

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTIVE 61

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| Case Title: SEAWORK FISH PROCESSORS (PTY) LTD APPLICANT and GREEN ROSE TRADING (PTY) LTD RESPONDENT | Case No: HC-MD-CIV-MOT-GEN-2023/00144 |
| | Division of Court: Main Division |
| | Heard on: 25 August 2023 |
| Heard before: Honourable Justice Usiku | Delivered on: 6 October 2023 |
| Neutral citation: <i>Seawork Fish Processors (Pty) Ltd v Green Rose Trading (Pty) Ltd</i> (HC-MD-CIV-MOT-GEN-2023/00144) [2023] NAHCMD 632 (6 October 2023) | |
| Order: <ol style="list-style-type: none">1. The respondent's condonation application is dismissed.2. The respondent is ordered to pay the costs of the applicant, including the costs of one instructing and instructed counsel.3. The matter is postponed to 15 November 2023 at 15h15, for consideration of the applicant's main application.4. The applicant shall file a status report on or before 8 November 2023. | |
| Reasons for order: | |
| USIKU J: | |

Introduction

[1] For the sake of convenience the parties are referred to as in the main application. This is an opposed interlocutory application in terms of which the respondent seeks condonation for the late filing of its answering affidavit and to be granted an extension of time within which to deliver its answering affidavit. On 9 June 2023, this court set out time frames within which parties were directed to file their respective pleadings as regards the condonation application. However, on 26 June 2023, the parties filed a joint status report wherein they reported that the respondent reached out to counsel for the applicant indicating their inability to file their replying affidavit timeously and seeking a one week extension to attend to same. The applicant agreed to the request on the basis that it would also be permitted to file its answering affidavit a week later. Upon such agreement, the applicant filed the answering affidavit and the respondent filed the replying affidavit on 7 July 2023 and 17 July 2023, respectively. The pleadings have since been filed, albeit a day later than the agreed date on the part of the respondent.

Brief background

[2] The parties attended arbitration proceedings and an arbitration award was delivered on 31 January 2023. In terms s 33 (2) of the Arbitration Act 42 of 1965 ('the Act'), the respondent was entitled to challenge the validity of the award within six weeks after the publication of the award to the parties, if it so wished. Upon the respondent's failure to challenge the award, on 30 March 2023, the applicant brought an application to have the arbitration award made an order of this court. The arbitration award provides as follows:

1. It is declared that the November 2021 quota allocation and any further fishing quotas allocated to the respondent and/or the respondent's shareholders from part of the Quota Participation Agreement concluded between the claimant and respondent at Walvis Bay on or about 6 December 2016;

2. Payment by the respondent to the claimant of the amount of N\$12,877,966.00 (Twelve Million Eight Hundred and Seventy Seven Thousand Nine Hundred and Sixty Six Namibia Dollars);

3. Payment of interest by the respondent to the claimant on the Aforesaid amount of N\$ 12,877,966.00 at the rate of 20% per annum as from date of this award to date of payment.

4. Payment by the respondent to the claimant of the cost of this arbitration including the costs of one instructing and two instructed counsel.'

[3] The respondent opposed the application on 17 April 2023 and was required to file an answering affidavit not later than 9 May 2023. The respondent did not do so, prompting the present condonation application.

Application for condonation

[4] The respondent filed the present application on 7 July 2023 seeking the following order:

- '1. That the respondent/applicant's late filing of its answering affidavit is hereby condoned, and the respondent/applicant is hereby granted an extension to serve and file its answering affidavit/counter-application on or before the 23 June 2023;
2. That the applicant/respondent is afforded to file its replying/answering affidavit within 14 days from date of the aforementioned answering affidavit/counter-application so served and filed as contemplated in paragraph 1 above;
3. Costs of the application (only in the event of the applicant/respondent opposing);
4. Such further and/or alternative relief as the honourable court may deem fit.'

