**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 24202/21**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED.

_____ _____/_____/_____
SIGNATURE DATE

In the matter between:

| | |
|---|---|
| **GENET MINERAL PROCESSING (PTY) LTD** | Applicant |
| And | |
| **L D R VAN DER MERWE N.O** | First respondent |
| **S G COAL (PTY) LTD** | Second respondent |
| **INCEKU MINING (PTY) LTD** | Third respondent |
| **ADVOCATE F H ODENDAAL SC** | Fourth respondent |

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**J U D G M E N T**

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Arbitration proceedings – institution of claim subject to time-bar clause in arbitration agreement - application for extension of time under section 8 of Arbitration Act – facts distinguishable from

those in *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* [2021] ZASCA 60 - question whether application may be made for extension after arbitrator has ruled applicant is time barred – principle of finality of arbitration awards embodied in section 28 not overridden by section 8 – relief under section 8 not available in those circumstances

**KEIGHTLEY, J:**

INTRODUCTION

1. In this matter the applicant, Genet Mineral Processing (Pty) Ltd (Genet) seeks an order under s 8 of the Arbitration Act 42 of 1965 (the Act). That section provides that:

> "Where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, may extend the time for such period as it considers proper, whether the item so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing arbitration proceedings."

Put simply, what s 8 does is to give a court the power to "condone", for want of a better word, an arbitration party's failure to comply with what are commonly referred to as time-bar clauses in arbitration agreements.

2. The present application arises in the context of business rescue proceedings in terms of which a company, Kleinfontein Colliery (Pty) Ltd (Kleinfontein) was placed into business rescue. The first respondent, Mr Van Der Merwe, was appointed as the business rescue practitioner (the BRP). On 31 July 2020 the creditors of Kleinfontein adopted the plan, which then became binding on all creditors. The plan devised a process in terms of which creditors could lodge claims with the BRP. Clause 29.3.6 gave creditors the right to a review by an arbitrator (the fourth respondent) of the BRP's rejection of a claim on application by the creditor

concerned, provided that such review was brought within 15 business days of receipt of the notice of the BRP's decision. Clause 30.2 of the plan gave details of what was required in the notice to review.

3. Genet is a creditor and duly submitted a claim to the BRP. The BRP accepted a portion of Genet's claim, but rejected a claim for penalties (in the amount of R36, 750 million) as well as a claim by Genet that it held a lien over the assets of Kleinfontein. In addition, the BRP set off an amount of some R17 million against Genet's recognised claim. This left Genet with a recognised claim of R71 829 491, 39 as an unsecured creditor.

4. Unhappy with this decision, Genet decided to exercise its right to review the BRP's decision before an arbitrator. However, it is common cause that Genet did not give the requisite notice instituting the arbitration proceedings within the 15-day time limit specified in clauses 29.3.6 and 30.2 of the plan. It gave notice on 18 September 2020, which was one day later than it should have done. Genet accepts that the 15-day time limit ended on 17 September and that, for purposes of this application, its notice commencing the arbitration proceedings fell foul of the time-bar clause provided in the plan.

5. Genet accordingly seeks an order that:

> "The time period stipulated in clause 29.3.6 of the business rescue plan … is extended until after the notice was given by the Applicant to the First Respondent, in terms of clause 30.2 of the business rescue plan, on or about 18 September 2020."

6. The second and third respondents are also creditors of Kleinfontein and are intervening parties in the arbitration instituted by Genet. The second respondent does not oppose the s 8 relief, nor does the BRP. The third respondent, Inceku Mining (Pty) Ltd (Inceku), does. It is the only respondent opposing that relief.

7. There is very little, if anything that is disputed on the facts between the two opposing parties. Indeed, they also agree on the general principles that apply to the court's discretion to extend a time-bar clause under s 8 of the Act. However, there is one point on which the parties diverge, and which is thus critical to the dispute. The question is whether a court may extend a time-bar clause under s 8 in circumstances where the arbitrator has already found, and made an award, to the effect that the party seeking the extension did not institute their arbitration claim timeously and thus is time barred from doing so.

