**
TULELA PROCESSING SOLUTIONS PROPRIETARY LIMITED	**THIRD RESPONDENT**

Neutral citation: *Weatherly Mining Namibia Limited and Others v Corbett SC N.O* (HC-MD-CIV-MOT-GEN-2022/00445) [2023] NAHCMD 581 (20 September 2023)

Coram: PARKER AJ
Heard: **26 July 2023**
Delivered: **20 September 2023**

Flynote: Arbitration – In terms of the Arbitration Act 42 of 1965 – Arbitration agreement providing time limit within which the arbitration is to be concluded.

Summary: Arbitration in terms of the Arbitration Act 42 of 1965. The applicant brought an application for 'mandamus' that is, mandatory interdict, to order the arbitrator to issue their award. The arbitrators failed to issue an award within the stipulated time limit. The court found that if they performed any act after their jurisdiction has lapsed in terms of the time limit, they would be acting ultra vires their jurisdiction under the arbitration agreement and any act performed would be a nullity. The court found further that the applicants failed to satisfy all the requirements of final interdict and therefore they could not succeed. Accordingly, the application was dismissed with costs.

Held, the arbitrator in a private arbitration has a statutory duty to use all reasonable dispatch on entering on and proceeding with the reference and making an award in terms of the Arbitration Act 42 of 1965, s 13(2) – Failure to do so within a time limit set by the arbitration agreement will cause his or her jurisdiction to lapse unless it is extended by the parties or a competent court.

ORDER

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1. The application is dismissed with costs.

2. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] The applicant represented by Mr Mayumbelo, has brought the instant application for an order of 'mandamus' directed at the first and second respondents and costs. The first and second respondents, represented by Mr Kutzner have moved to reject the application.

[2] The relief that the applicant seeks is mandatory interdict, as explained in para 3 below. The applicant refers to it as mandamus. A mandatory interdict orders the respondent to perform an act. When such an order is made against a public authority it is called mandamus.

[3] As Mr Kutzner reminded the court, to succeed in obtaining a final interdict, as the applicant in this proceeding does, the applicant must establish all together:

(a) a clear right;

(b) an injury actually committed or reasonably apprehended; and

(c) the absence of a similar protection by any other ordinary remedy.[1]

[4] By an arbitration agreement, the President of the Society of Advocates appointed Andrew W Corbett SC (first respondent N.O) and Mr Steve Rukoro (second respondent N.O) as arbitrators. They were appointed to arbitrate a dispute between the first applicant and the third respondent.

[5] The arbitrator has a statutory duty to use all reasonable dispatch in entering on and proceeding with the reference and making an award in terms of s 13(2) of the Arbitration Act 42 of 1965. Failure to do so within a stipulated time limit will cause his or her jurisdiction to lapse unless it is extended by the parties or a competent court.[2]

[6] In terms of clause 24.2 of the arbitration agreement between the parties, 'The arbitrators shall hear the matter within 14 days of their appointment.' The first and second respondents accepted their appointment on 30 October 2020.

[7] As I understand the law, in my view, 'shall hear the matter' in the aforementioned clause 24.2 of the agreement means, for a private arbitration under the Arbitration Act, shall enter on and proceed with the reference and make an award.[3] It is important to note that these three activities form a continuum to be completed within the time limit.

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[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[2] David Butler and Eyvind Finsen *Arbitration in South Africa: Law and Practice* (1993) at 99.
[3] Loc. cit.

[8] It means that in the instant proceedings, since the arbitrators were appointed on 30 October 2020, they had a duty to enter on and proceed with the reference and make an award within 14 days after 30 October 2020. That would take them to 13 November 2020. The arbitrators had jurisdiction to hear the matter not later than 13 November 2020. Failure to do so caused their jurisdiction to lapse unless it was extended by the parties or the court.[4] In sum, the arbitrators' jurisdiction lapsed as on 14 November 2020.

[9] Therefore any act they performed, including the issuance of the Procedural Directive (1) on 17 November 2020, as from 14 November 2020. They acted ultra vires their jurisdiction under the arbitration tribunal.

[10] On the papers and from the analysis undertaken above and the conclusions reached thereon, I conclude that the applicants have failed to establish a clear right. Since their jurisdiction lapsed on 13 November 2020, as aforesaid, they cannot make an award or, indeed, perform any act under the arbitration agreement after 13 November 2020. They have also failed to establish the absence of a similar protection by any other ordinary remedy. They could extend the time limit that has expired or they could approach the court to extend the time limit, or they may appoint a substitute arbitrator to arbitrate the dispute.[5] The result is that they have failed to satisfy all the *Setlego* requirements.

[11] It serves no purpose to consider who warned that the arbitrators' jurisdiction had lapsed and that any decision they took was invalid. Furthermore, it matters tuppence as to which party was unwilling to cooperate with the arbitration proceedings. Above all, the bevy of letters that passed between the parties inter se and between the parties and the arbitrators after 13 November 2020 are irrelevant in these proceedings. By a parity of reasoning, it serves no purpose to consider the issue of estoppel by acquiescence raised by Mr Mayumbelo.

[12] Based on these reasons, I hold that the application fails. In the result, I order as follows:

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[4] Loc. cit.
[5] David Butler and Eyvind Finsen *Arbitration in South Africa: Law and Practice* footnote 2 at 99.

1. The application is dismissed with costs.

2. The matter is finalized and removed from the roll.

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C Parker

Acting Judge

APPEARANCES:

APPLICANTS:	C MAYUMBELO Of Chris Mayumbelo & Co., WIndhoek
FIRST AND SECOND RESPONDENTS:	M KUTZNER Of Engling, Stritter & Partners, Windhoek