[5] Mr Tjeripo Hjarunguru, the respondent's director, deposed to the respondent's founding affidavit. Mr Hjarunguru explains that the arbitration award was delivered on 31 January 2023 and received by him when he met with the respondent's legal team to discuss the award as received. No decision, however, was taken regarding whether or not to challenge the said award. On 6 April 2023, the respondent's legal practitioners of record received the applicant's application to have the arbitration award made an order of this court. On 17 April 2023, the respondent opposed the applicant's application. However, the respondent's legal representatives only met on 16 May 2023 to consult and obtain advice as to the further steps, if any, the respondent could take and if there was any basis in law to oppose the application. It was during this consultation that the respondent was informed that the date for filing the answering affidavit had already expired but counsel was unable to render advice earlier due to various time constraints.

[6] According to Mr Hjarunguru, the reason for the late filing of the answering affidavit and extension sought, in brief, is that both the respondent's legal counsel experienced a substantial workload which demanded their attention and time during April and May. Mr Hjarunguru avers that his counsel, Adv Strydom, had to suspend taking leave in May in an attempt to keep to time limits imposed by various case management orders. Such orders related to filing of witness

statements, pre-trial orders, as well as court appearances. These made it impossible for Adv Strydom to render proper advice on the award before filing of the answering affidavit became due. Mr Hjarunguru narrated counsel's case-load consisting of various court appearances, consultations with clients as well as drafting and filing of pleadings from 14 April 2023 to 1 June 2023. What aggravated and delayed matters, according to Mr Hjarunguru, was the fact that counsel's laptop containing 90 percent of his work was stolen out of his car on 19 May 2023, resulting in a detrimental effect on the further preparation of papers herein. It is Mr Hjarunguru's assertion that Adv Strydom and Adv Corbett SC have been involved in this matter since January 2022 and June 2022, respectively. Hence, it was not possible to 'change ship' at this juncture as both counsel have intimate knowledge about the matter from its inception until the arbitration.

[7] As far as reasonable prospects of success are concerned, Mr Hjarunguru avers the applicant's cause of action is predicated on an agreement known as the Quota Participation Agreement ('the agreement') which was concluded between the parties during 2016 and in respect of which, the respondent (who at the time of the conclusion of the agreement was the holder of a fishing quota allocated to it by the Minister of Marine Resources) was to make such quota available to the applicant. During 2021, the respondent did not receive any fishing quota but instead, its shareholders were allocated fishing quota individually by the Minister of Marine Resources. Notwithstanding this fundamental change in the allocation of fishing quota circumstances, according to Mr Hjarunguru, the applicant instituted arbitration proceedings against the respondent and sought declaratory relief as well as payment for damages it ostensibly suffered. None of the respondent's shareholders were joined as parties to the arbitration proceedings. During the arbitration hearing, however, the applicant wanted the arbitrator to come to the conclusion that the arbitration award should be binding on the shareholders of the respondent, but the arbitrator expressly declined to come to such a finding and, furthermore, expressly found that he could not bind the shareholders of the respondent, especially in circumstances where they are not parties to the agreement.

[8] It is Mr Hjarunguru's assertion that notwithstanding the arbitrator's finding and reasoning as aforesaid, the arbitrator found in paragraph 1 of the award that the November 2021 quota allocation and any further fishing quotas allocated to the respondent and/or the respondent's shareholders form part of the Quota Participation Agreement concluded between the claimant and respondent at Walvis Bay on or about 6 December 2016. According to Mr Hjarunguru, the inclusion of the words 'respondent's shareholders' should have been omitted in order to reach the conclusion contended for by the arbitrator and, as such, is unenforceable against the said

shareholders. It is further Mr Hjarunguru's contention that the ambit and effect of paragraph 1 of the award essentially constitutes an order for specific performance imposing such obligation upon the respondent to perform. There is no basis in law whereby the respondent could be ordered to perform such an act, especially where the control in the respondent lies with its shareholders and not the other way round. It consequently follows that the maxim *lex neminem cogit ad impossibilia* finds application in such circumstances which also renders the award or at least paragraph 1 thereof unenforceable.