8. It is common cause that this is what the arbitrator in this case has done. I need not go fully into the details of the events that led to this outcome. It is sufficient to record that once the arbitration proceedings were initiated, both the second respondent and Inceku indicated an intention to intervene. The BRP and both of those parties filed statements of defence to Genet's claim. Amendments were effected by various parties and witness statements exchanged. Both Genet's and Inceku's *locus standi* were challenged. This remains an outstanding issue that is yet to be resolved. While none of the defendants initially took the point that Genet's arbitral review claim was not timeously lodged, Inceku gave notice shortly before the scheduled date of the arbitration hearing that it intended to amend its statement of defence to include this point.

9. The arbitration was supposed to proceed on 26 April 2021. For various reasons it could not do so. One of the outstanding issues was that of the *locus standi* of Genet and Inceku. The arbitrator directed that certain issues would be determined separately. One of these issues was the time-bar defence raised by Inceku.

10. In its amended statement of defence, Inceku pleaded that the consequence of Genet's failure timeously to deliver the notice under clause 29.3.6 read with clause

30.2 was that Genet had lost its right to review the BRP's decision. Genet argued in opposition to this defence, *inter alia*, that the relevant clauses in the plan did not expressly provide what the consequences would be of a failure to comply with the time-bar clause. The arbitrator found that it is inherent in such a clause that failure to comply leads to the loss of the relevant right. In addition, Genet raised in argument, but did not plead, that the enforcement of the time-bar clause would be contrary to the Constitution and thus to public policy. The arbitrator dismissed this submission. In doing so, he said the following:

> "It must also be remembered that the claimant is not left without any remedy. Section 8 of the Arbitration Act stipulates that a Court, i(f) it is of the opinion that in the circumstances of a case undue hardship would otherwise be caused if arbitration proceedings are not commenced within a time fixed by the agreement, may extend the time for such period as it considers proper. Therefore, and in so far as it may be said that the time bar clause under discussion is unfair or unreasonable and accordingly contrary to public policy, the remedy provided in the said Section 8 of the Arbitration Act seems to purge the time bar of the unfairness and unreasonableness that might otherwise have rendered it contrary to public policy. Section 8 accordingly has an ameliorating effect and the time bar clause can therefore not be said to be unfair and unreasonable and thus contrary to public policy."

11. It is important to note that Genet did not plead, in the alternative, for a stay of the arbitration proceedings, in order to permit Genet to approach the High Court for an order under s 8, in the event of the arbitrator finding that the time-bar clause was enforceable. Consequently, having dismissed Genet's opposition to Inceku's time-bar defence, the arbitrator proceeded to make his award.

12. While he found in favour of Genet on three of the four separated issues, he upheld Inceku's time-bar defence. The arbitrator's award in this respect was as follows:

> "4. At the instance of the second intervening party it is declared that the claimant has not timeously instituted and commenced these arbitration proceedings and that it is accordingly time barred from doing so."

The award came with the express proviso that the arbitrator's findings were subject to Genet and Inceku proving, in due course, their *locus standi*. The arbitrator noted that for purposes of his consideration of the separated issues, he had assumed that they had the requisite *locus standi*.

13. Genet proceeded thereafter to institute the present application effectively seeking an extension of the time provided in the plan to institute the arbitration proceedings. Unlike all other cases to which I have been referred, in which s 8 relief was sought, Genet's application is singularly unusual in that the application was made *ex post facto* the arbitrator's ruling that Genet is time barred. This was not an issue specifically addressed in Genet's founding affidavit. Genet's assumption appears to have been that its application for s 8 relief was like any other.

14. Accordingly, in its founding affidavit Genet referred to the wide discretion that a court has under s 8 to extend the time within which a party must institute arbitration proceedings under a time-bar clause. Genet pointed to the hardship that would follow if the relief was not granted: it would be left with an unsecured and substantially reduced claim against Kleinfontein. Genet also highlighted that the extent of the delay was extremely modest in that it had given notice only one day after the stipulated period of 15 business days had expired. In addition, Genet submitted that the delay had not been deliberate. Genet had merely miscalculated that the notice period expired on 18 September, when in fact it had expired on 17 September. It provided affidavits to substantiate its contention that the error had been *bona fide*. Genet also contended that Inceku would suffer no prejudice if the extension was granted, and nor would the BRP. This was evidenced by the fact that no-one had taken issue with Genet's delay until shortly before the scheduled date of the hearing before the arbitrator when Inceku gave notice of an

amendment to its statement of defence to include the time-bar defence. Genet submitted further that it had not delayed in instituting its application expeditiously after the arbitrator had made his award.

15. In summary, then, Genet submitted that this was "manifestly a case where undue hardship would be caused … if the time bar provision is enforced by (the court) refusing to grant Genet the relief it seeks."

16. The factors dealt with by Genet in its founding affidavit in support of the relief are consistent with what our courts have found to be relevant to a proper exercise of a court's discretion under s 8. It is also correct that a court has a wide and generous discretion to grant relief under that section. As the Supreme Court of Appeal recently stated in *Samancor*:

> "There is nothing in s 8 to indicate that the power of extension should only be exercised rarely or in exceptional circumstances. There is no reason to add a gloss to the plain language of the section. A restrictive interpretation would be antithetical to s 34 of the Constitution which guarantees access to courts or other independent and impartial tribunals in order to have justiciable disputes adjudicated."[1]

17. In its answering affidavit Inceku did not take issue with Genet's averments regarding the factors relevant to the exercise of the court's discretion under s 8. Instead, it homed in on the key issue: Inceku contended that it was incompetent for Genet to pursue s 8 relief at all. This was because the arbitrator had already ruled that Genet was time barred from instituting the arbitration proceedings.

18. Inceku pointed out that the arbitrator's award was not made conditional on, or subject to, a court subsequently extending the time period for the institution of the arbitration under s 8. Genet had elected not to seek a stay of the arbitration process, but instead had permitted the arbitrator to proceed to make a

1 *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* [2021] ZASCA 60, 2921 JDR 0981 (SCA) at para 33

determination on, and to uphold, the time-bar defence. Nor had Genet sought to appeal the arbitrator's award upholding that defence, as it was entitled to do under the plan. It had also not sought to review the award under s 33 of the Act. Consequently, Inceku contended that Genet had accepted the finality of the arbitrator's award. The effect of the arbitrator's award was that Genet had lost the right to enter upon the merits of the arbitration in the pending proceedings. Such consequence, said Inceku, could not be unraveled under s 8 of the Act.

19. It follows that the only real issue between the parties is whether s 8 has application in this case at all. If it does, Inceku does not take material issue with Genet's case for relief, meaning that it would fall to me to exercise my wide and generous discretion based on the facts averred by Genet in support of its case. The prior question, that of whether s 8 applies at all, is essentially one of interpretation. Genet contends that on a proper interpretation of s 8 there is nothing to prevent a court granting relief *ex post facto* an arbitrator ruling that a claimant is time barred. Inceku, of course, posits a different interpretation.

20. Interpretation as we now well know is a question of looking at the language used, understood in its context and having regard to the purpose of the provision in question. It is a unitary process in which:

> "…the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the … instrument as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined."[2]

21. Genet accepts that under s 28 of the Act an award by an arbitrator in general is final. That section states:

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2 *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA) at para 25, citing *Natal Joint Municipal Pensions Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18

> "Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms."

Genet also accepts that the arbitrator's award in upholding Inceku's time-bar defence was final.

22. However, Genet says that the final nature of the award does not preclude this court exercising its discretion under s 8 as, on a proper interpretation of s 8 and s 28, the former is the dominant and the latter is the subordinate provision. This is because s 28 is expressly made "subject to the provisions of this Act". This means, so Genet's argument goes, that the final nature of an arbitral award, as provided under s 28, is "subject to" s 8 and must give way to that section in a case of a conflict between the two. Genet relies on *Sentra-Oes Kööperatief Bpk v Commissioner for Inland Revenue*[3] in this regard. In that case, in considering the meaning of the phrase "subject to" in legislation, the Appellate Division cited *S v Marwane*,[4] in which it was held:

> "… to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject' is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariable, qualifies such enactment by the method of declaring it to be 'subject' to the other specified one."