[9] Further grounds raised by Mr Hjarunguru constituting prospects of success of the respondent's case include; (a) an arbitrator should not make an award for specific performance in circumstances where a court would not do so for the reason that it would be difficult for the court to enforce it, such as in this case; (b) the arbitrator failed to stipulate and fix the date when the award is effective, ie when payment of the amount stipulated in paragraph 2 thereof should be made by the respondent; (c) despite what was pleaded on both sides, none of the parties relied on the finding and conclusion reached by the arbitrator with regard to the ambit contemplated in paragraph 1 of the award. As such, the award compelling the respondent to still provide quota (despite it no longer being the recipient of such quota, as was the case when it concluded the agreement) was never raised in such a form by either party on the pleadings and the arbitrator never gave any of the parties the opportunity to make proper submissions in this regard which may render such lacuna a gross irregularity in the arbitration proceedings; (d) part of the issue raised in sub-paragraph (c) also includes the provisions of the Marine Resources Act, particularly s 42 thereof, which expressly provides that no right and/or fishing quota may be transferred to another person without the consent of the Minister. It, therefore, poses the question whether the arbitrator, in law, could make such an order for specific performance.

[10] Mr Hjarunguru concludes by submitting that the respondent has shown good cause and that the non-compliance with the rules of this court was not due to a flagrant disregard of the rules of this court nor its authority and ability to direct parties about litigation. Further, Mr Hjarunguru submits that there is no mala fides or culpable remissness on the respondent's part and/or that of its legal representatives. It is his submission further that the extension of the time sought would also not be prejudicial to the applicant because during the arbitration proceedings, the applicant would sometimes delay taking the next step and sought the indulgence of the respondent in that regard. Mr Hjarunguru prays that the relief be granted as set out in the notice of motion.

Opposition

[11] The applicant opposes the condonation application on the basis that the respondent's lackadaisical handling of the timelines in this matter are inimical to the overriding objectives of the rules of this court, which is to facilitate the resolution of the real issues justly and speedily, efficiently and cost effectively.

[12] The applicant's answering affidavit, was deposed to by Mr Jurgen Sander, the applicant's managing director. Mr Sander contends that the arbitration award was handed down on 31 January 2023 and as a result of the respondent's failure to challenge the arbitration award within the permitted time as per s 33 of the Arbitration Act 42 of 1965, the applicant proceeded to bring an application to have the arbitration award made an order of this court. The respondent opposed the application on 17 April 2023, but failed to file the answering affidavit which was due on or before 9 May 2023. The respondent only addressed a letter to the applicant on 10 May 2023 seeking an extension of time to file its answering affidavit. The respondent, however, only filed its condonation application on 9 June 2023, the date the matter was scheduled to be heard.

[13] Mr Sander contends that counsel's workload, and any delay caused thereby, do not constitute 'good cause' for the purposes of a condonation application and, consequently, Mr Sanders avers, the respondent has failed to make out a case and show good cause for the indulgence it seeks.

[14] As far as the respondent's prospects of success are concerned, Mr Sander refers to clauses 10.9 and 10.10 of the agreement which provides that the decision of the arbitrator shall be final and binding on the parties and the arbitrator shall be entitled to make such an award as he in his sole discretion may deem fit and appropriate, such award to include an award for specific performance, damages, interdict or a penalty. It is Mr Sanders assertion that the award is in line with the findings made by the arbitrator because it is clear that any rights and quotas, whether awarded to the respondent or any of its shareholders, forms part of what is committed in the agreement by the respondent to the applicant. Therefore, the respondent cannot allege with any degree of credibility that the award was an attempt to bind the shareholders of the respondent. Further, Mr Sander avers that for the respondent to try and convince this court not

to enforce the payment of the arbitration award because the arbitrator did not fix a date for payment is clutching at straws because the date of the award is the date upon which the obligation has become enforceable. At the very latest, the damages were due on the date of the award.