23. Genet contends that there is a clear conflict between s 8 and s 28 in that s 28 renders an arbitral award final, whereas s 8 provides a court with a wide discretion to extend a time limit set in a time-bar clause. The finality effected under s 28 is subject to, and overridden by, the wide discretion conferred in s 8.

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3 1995 (3) SA 197 (A) at 207C-F
4 1982 (3) SA 717 (A) at 747H-748B

24. In other words, on Genet's interpretation, if an arbitrator has ruled that a claimant is time barred, that award is not final insofar as it is still permissible for a court under s 8 subsequently to reverse the effect of that ruling. Genet submits further that any contrary interpretation would be inconsistent with the express findings by our courts, in cases like *Samancor*,[5] that s 8 should be given a wide and not a restrictive interpretation.

25. There are a number of difficulties with Genet's interpretation.

26. To begin with, it is so that our courts have consistently held that s 8 should be given a wide rather than a restrictive interpretation. However, the difficulty with this line of argument by Genet is that the dicta supporting a wide rather than a restrictive interpretation are found in cases where the courts were simply applying section 8. They were not concerned with the pre-existing question, as we are in this case, as to whether s 8 has any application at all. Genet's argument in this regard is circular: it assumes s 8 applies and then says that because s 8 applies the question of its application must be based on a wide and not a restrictive interpretation. This approach is clearly untenable.

27. It is also not clear to me that Genet's dominant/subordinate interpretational analysis is applicable in this case. Its interpretation is based on the understanding that s 8 and s 28 are necessarily linked. The link Genet relies on is the broad proviso in s 28 that it is "subject to the provisions of this Act". Hence, says Genet, this must mean s 8.

28. Section 28 does not specify the particular provisions to which it is subject. However, as Inceku submits, one must as a matter of logic infer that it is subject to those provisions of the Act that are relevant to s 28. In other words, those other

5 Above at para 33

provisions of the Act that have a material connection to the principle embodied in s 28, that principle being the final and binding nature of an arbitral award.

29. Considering s 8 itself, from its language it does not appear to bear any relation to s 28 and to the principle of finality embodied in the latter section. Section 8 deals with the power of a court to extend a time-bar clause contained in an arbitration agreement. Section 28 deals with arbitral awards, not with arbitration agreements. Although s 8 gives a court the power to extend the time under a time-bar in an agreement "whether the time so fixed has expired or not", it does not give the court the power to do so after an arbitrator has made an award upholding a time-bar defence.

30. An award upholding a time-bar defence raised by a defendant has significant consequences for the right of a claimant to pursue the merits of its claim in the arbitration proceedings. The SCA in *Samancor* described the consequences as follows:

> "A claimant could only run an arbitration on its merits by alleging and satisfying the arbitrator that the time-bar clause is unenforceable. Absent such a finding, the arbitrator would simply uphold the time-bar defence and dismiss the claim without entering upon the merits."[6]

31. The effect of such a ruling is to prohibit a claimant from proceeding any further in pursuing its claim through those arbitration proceedings. It is a trite principle arising from our common law that arbitral awards are final and binding.[7] That principle is embodied in s 28. The legislature is presumed to know the law.[8] If, indeed, it had intended s 8 effectively to reverse the final and binding effect of an award upholding a time-bar defence, one would have expected that this would

6 Above, para 53
7 *Dickenson and Brown v Fishers Executives* 1915 AD 166 at 174
8 *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2016 (6) SA 121 (SCA) at para 11

have been expressly stated in s 8, or elsewhere. The absence of any provision to this effect in s 8, and indeed, any other apparent link in that section between it and s 28, leads to the inevitable conclusion that s 8 is not one of those "provisions" to which s 28 is "subject'.

32. A holistic and relational consideration between the language, context and purpose of s 28 supports this conclusion. The clear purpose of s 28 is to reinforce the finality of arbitral awards. The principle of finality embodied in the section is expressly made subject to "the provisions of the Act". Reading this language in context, one must ask which other provisions of the Act detract from the otherwise fundamental principle of the finality of arbitral awards expressed in s 28? The answer is readily apparent. Under s 30, an arbitrator may correct any clerical mistake or patent error arising from any accidental "slip or omission". Section 32 provides that:

> "(1) The parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the parties may specify in the said writing.
>
> (2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.
>
> …"

33. The most directly relevant provision of the Act is s 33. It gives a court the power to set aside of an arbitral award in the following circumstances:

33.1. misconduct on the part of the arbitrator in relation to her duties;

33.2. gross irregularity in the conduct of the arbitration proceedings or where the tribunal has exceeded its powers; or

33.3. where an award has been improperly obtained.

34. When one reads the language of s 28 in context, it appears to me to be clear that it is these provisions to which the principle of finality is "subject". It is in respect of them that the dominant/subordinate analysis would apply, not in respect of s 8, which has no express or otherwise linguistic or logical relevance to s 28.

35. Even under s 33 a court has limited powers to set aside an arbitral award. This is consistent with an important underlying purpose of the Act, which is to respect the binding force of the parties' agreement to submit to arbitration and to be held bound by any award emanating from that process. In *Lufuno*,[9] the Constitutional Court expressly directed that courts should be cautious when exercising their power to set aside arbitral awards under s 33. O'Regan J, in the majority judgment, stated the position as follows:

> "… it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggest that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraph, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration."

36. Genet's interpretation in this case overlooks the fundamental importance of the principle of finality in arbitral awards. That principle is underpinned by the recognition that parties who have struck a bargain to arbitrate, and to be bound by the arbitrator's award, must be held to their bargain. This is the underlying reason

9 *Lufuno Mphaphuli & Associates v Andrews and another* 2009 (4) SA 529 (CC) at para 235

why the phrase “subject to the provisions of this Act” in s 28 cannot be interpreted on the expansive basis for which Genet contends. The effect of Genet’s interpretation would be to give a court, through s 8, a back-door, and implied power to interfere with, and reverse, an award upholding a time-bar defence. Such an interpretation is not linguistically supported, nor is it supported by a contextual and purposive interpretation of s 28. It is in conflict with the statutory scheme, which is to restrict the power of the court to set aside arbitral awards. It is also in conflict with the direct injunction by the Court in *Lufuno* for caution.

37. For these reasons, I agree with the submission by Inceku that Genet’s interpretation of s 28 and s 8 is not correct. Section 8 does not permit a court to grant an extension of time after an arbitrator has made an award upholding a time-bar defence. It is this feature of the case that distinguishes it from that of *Samancor*, on which Genet relied. In *Samancor*, the defendant raised a time-bar defence in its statement of defence. The claimant opposed this defence on the basis that the clause did not constitute a time-bar or, if it did, the clause was unenforceable on the grounds of public policy. To this extent, the pleadings in *Samancor* were similar to those in this matter.

38. However, and critically, in *Samancor* the claimant pleaded further that if the arbitrator dismissed these two preliminary points, it should be granted a stay of the arbitration proceedings to enable it to seek s 8 relief in the High Court. The arbitrator granted that relief. Consequently, and unlike the arbitrator in the proceedings between Genet and Inceku, he never ruled that the claimant was time barred. That issue remained open for determination by the arbitrator if the court had refused the claimant’s application for an extension of time under s 8. As

matters transpired, the High Court granted the extension of time,[10] and that order was subsequently upheld by the Supreme Court of Appeal. One assumes that this put paid to the time-bar defence in the subsequent arbitration proceedings.

39. Counsel have been unable to refer me to any other case in which s 8 relief was sought after an award by an arbitrator upholding a time-bar defence and ruling that a claimant was time barred. Section 8 relief is normally sought before such a ruling.[11] Given the final nature of arbitrators' awards, it is understandable why this is so.

40. It seems to me that what Genet ought to have done was to proceed on the same lines as the claimant did in *Samancor*. This would have preserved its right to proceed on the merits of its claim before the arbitrator, pending the High Court's decision on its application under s 8. However, once the arbitrator ruled that Genet was time barred, this option fell away. It is so that the arbitrator did not dismiss Genet's claim at the same time as he made this award. However, that was only because both Genet and Inceku still had to establish their *locus standi*. This was the only condition to which the ruling was subject. If Inceku and Genet subsequently establish their *locus standi*, the inevitable consequence will be an order dismissing Genet's claim following on the existing ruling that it is time barred.