[15] As regards s 42 of of the Marine Resources Act, Mr Sander is of the opinion that this court is not required nor competent to re-hear the arbitration. Further, the respondent has failed to show any prospects of success with an application based on the limited grounds contained in s 33 of the Act. Further, the respondent's failure to timeously file the application for extension of time and condonation application is a flagrant disregard of the rules of court, specifically, rule 66(1)(b) thereof. Mr Sander asserts that there was indeed culpable remissness on the part of the respondent and/or its legal representatives and the non-compliance with the rules and the additional delay caused thereby severally prejudices the applicant.

[16] In reply, Mr Hjarunguru concedes that the grounds upon which an arbitration award can be challenged are limited, however, the court has the requisite authority and power to extend the period based on s 38 of the Act and the basis of the respondent's opposition falls within the limited scope contemplated in the Act. Mr Hjarunguru contends that the parties have always dealt with time limits on a pragmatic basis and have given each other extensions on numerous times in the past. It was certainly expected that the same conduct would be applied in this instance, and it therefore, came as a surprise to the respondent when the applicant suddenly adopted the stance that the respondent should now seek condonation in this instance.

Analysis

[17] At the outset, this court takes issue with the manner in which parties deviate from the timeframes directed in a court order and follow their own timelines. This practice is prohibited under rule 54(2) of the rules of this court and by itself constitutes a violation of the rules of this court. In *QKR Navachab Gold Mine v Kwala* (HC-MD-LAB-MOT-GEN-2022/00109) [2022] NALCMD 43 (4 August 2022), it was stated that, the violation or non-compliance of court orders or rules of court can only be purged by the court and not the parties, either individually or collectively. Therefore, such practice as regards the non-compliance with time frames directed in a court order, on the ground that the parties agreed not to abide by the prescribed timelines, should be discouraged.

[18] It is trite that where the non-compliance is time related, the date, duration and extent of

any impediment to compliance, on which reliance is placed, must be spelt out.¹ Condonation is not to be had merely for the asking. A full, detailed and accurate account of the cause of the delay and its effect must be stated.

[19] The respondent's explanation for the delay lacks a full description of what exactly happened during the period between 17 April 2023 and 9 May 2023 when the date for filing the answering affidavit became due and no answering affidavit was filed. Further, the respondent fails to explain why its legal practitioners only met after the due date for filing the answering affidavit had lapsed. As regards the explanation relating to pressure of work on the part of the respondent's counsel, pressure of work is not a ground for condonation, and does not on its own, constitute a reasonable and acceptable explanation for the default. I am, therefore, of the view that the respondent's explanation for the delay is entirely unsatisfactory.

[20] As regards to the prospects of success, the defences that the respondent puts forth to show prospects of success, such as that the award constitutes an order for specific performance, the arbitrator did not stipulate a date for the payment of the amount awarded etc, appears to be a disguised attempt aimed at setting aside the award. I am in agreement with the applicant's stance that it is not availed to the respondent to revisit the merits of the award. Any challenge to the merits must be dealt with within the scope of the provisions of s 33 of the Act. The respondent has not shown that it has a case that enjoys reasonable prospects of success within the ambit of s 33 of the Act. I am, therefore, of the opinion that the respondent has not established that it has reasonable prospects of success on the merits of the main application. The condonation application therefore, stands to be dismissed.

[21] As regards the issue of costs, the general principle is that costs follow the event. The parties did not raise any arguments why this principle should not be applied. The general principle therefore, finds application in the present matter.

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

1. The respondent's condonation application is dismissed.
2. The respondent is ordered to pay the costs of the applicant, including the costs of one instructing and instructed counsel.
3. The matter is postponed to 15 November 2023 at 15h15 for the consideration of applicant's main application.
4. The applicant shall file a status report on or before 1 November 2023.

¹ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA).

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| Judge's signature | Note to the parties: |
| B Usiku Judge | Not applicable |
| Counsel: | |
| Applicant: | Respondent: |
| G Dicks Instructed by Ellis & Partners Legal Practitioners, Windhoek | J Strydom Instructed by Theunissen, Louw & Partners, Windhoek |