41. It was suggested by Genet that the arbitrator was aware of, and recognised Genet's right to pursue relief under s 8. Genet referred to the passage I quoted

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10 *Samancor Chrome Holdings (Pty) Ltd and Another v Samancor Holdings (Pty) Ltd and Others* [2019] 4 All SA 906 (GJ)

11 See, for example, *Administrateur Kaap v Asla Konstruksie (Edms) Bpk* 1989 (4) SA 458 (C), in which the application was made after an award on the merits by a mediator, but before a review of the award by an arbitrator in accordance with the parties' agreement. In that matter, the claimant had failed to comply with the time-bar clause governing the institution of arbitral review proceedings. Similarly, in *Chevron South Africa (Pty) Ltd v Unical Call Bunker Services (Pty) Ltd and Another* [2011] ZAWCHC 266, the claimant sought s 8 relief while the time-bar defence was still pending before the arbitrator.

earlier from the arbitrator's award in which the arbitrator stated that: "It must also be remembered that the claimant is not left without any remedy." He then referred to s 8 of the Act. If one reads the passage in context, the statement is made with reference to Genet's argument that enforcement of the time-bar clause would be against public policy. The arbitrator's statement recognises, as courts have done, that a countervailing consideration to the argument is that s 8 ameliorates the potentially harsh effects of a time-bar clause, and that they cannot, as a matter of course, for this reason be regarded to be against public policy. In other words, as I read the passage, the arbitrator was making a general point about s 8, rather than recognising that Genet would have a right to seek s 8 relief *ex post facto* his ruling on the time-bar clause.

42. Even if this is not so, of course it was not for the arbitrator to determine that issue. Nor, as I have already pointed out, did the arbitrator make his ruling subject to Genet obtaining an order from the High Court granting it an extension of time under s 8.

43. Unfortunately for Genet, on what I believe to be the proper interpretation of s 8 and s 28, it cannot at this stage, seek relief under s 8. This may seem to be unfair, given the fact that Genet's delay was minimal and Inceku has not put up any facts to dispute Genet's case that, but for the point raised by Inceku, it would be entitled to relief. It must be borne in mind that s 8 is not a guaranteed panacea for a claimant who has failed to comply with a time-bar clause in an agreement. Delay is always a factor that a court, properly seized with an application for s 8 relief, will consider in determining whether that relief should be granted. This includes delay in instituting the application for s 8 relief.[12] Here, Genet's difficulty is not that its delay in seeking the relief was lengthy, but rather that it did not do so before the

12 *Samancor*, above para 44

arbitrator made his award. It is this aspect of Genet's delay that means the application is not properly before me. Consequently, the question of fairness or undue hardship does not arise.

44. For the reasons traversed fully by me earlier, I do not agree that Genet's interpretation of s 8 and s 28 is correct. I agree with the interpretation posited by Inceku: once an arbitrator has made an award upholding a time-bar defence and finding that a claimant is time-barred, it is no longer open to the claimant to pursue relief under s 8 before a court. A claimant can avoid that outcome by pleading along the lines of the claimant in *Samancor*. However, in the present matter Genet did not do so, with the inevitable consequence that its application for relief under s 8 is without legal foundation.

45. In the circumstances, the application must be dismissed.

46. I make the following order:

"The application is dismissed with costs, such costs to include those of two counsel, one being senior counsel."

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**R M KEIGHTLEY**

**JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION**

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 November 2021.

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| Date Heard (Microsoft Teams): | 07 October 2021 |
| Date of Judgment: | 2 December 2021 |
| On behalf of the Applicant: | SC Rorke SC<br>JJ Nepgen |
| Instructed by: | WERKSMANS ATTORNEYS |
| On behalf of the Third Respondent: | PG Cillers SC<br>Adv. APJ Els |
| Instructed by: | JW BOTES INCORPORATED |